

***James Madison and the Creation of an  
Impartial Republic, 1780-1792***

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We are currently in the midst of an ongoing renaissance in Madisonian studies in which scholars have explored virtually every aspect of Madison's life and political thought.<sup>1</sup>

The most important dimension of Madison's political thought to escape systematic investigation, however, is his commitment to impartiality and the creation of an impartial republic.<sup>2</sup> This essay, a distillation of an ongoing book project, addresses this gap by

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<sup>1</sup> Three biographies of Madison were published in 2012-2013 alone. These include: Kevin R.C. Gutzman, *James Madison and the Making of America* (New York: St. Martin's Press, 2012); Richard Brookhiser, *James Madison* (New York: Basic Books, 2011); Jeff Broadwater, *James Madison: A Son of Virginia & a Founder of the Nation* (Chapel Hill: The University of North Carolina Press, 2012). In addition, during the last decade, scholars have examined, among other topics, Madison's conduct as a slave holder and positions on slavery, his contributions to the establishment of religious liberty in America, his understanding of public opinion and role as an intellectual midwife of that then fledgling political concept, his Presidency and conduct during the War of 1812, and Montpelier and the Madisons' life there. For these topics see Scott Kester, *The Haunted Philosopher: James Madison, Republicanism, and Slavery* (Lanham: Lexington Books, 2008); Elizabeth Dowling Taylor, *A Slave in the White House: Paul Jennings and the Madisons* (New York: Palgrave Macmillan, 2012); Phillip Muñoz, "James Madison's Principle of Religious Liberty," *The American Political Science Review*, 97 (Feb., 2003): 17-32; Alan Gibson, "From Veneration to Vigilance: James Madison and Public Opinion, 1785-1800," *The Review of Politics* 67 (Winter, 2005): 5-35, 69-76; Colleen Sheehan, *James Madison and the Spirit of Republican Self-Government* (Cambridge: Cambridge University Press, 2009); Garry Wills, *James Madison* (New York: Times Books, Henry Holt and Company, 2002); Hugh Howard, *Mr. and Mrs. Madison's War: America's First Couple and the Second War of Independence* (New York: Bloomsbury Press, 2012); Matthew Hyland, *Montpelier and the Madisons: House, Home, and the American Heritage*. (Charleston, S.C.: The History Press, 2007); Ralph Ketcham, *The Madisons at Montpelier: Reflections on the Founding Couple* (Charlottesville: University of Virginia Press, 2011).

<sup>2</sup> Impartiality plays little or no role in the interpretations of Madison's political thought of Lance Banning, Richard Matthews, Jack Rakove, Gary Rosen, or Colleen Sheehan. See Banning, *The Sacred Fire of Liberty: James Madison & the Founding of the Federal*

exploring the origins of Madison's commitment to impartiality and his evolving exposition of its contours, his efforts to institutionalize impartial administration, and his understanding of the politics and policy implications of impartiality. My primary goals are to establish impartiality as a meta-principle in Madison's political thought, to examine its complexity and multiple manifestations, and to establish its place as a broad thread of consistency in Madison's political thought.

If it is difficult to find the center of the political thought of an intellectual statesman as keen, complex, and creative as Madison, impartiality is nevertheless a

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*Republic* (Ithaca: Cornell University Press, 1995); Richard Matthews, *If Men Were Angels James Madison & the Heartless Empire of Reason* (Lawrence: University Press of Kansas, 1995); Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Alfred A. Knopf, 1996); Gary Rosen, *American Compact: James Madison and the Problem of Founding* (Lawrence: University Press of Kansas, 1999); Colleen Sheehan, *James Madison and the Spirit of Republican Self-Government* (New York: Cambridge University Press, 2009).

Limited observations about the role of impartiality in Madison's political thought are included in Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998), 17-19; George Carey, *The Federalist: Design for a Constitutional Republic* (Urbana: University of Illinois Press, 1989), 9-44; David Epstein, *The Political Theory of The Federalist* (Chicago: The University of Chicago Press, 1984), 81-88; Andrew S. Trees, *The Founding Fathers and the Politics of Character* (Princeton: Princeton University Press, 2004), 112-122; Garry Wills, *Explaining America: The Federalist* (New York: Penguin Books, 1981, 2001), especially ix-x, 179-264; Wills, "Introduction" in *The Federalist Papers*, ed. Garry Wills (New York: Bantam Books, 1988), xxi-xxiv. Wills, *James Madison* (New York: Times Books, Henry Holt and Company, 2002), 31-36; Gordon Wood, "Heroics," Review of Garry Wills, *Explaining America: The Federalist* in *The New York Review of Books*, April 2, 1981, 17-18; Wood, "Interests and Disinterestedness in the Making of the Constitution" in *Beyond Confederation: Origins of the Constitution and American National Identity*, ed. Richard Beeman, Stephen Botein, and Edward C. Carter (Chapel Hill: University of North Carolina Press, 1987): 69-109; John Zvesper, *Political Philosophy and Rhetoric: A Study of the Origins of American Party Politics* (Cambridge: Cambridge University Press, 1977). Other dimensions of my interpretation of Madison's conception of impartial administration are covered in Alan Gibson, "Impartial Representation and the Extended Republic: Towards a Comprehensive and Balanced Reading of the tenth Federalist Paper," *History of Political Thought* 12 (Summer, 1991): 263-304; "Madison's 'Great Desideratum': Impartial Administration and the Extended Republic," *American Political Thought: A Journal of Ideas, Institutions, and Culture* 1 (Fall, 2012): 181-207.

strong candidate. Once its several dimensions are identified, it begins to pop up everywhere in his writings and speeches where it transcends and organizes other principles and informs his thinking on an array of topics. Impartiality brings together and structures Madison's varied commitments to disinterested public service, the equal protection of the rights (especially property) of all individuals, interests, and sections, the preservation of the union against sectional partisanship and rivalry, the pursuit of proportionality and fairness in power sharing arrangements, the just distribution of public benefits and burdens, and the repudiation of public officials who sought to become judges in their own causes and use public office for private advantage and profit. No account of Madison's political thought that ignores the sweeping dimensions of impartiality is adequate.

Focusing upon the importance of impartiality to Madison also provides a means of addressing the question of the consistency of his political career and thought or what scholars have come to call "the James Madison problem."<sup>3</sup> Madison's commitment to impartiality was steadfast and unwavering from 1780 to 1792. When impartiality is identified as the broadest thread in Madison's political thought and his efforts to create an impartial republic are recognized as his foremost goal, not only does the arc of Madison's political career become more understandable but the character and deepest roots of Madison's moral animus against Hamilton's program, especially his economic policies, are brought into sharp relief. Viewing it through the prism of his own vision of American nationhood and his understanding of the government as a disinterested umpire, Madison

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<sup>3</sup> See Gordon Wood, *Revolutionary Characters: What Made the Founders Different* (New York: The Penguin Press, 2006), 141-172.

condemned Hamilton's economic program as a partisan measure that helped Eastern elites and sparked a speculative frenzy fueled by insider knowledge.

Unfortunately, Madison never devoted a treatise or even a single essay exclusively to impartiality and never expressed his understanding of it in some single moment. His beliefs about the character and implications of impartiality and impartial administration must therefore be teased from his voluminous public and private writings and speeches and the policies that he favored. This goal is best achieved by pursuing a broad and novel narrative of Madison's political career from 1780 to 1792. During these years, the most studied and storied of his political career, Madison served in Confederation Congress then the Virginia state legislature, sparked the movement for wholesale reform of the Constitution, played a central role at the Philadelphia Convention, promoted ratification of the Constitution as Publius and as a delegate to the Virginia ratifying convention, and acted as the chief organizer of the Jeffersonian or Republican party in the early 1790s.

This essay is organized as a five-part chronological narrative around these years in which Madison explored the substance, institutional requirements, and rules and policies necessary to create an impartial republic. I first briefly examine Madison's service in the Confederation Congress from 1780 to 1783 and the Virginia legislature from 1784 to 1786, identifying the set of problems that shaped his understanding of the need for and imperatives of wholesale constitutional reform (rather than simply amendments to the Articles of Confederation). A second section analyzes the constitutional reform program that he developed to address these problems and his pre-convention vision of the national government as an impartial umpire in disputes within

the state governments. A third section explores how this vision was transformed with the defeat of the Madison's pet proposal empowering the national government with a universal veto of all state laws. This section examines Madison's efforts – especially as Publius - to explain how the original Constitution institutionalizes impartial administration through elections of representatives from large districts, extent of territory, separation of powers, a strong Senate, and independent executive and judicial branches. A fourth section treats some of the ways that Madison's commitment to impartiality and his efforts to bring into life an impartial republic informed the policies that he favored in the First Congress. A final section examines the revised understanding of the arch of Madison's political career that arises from this reinterpretation of Madison's political thought and constitutional vision.

#### ***Madison's Path to Constitutional Reform, 1780-1786***

James Madison served in the Confederation Congress from 1780 to 1783 before becoming ineligible for reelection under the term-limitation provision in the Articles of Confederation that stipulated that Congressmen could only serve three out of every six years. He then returned to Virginia and service in the House of Delegates from 1784 to 1786 before coming back for a brief stint in the soon to be defunct Confederation Congress in 1787. Such revolving service at the national and state level was the product of the term-limitation requirement of the Articles of Confederation (delegates to Congress could serve only three of every six years) and was typical of the men who later served as delegates to the Constitutional Convention.<sup>4</sup> Madison was not atypical in

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<sup>4</sup> Thirty-nine of the fifty-five delegates to the Philadelphia Convention had served in political posts at both the continental and state level. See Lloyd, "Individual Biographies

having both state and national experience, but rather in the lessons that he drew from it. Most important for our purposes, Madison's revolving service in Congress and the Virginia legislature impressed upon his mind the array problems that eventually led him by 1786 to accept the need for wholesale constitutional reform, profoundly shaped his idiosyncratic beliefs about the imperatives that that reform should take, and was the essential spark to his vision of an impartial republic.

Although it is beyond the scope of this essay to fully explore this period of Madison's political career, Madison's service in the Confederation Congress from 1780 to 1783 began, in his estimation, at the most desperate and precarious days in the life of the young republic. "Our army," he wrote in 1780 in perhaps his earliest letter to Thomas Jefferson, "[is] threatened with an immediate alternative of disbanding or living on free quarter; the public treasury empty; public credit exhausted, nay private credit of purchasing Agents employed, I am told, as far as it will bear, Congress complaining of the extortion of the people; the people of the improvidence of Congress, and the army of both; our affairs requiring the most mature & systematic measures, and the urgency of occasions admitting only of temporizing expedients, and those expedients generating new difficulties."<sup>5</sup> Madison's correspondence during these years chronicles the British campaign in the South that led to the occupation of parts of the South, repeated failures of the Confederation government to raise adequate money or troops and of amendments to the Confederation that would address these problems, mutinies in the continental forces

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of the Delegates to the Constitutional Convention"@  
<http://teachingamericanhistory.org/convention/delegates/>.

<sup>5</sup> Madison to Thomas Jefferson, 27 March 1780, *The Papers of James Madison*, ed. William T. Hutchinson et. al. (Chicago and Charlottesville: University of Chicago Press and University of Virginia Press, 1962-), II, 6. This work is hereafter cited as *PJM*.

in Pennsylvania and New Jersey, and Benedict Arnold's betrayal of the American cause. It also chronicles the devaluation of continental currency and the inability to keep its value stable, the secession efforts of settlers in Kentucky and Vermont, disputes over western lands and the creation of a national domain, and American efforts to create alliances with Spain and France, which in turn raised the prospect that delegates from the eastern states would barter American navigation rights on the Mississippi for a favorable treaty.

Madison's three years of service in the Confederation Congress deeply impressed upon him the impotence of the national "government" (if it deserved that appellation), baptized him in the sectional jealousies and state squabbles of Congress, and made him keenly aware that representatives would use their office for economic advantage. He returned to state politics in 1784 hoping to address the constellation of problems associated with the weaknesses of the Confederation Congress, to lessen the dependency of Congress on the states, and to instill respect for national authority in a body composed of many state-minded men. Addressing these problems meant getting Virginians to understand the importance of meeting their quotas of contribution to the federal treasury, accepting the Congressional recommendations of 1783 that he had drafted for strengthening the union, abiding by the 1783 Treaty of Peace with Great Britain, which forbade the confiscation of loyalist property and acknowledged the claims of British creditors, and getting his home state to use its influence to get other states to follow its example.

In addition to fortifying the union from the ground up, Madison also faced a variety of state issues – some of which were peculiar to Virginia and others that arose or

were felt within each of the states across the nation – that heightened his awareness of the inherent tension between majority rule and the protection of individual and minority rights. The famous church state struggle in Virginia illustrated at once the threat to individual rights of what Madison would later call an “interesting and overbearing majority,” the inability of mere laws or declarations of rights to protect individual rights against this threat, and the importance of social pluralism for that purpose.<sup>6</sup> It was also the point at which Madison formulated in embryonic form his first version of the proper contours of a just and impartial government. In “Memorial and Remonstrance Against Religious Assessment,” Madison’s landmark statement of separation of church and state, he observed that a just government is one that protects “every Citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.” The proposition that a just government will treat all groups, sections, and individuals with an equal hand, neither violating their rights nor allowing a majority to do so, becomes, in embryonic form his understanding of the proper contours of a just government.

The threat that majority factions and legislative encroachments posed to liberty – especially the rights of creditors - was reinforced in spades for Madison in the paper

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<sup>6</sup> Quote is from *The Federalist* No. 10 in Alexander Hamilton, James Madison, and John Jay, *The Federalist*, edited and with an Introduction and Notes by Jacob E. Cooke (Middletown, CT.: Wesleyan University Press, 1961), 57. All subsequent citations are to this edition of *The Federalist*. For the church-state struggle in Virginia see Thomas Buckley, *Church and State in Revolutionary Virginia, 1776-1787* (Charlottesville: University Press of Virginia, 1977); H.J. Eckenrode, *Separation of Church and State in Virginia: A Study in the Development of the Revolution* (New York: Da Capo Press, 1971); Rhys Isaac, *The Transformation of Virginia, 1740-1790* (Chapel Hill: University of North Carolina Press, 1982).

money crisis that swept the young nation in the two years leading up to the Constitutional Convention. Madison decried paper money as unnecessary, unjust, unconstitutional, antifederal, and pernicious. Most fundamentally, he opposed debtor relief legislation and the excessive use of paper money as both unjust and imprudent. If creditors were defrauded of their property by legislative enactments such as stay laws or other measures that abrogated contracts or if they were presented with devalued money as payment for their loans, then they would quit lending. Madison led the successful effort to prevent paper money emissions in Virginia. In seven other states, however, paper money advocates gained control of state legislatures. To Madison's dismay, popular leaders representing popular majorities continued to sanction the printing of this "fictitious" money and to sponsor other forms of debtor relief legislation, thus violating contract and property rights.<sup>7</sup>

Madison's opposition to the injustices of paper money and debtor relief legislation is usually and rightly characterized as an expression of his concern for the protection of the rights of creditors against the threat of democratic majorities. Indeed, although the threat that majority religious sects posed to religious rights seemed to serve as the paradigmatic case for Madison's concern for democratic despotism, Madison's experience with popular majorities seeking debtor relief framed and sharpened his understanding of the deepest tension within republican orthodoxy. The majority makes decisions in republican governments, Madison realized, and thus acts as a judge in its own cause. This majority, however, is still only a part – and often a partisan fraction – of

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<sup>7</sup> "Notes for Speech Opposing Paper Money," *PJM*, IX, 156-160; Madison to James Monroe, June 4, 1786, *Ibid.*, 74, n. 6; Madison to Jefferson, August 12, 1786, *Ibid.*, 94-95.

the whole and nothing in the constitutional system prevents it from enacting schemes of oppression.

Still, Madison saw the paper money crisis not simply as a sign of excessive democracy, but also as the product of federal impotence. Following the declaration of peace of 1783, Britain had kept in place its navigation acts that prohibited the products of American farmers from lucrative trading centers, especially the West Indies. But governed by the feckless and hapless Confederation government, the United States had been unable to negotiate commercial treaties with other countries and to engage in commercial retaliation against Great Britain to force them to open American products to European markets. Unable to bring their crops to export, Americans nevertheless clamored for British products and used their scarce specie to buy them. The result was an unfavorable balance of trade and growing debts that led, in turn, to calls for the postponement of taxes, and paper money and other forms of debtor relief legislation. Madison summed up this situation tersely when he declared to Jefferson that “most of our political evils may be traced up to our commercial ones, as most of our moral may to our political.”<sup>8</sup>

Furthermore, Madison believed that the debtor relief crisis and the democratic turbulence of the mid-1780s provided an opportunity for the schemes of interested individuals as well as interested majorities. In particular, at the Constitutional Convention, Madison had opposed a motion to require representatives to hold landed property as a qualification for election because, he argued, landed property was no evidence of real wealth. Many men with landed property, Madison observed, had

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<sup>8</sup> Madison to Jefferson, March, 18 1786, *PJM*, VIII, 502. See also Banning, *Sacred Fire*, 75.

acquired it on credit and then sought election to the legislature with the goal of promoting unjust laws against their creditors. Thus, far from being ordinary farmers, some debtors at least were, in Madison's eyes, scheming and ambitious men seeking profit at the public expense. They were, indeed, property holders without respect for property rights.<sup>9</sup> Such men, Madison added in *The Federalist* Nos. 44 and 62, also benefitted from the multiplicity and mutability of the laws. Hidden behind the screen of a multiplicity of contrary laws and with inside knowledge of which ones were now in place, the "enterprising and influential speculators" and the "moneyed few" could speculate on public measures and make money at the expense of ordinary members.<sup>10</sup>

Most important, contrary to so much that has been written about Madison during this period, he did not favor the creditor class at the expense of ordinary farmers or indeed members of any occupation. His protection of the legitimate rights of creditors did not carry with it any reciprocal privileges. Unlike Hamilton, he did not believe that the interests of a mercantile, creditor class had to be tied directly to national government to override state allegiances or insure the stability and longevity of the republic. He also did not believe more generally that what was good for creditors was good for the nation. In the mid- 1780s, he fought for the protection of the property of creditors because their property rights was being threatened and violated. But his economic policies and vision of constitutional reform were designed to alleviate the pernicious effects of debtor relief legislation in a way that would benefit the long term prosperity of a broader class of ordinary Americans. In particular, he favored a national impost that would weigh most

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<sup>9</sup> "Qualifications for Holding Office," Speech at the Constitutional Convention, July 26, 1787, Koch ed., *Notes of Debates*, 375.

<sup>10</sup> *The Federalist* No. 44, 301-302; *The Federalist* No. 62, 421-422;

heavily on the wealthy as an alternative to the land and excise taxes that the states lodged against their citizens to meet federal requisitions. Unburdened of these direct taxes, ordinary Americans would not need paper money and debtor relief legislation. Furthermore, in the 1780s as he would later in the 1790s, Madison opposed public officials who hoped to use their insider knowledge of government policies to make speculative gains. In both decades, his actions reflected his genuine vow - made in "Memorial and Remonstrance" (1785), in the tenth *Federalist* Paper (1787), and in "Property" (1792) - to protect the property rights of all and treat all forms of property, like all religious sects, on an impartial and equal basis.<sup>11</sup>

The paper money crisis of 1786 to 1787, along with Shays' rebellion and sectional conflict over negotiations with Spain on navigation rights on the Mississippi, were among a nexus of problems that completed the descent of Madison's respect for the Articles of Confederation. "The present system," he concluded in February, 1787, "neither has nor deserves advocates."<sup>12</sup> As is well-known, Madison diagnosed the problems by engaging in a systematic study of ancient and modern confederations and produced two documents: "Notes on Confederations" and "Vices of the Political System of the United States."

These two private memoranda are best viewed as companion analyses with the former focused upon the endemic maladies of the genus confederation and the later upon problems within the American species. In particular, in "Notes on Confederation," Madison's engaged in a comparative analysis of ancient and modern confederations, including three Greek confederations (the Lycian, Amphyctionic, and Achaean

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<sup>11</sup> Compare "Memorial and Remonstrance Against Religious Assessments," *PJM*, VIII, 302; *The Federalist* No. 10, 59-60; "Property," *PJM*, XIV, 266-268.

<sup>12</sup> Madison to Edmund Pendleton, February 24, 1787, *PJM*, IX, 294-295.

confederations) and three modern ones (the Swiss or Helvetic confederation, the Flemish or Dutch confederation, and the Germanic confederation) in search of the essential characteristics and endemic problems within this form of political organization.<sup>13</sup> The natural or essential condition of confederations and their deepest structural flaw, Madison concluded, was “the evil of imperia in imperio” (a sovereignty within a sovereignty) or, stated differently, the absence of a source of final authority.<sup>14</sup> This flaw was foundational because it was the core cause of the centrifugal tendencies and endemic instability that naturally and unavoidably arose in political systems with no controlling sovereign.

Whereas “Notes on Confederation” is best described as a set of detailed notes and systematic observations about numerous confederations both ancient and modern, “Vices of the Political System of the United States” was a more polished essay that, as David Hendrickson has keenly observed, summarized “a volume of accumulated commentary on the nature of the American malady.”<sup>15</sup> In particular, Madison’s list of twelve vices of the American confederation included a comprehensive survey of the major problems that had vexed and angered him since his earliest days of service in the Confederation Congress. The Confederation government, he noted, had been unable to secure compliance with constitutional requisitions, to prevent them from encroaching on the powers of the central authority, and to keep them from violating national treaties and

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<sup>13</sup> See also the informed discussion of “Notes on Ancient and Modern Confederacies” by David J. Bederman, *The Classical Foundations of the American Constitution: Prevailing Wisdom* (New York: Cambridge University Press, 2008), 111-114.

<sup>14</sup> Madison uses the phrase “the evil of imperia in imperio” in Madison to Jefferson, October 24, 1787, *PJM*, X, 209. For the general history of this principle see Alison LaCroix, *The Ideological Origins of American Federalism* (Cambridge, MA.: Harvard University Press, 2010), especially 14, 81, 172-173, 178-179.

<sup>15</sup> David Hendrickson, *Peace Pact: The Lost World of the American Founding* (Lawrence: University Press of Kansas, 2003), 212.

laws. The “dominant theme” of “Vices” contained within its longest section and the primary impetus for Madison to constitutional reform, however, was neither the structural defects of the Articles of Confederation nor its failures to secure national objectives, but rather the problems within the states, including the multiplicity, mutability, and injustices of the state laws.<sup>16</sup> Indeed, Madison’s most abiding concern during the mid-1780s was the violation of individual and minority rights by majority factions within the small sphere of the states.<sup>17</sup> Violations of the rights of minorities and individuals resulting from the abrogation of contracts, paper money legislation, and other schemes of debtor relief, Madison observed several times in 1787-1788, “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.”<sup>18</sup>

Madison’s researches in ancient and modern confederacies confirmed and crystallized the lessons that he had learned from his previous six years of political service at both the national and state level, catalyzed him into an enthusiastic advocate for radical constitutional change, and informed and focused the particular constitutional reforms that he proposed. Madison outlined his initial thoughts on constitutional reform in what he later called “the first shoot of his thoughts of a plan of Federal Government” in letters to

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<sup>16</sup> “Vices of the Political System of the United States,” *PJM*, IX, 346.

<sup>17</sup> This is a consistent conclusion of Madison scholars. See Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Alfred A. Knopf, 1996), 42; Gordon Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: The University of North Carolina Press, 1969, 1998), 502.

<sup>18</sup> Madison to Thomas Jefferson, Oct 24, 1787, *PJM*, X, 212. See also “Popular Election of the First Branch of the Legislature,” Speech of June 6, 1787, *ibid.*, 32; “Election of the Senate,” “Speech of June 7” *ibid.*, 40.

Washington, Jefferson, and Edmund Randolph.<sup>19</sup> Here he called for the creation of a totally reorganized national government with “positive and compleat [sic] authority” over all matters requiring uniformity including the regulation of trade and the right to tax both imports and exports.<sup>20</sup> He also called for separation of powers between independent legislative, executive, and judicial branches, proportional representation of both branches in the national government, popular ratification, and, most strikingly and importantly, a universal veto lodged in the national government to strike down state laws “in all cases whatsoever.”

In the multiple letters and speeches at the Convention in which he defended the universal veto, Madison laid out three specific purposes that it served.<sup>21</sup> First, he argued that it would prevent encroachments against the powers of the national government and conversely allow the national government to prevent the states from robbing it of its peculiar prerogatives. Preventing the states from drawing power back into their vortex, in

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<sup>19</sup> Adair ed., “Madison’s Autobiography,” 202; Madison to Thomas Jefferson, March 19, 1787, *PJM*, IX, 318-319; Madison to Edmund Randolph, April 8, 1787, *PJM*, IX, 369-370; Madison to George Washington, April 16, 1787, *PJM*, IX, 383-385.

<sup>20</sup> Madison to Edmund Randolph, April 8, 1787, *PJM*, IX, 370.

<sup>21</sup> Madison relentlessly defended the universal veto in four bursts – the last in late August - at the Constitutional Convention and then again to Jefferson in his long, remarkable post-Convention letter of October 24, 1787. Only much later in his life did he concede that the universal veto was impractical and that it was “justly abandoned” by the Convention. Madison to Thomas Jefferson, March 19, 1787, *PJM*, IX, 318-319; Madison to Edmund Randolph, April 8, 1787, *PJM*, IX, 369-370; Madison to George Washington, April 16, 1787, *PJM*, IX, 383-385; Speeches of June 8<sup>th</sup>, June 28<sup>th</sup>, July 17<sup>th</sup>, and August 28<sup>th</sup>, *PJM*, X, 41-43, 80, 102-103; Madison to Jefferson, Oct. 24, 1787, *PJM*, X, 212-214; See “Preface to Debates in the Convention: A Sketch Never Finished nor Applied,” in Adrienne Koch ed., *Notes of Debates in the Federal Convention Of 1787 Reported by James Madison* (New York: W.W. Norton, 1987), 16. The excellent scholarship that highlights the place of the universal veto in Madison’s constitutional reform program includes Hobson, “The Negative on State Laws,” 215-235; Rakove, *Original Meanings*, 14, 52-53, 62, 81-82, 169, 197-198, 316, 337; LaCroix, *The Ideological Origins of American Federalism*, 132-172.

turn, would prevent the system from spinning out of control. Fusing a Newtonian metaphor with his vision of a republican Congress exercising the King's prerogative in colonies, Madison likened the universal veto to gravity that prevented the centrifugal tendencies of the states and would hold them in their proper sphere of motion.<sup>22</sup>

Second, Madison believed that the negative would have a peace-keeping function by "restrain[ing] the States from thwarting and molesting each other."<sup>23</sup> In "Vices," Madison had noted that violations of individual rights were also violations of the rights of the states and the source of provocations and antagonisms between them and even with foreign nations. He now asserted that by vetoing such legislation the national government would prevent the rise of such antagonisms and serve as a peace-keeper between the states. Here Madison envisioned the universal veto as an essential weapon in interstate and even international relations to enhance the peace between the states, preserve the union, and diminish the likelihood of intervention by foreign powers in American affairs.

Third, as he thought through the implications of arming the national government with the universal veto, Madison also celebrated the "happy effect" it would have in protecting rights within the states.<sup>24</sup> Armed with the universal veto, the national government would reach into the states and veto laws that violated the rights of minorities and individuals. Madison had in mind here particularly paper money legislation, stay laws, and other debtor relief legislation. Had his preferred reform passed, however, he might also have favored using it to veto mischievous projects for religious assessments by the states and any number of other improper projects.

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<sup>22</sup> "Madison's Speech of June 8<sup>th</sup>, *PJM*, X, 41.

<sup>23</sup> Madison to Jefferson, March 19, 1787, *PJM*, IX, 318.

<sup>24</sup> Madison to George Washington, *PJM*, IX, 384.

In addition to enumerating these specific purposes for the veto of state laws, Madison repeatedly emphasized that the universal veto had to be absolute. It had to extend to “all cases whatsoever,” Madison argued, because legislative authority was plastic by its nature and because the state legislatures had proved so adroit at discovering ways of bypassing and disobeying federal commands. Any less sweeping power would be artfully dodged by the states and would become a source of antagonism between the national government and the states as they vied for control over jurisdictions of power.<sup>25</sup> Furthermore, only a universal veto in control of the national government could address the problem of majority tyranny within the states and supply the essential prerogative that previous confederations had lacked.<sup>26</sup>

Most important for our purposes, it was Madison’s effort to explain to himself and then justify to others how a republican body could wield the universal veto without becoming tyrannical that led him to formulate his famous theory of an extended republic, to address what he called “the great desideratum in Government,” and to formulate his initial vision of the national government as an impartial republic or as he called it a “disinterested and dispassionate umpire.”<sup>27</sup> In particular, Madison faced two objections to the universal veto as he thought through how to defend it. He first had to explain how

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<sup>25</sup> On this point see Rakove, *Original Meanings*, 52-53.

<sup>26</sup> Madison to Jefferson, March 19, 1787, *PJM*, IX, 318; Madison to George Washington, April 16, 1787, *PJM*, IX, 384.

<sup>27</sup> The phrase the “great desideratum” is used in “Vices of the Political System of the United States,” Madison’s important pre-Convention letter to Washington of April 16, 1787, his post-Convention defense of the universal veto to Jefferson of October 24, 1787, and then in *The Federalist* No. 10. See Vices of the Political System of the United States,” *PJM*, IX, 357; Madison to George Washington, April 16, 1787, *Ibid.*, IX, 384; Madison to Thomas Jefferson, Oct 24, 1787, *Ibid.*, X, 214; *The Federalist* No. 10, *Ibid.*, X, 267. The phrase “disinterested and dispassionate umpire” is from Madison to Washington, April 16, 1787, *PJM*, IX, 384.

the national government would not abuse the use of the universal negative as the King had and thus how it met the standard of being republican. He addressed this objection by observing that the universal negative would be exercised by a popular legislative body (Congress) that would be responsible to the people. Unlike the King, a popularly elected body could be counted upon to keep the interests of the people in mind and to have the necessary information to understand their perspective.<sup>28</sup>

Lodging the veto in the hands of Congress, however, raised a second objection to the negative - and it was addressing this specific question that led Madison to defend an extended republic. "It may be asked," he observed as he defended the universal veto to Jefferson even after he left the Convention, "how private rights will be more secure under the Guardianship of the General Government than under the State Governments, since they are both founded on the republican principle which refers the ultimate decision to the will of the majority, and are distinguished rather by the extent within which they will operate, than by any material difference in their structure."<sup>29</sup> Why, in other words, would the national legislature not be subjected to the problem of majority tyranny as the states had been? Madison's answer to this question was that majorities in Congress would be gathered from the whole nation with its diversity of interests and religious sects. A majority faction was much less likely to take over Congress than it had been to take over the state legislatures. Purged of majority factions but controlled by majority will,

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<sup>28</sup> Madison initially proposed lodging the universal veto in the Senate to meet the objection that otherwise the House would have to sit continuously. See "Power of the Legislature to Negative State Laws," Speech of June 8, *PJM*, X, 41. The Convention's decisions to give states equal representation and to elect Senators from the state legislatures, however, doubtlessly would have changed his mind about lodging it there had the Convention responded seriously to his attempts to revive the universal veto late in the Convention. See Rakove, *Original Meanings*, 14, 62, 81-83.

<sup>29</sup> Madison to Jefferson, October 24, 1787, *PJM*, X, 212.

Congress would be qualified to exercise the veto in an impartial fashion. The "evil of imperia in imperio," the endemic problem that had plagued all previous confederations, would be remedied. Furthermore, Congress could protect private rights against violations by majority factions within the states, and sectional rivalries would be diminished because states would not be allowed to pass laws that violated the rights of citizens from another.

On an even more abstract plane, the exercise of the universal veto by an impartial government also addressed what Madison called "the great desideratum in Government."<sup>30</sup> Madison's "great desideratum" – the essential goal that he believed had eluded previous governments and that he now hoped to secure in the one formed under a new Constitution - was to balance neutrality or impartiality with popular control. All civilized societies, Madison observed in one of several famous formulations, were divided into factions based upon different kinds and degrees of wealth, different religious and political opinions, and attachments to different leaders. Republican governments contained within a small geographic area rarely betrayed the interests of the people, but were often subjected to rule by majority factions. Since republics were governed by the will of the majority, majority factions in small republics readily become judges in their own causes, effectively substituting force for right. In contrast, principalities achieved a

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<sup>30</sup> The phrase the "Great Desideratum" is used in "Vices of the Political System of the United States," Madison's important pre-Convention letter to Washington of April 16, 1787, his post-Convention defense of the universal veto to Jefferson of October 24, 1787, and then in *The Federalist* No. 10. See Vices of the Political System of the United States," *PJM*, IX, 357; Madison to George Washington, April 16, 1787, *Ibid.*, IX, 384; Madison to Thomas Jefferson, Oct 24, 1787, *Ibid.*, X, 214; *The Federalist* No. 10, *Ibid.*, X, 267.

sufficient neutrality or impartiality between the various factions in the society, but the Prince often betrayed the interests of all to his own ambition and avarice.

The trick was somehow to combine the impartiality achieved by the Prince with the fidelity to the interests of the people secured by small republics. This goal, Madison maintained, could be achieved in an extended republic. Again, in an extended republic, oppressive factious majorities could not easily form because the people “would be 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.” At the same time, however, a republican government confined within a “practicable sphere” or a “sphere of a mean extent” would be sufficiently dependent upon the will of the people to prevent it from betraying the interests of all and also allow for a “defensive concert” against an oppressive administration.<sup>31</sup>

This, then, was the genesis and initial formulation of Madison’s extended republic. In this first formulation, Madison brought together republicanism and federalism, discovered the basis for a federal union in which both the state and national governments were republican, and proposed a solution both to the problem of majority factionalism within the states and more generally to the perennial problem – the “great desideratum” - of insuring both impartiality and fidelity to the interests of the people. More concretely, the extended republic provided the logic superstructure around which the specific proposals within Madison’s constitutional reform package were integrated and served as the essential feature of the design of a novel federal union. Enlarged powers of taxation and trade, Madison believed, could now be exercised benevolently

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<sup>31</sup> Madison to Jefferson, October 24, 1787, *PJM*, X, 214. The phrase “practicable sphere” is from *The Federalist* Nos. 14 and 51, *Ibid.*, X, 284,479-480.

and responsibly by non –factious majorities in a bicameral Congress based upon proportional representation.

***Madison as Publius: The Constitutional Mechanics of Impartial Administration***

Madison’s prescient vision of an extended republic governed by an impartial national government exercising a universal veto to void improper and unjust laws within the states was substantially rejected by his fellow delegates at the Constitutional Convention. After the smoke had cleared from the Convention, the universal veto was replaced by the prohibitions against the states found in Article 1, Section 10, the national supremacy clause which declared the Constitution the “supreme law of the land,” and judicial enforcement that clause made explicit within it.<sup>32</sup> Madison was unsatisfied with these remedies. Judicial review acted after an injustice was committed, supposed that the aggrieved party had the resources to make a judicial appeal, and rested on the premise that a state would abide by a judicial ruling.<sup>33</sup> Furthermore, Madison had sought “a Republican remedy for the diseases most incident to Republican Government.”<sup>34</sup> The judicial remedy was, in his eyes, sufficiently republican.

As Madison specialists have now repeatedly emphasized, Madison’s convention losses – especially the loss of the universal veto – left the man that future generations would label “the Father of the Constitution” famously despondent about his progeny. The Constitution, he predicted to Jefferson on September 6, 1787, about two weeks before the

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<sup>32</sup> Hobson, “The Negative on State Laws,” 228-229.

<sup>33</sup> Madison to Jefferson, October 24, 1787, *PJM*, X, 211.

<sup>34</sup> *The Federalist* No. 10, 65.

Convention adjourned, “will neither effectually *answer* its *national object* nor prevent the local *mischiefs* which every where *excite* *disgusts* ag[ain]st the *state governments*.”<sup>35</sup>

Contrary to the assertions of two of Madison’s leading scholars, however, the loss of the universal veto at the Convention did not lead Madison to abandon the idea of the national government as an impartial arbiter.<sup>36</sup> Before and during the Convention, Madison had thought primarily about how to structure and empower the national government so that it could impartially umpire factional disputes *within the states*. The loss of the universal veto now made that impossible. Nevertheless, writing now as Publius, Madison continued to define and develop his understanding of the contours of impartial administration by the national government on national issues, but he concentrated on the mechanics of impartial administration and only alluded to the meaning and policy implications of impartiality.

Madison’s analysis of how the national government created by the Constitution would work to promote impartial administration was most evident in the reformulated theory of an extended republic that he presented in *The Federalist* No. 10. Disconnecting his case for an extended republic from the central problem that it had been originally formulated to address (majority factionalism *within the states*) and the specific power that it had been designed to justify (the universal veto), Madison now defended the salutary effect that extent of territory and the election of representatives from large districts would

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<sup>35</sup> Madison to Jefferson, September 6, 1787, *PJM*, X, 164. Italicized words are those written in code by Jefferson and encoded by Madison.

<sup>36</sup> For this claim see Lance Banning, *The Sacred Fire of Liberty: James Madison & the Founding of the Federal Republic* (Ithaca: Cornell University Press, 1995), 470, note 54 for quote. Emphasis is Banning’s. See also 445, note 52 and 469-470, notes 52 and 53; *The Federalist* No. 10, 59-60; Colleen Sheehan, *James Madison and the Spirit of Republican Self-Government* (New York: Cambridge University Press, 2009), 92- 93, note 26.. Cf. the discussion on 92 with note 26 on 93.

have in promoting impartial administration by the national government. As Publius, Madison also established the benefits that a strong and independent Senate, judiciary, and executive would have for that same purpose.

Madison's argument in *The Federalist* No. 10 remains one of the most storied and studied arguments in the history of political thought. Interpretation of it has evolved to a point approaching fetishism. The purpose of the detailed analysis that follows is not to drag us one more time through the numerous exegetical disputes that surround Madison's classic. It is instead to map Madison's familiar, but still deeply contested, argument onto his commitment to impartial administration - to show, in other words, how Madison's defense of an extended republic affirmed his commitment to impartial administration and to establish how the institutions in the completed Constitution were designed to promote that goal. Simply stated, within Madison's analysis in *The Federalist* No. 10, the remedies for the problem of faction – including most importantly majority factions – were representation (with representatives elected from expanded electoral districts) and extent of territory. These “two great points of difference” between a “pure Democracy” and a republic, in turn, serve the broader goal of enhancing impartial administration.<sup>37</sup>

Much of the scholarship surrounding the extended republic has focused on Madison's plan for electing elite representatives from large electoral districts. Madison expressed his greatest confidence in this procedure in “Vices of the Political System of the United States” where he used his most exalted language to describe the men he hoped to secure as officeholders. Elections from large districts, he observed here, would act as a process that “will most certainly extract from the mass of the Society the purest and

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<sup>37</sup> *The Federalist* No. 10. Quotes on 61-62.

noblest characters which it contains.”<sup>38</sup> In the tenth *Federalist*, he spoke of these representatives as a “chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations” and proposed that an extended republic would help secure the election of “representatives whose enlightened views and virtuous sentiments render them superior to local prejudices and schemes of injustice.”<sup>39</sup>

To be sure, expanded electoral districts were an important means of bringing men of the right character into office for Madison. In the tenth *Federalist* Paper, he defended the competitive advantage that elections from large districts would give to virtuous men or “fit characters” and corresponding disadvantages they would pose to “unworthy candidates.”<sup>40</sup> He also briefly alluded to the benefits of elections from large districts for facilitating the ability of representatives to “comprehend and pursue great and national objects” – a point further developed in his private correspondence.<sup>41</sup> Madison’s case for expanded electoral districts should also be tied to his case for the salutary effects that moderate representation would have on deliberations within Congress.

Madison defended the first of these claims in convoluted language that emphasized the importance of a “moderate number of representatives” and stressed the *probability* that large districts would result in the election of better representatives.<sup>42</sup>

In the first place, it is to be remarked that, however small the republic may be, the representatives must be raised to a certain number, in order to guard against the cabals of a few; and that, however large it may be, they must be limited to a certain number, in order to guard against the confusion of a multitude. Hence, the

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<sup>38</sup> “Vices of the Political System of the United States,” *PJM*, IX, 357.

<sup>39</sup> *The Federalist* No. 10. Quotes on 62, 64.

<sup>40</sup> *The Federalist* No. 10, 63.

<sup>41</sup> *Ibid.*

<sup>42</sup> *The Federalist* No. 56, 381.

number of representatives in the two cases not being in proportion to that of the two constituents, and being proportionally greater in the small republic, it follows that, if the proportion of fit characters be not less in the large than in the small republic, the former will present a greater option, and consequently a greater probability of a fit choice.<sup>43</sup>

The foundational and unsupported proposition underlying this scheme was that the proportion of representatives to constituents does not have to be as great in a large republic as it does in a small republic. If proportionally fewer representatives were necessary in a large than a small republic and there were proportionally at least as many qualified candidates in the large republic, then it followed that the large republic would create a "greater option" and insure the greater probability of a "fit" candidate for office.<sup>44</sup> Considered concretely within the historical context in which Madison wrote what this meant is that Madison believed that the number of representatives who would serve in the national government under the new Constitution could be proportionally much smaller than the number who had served in the state governments during the mid-1780s. Whereas several of the state legislatures at the time of the adoption of the Constitution had over a hundred representatives with electoral districts containing some three or four thousand persons, the new national government had only sixty-five representatives elected from districts with thirty to forty thousand residents. Madison was careful, however, to also maintain that the number of representatives had to be sufficient to adequately understand and represent the nation's many diverse interests.<sup>45</sup> This goal

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<sup>43</sup> *The Federalist* No. 10, 62 - 63.

<sup>44</sup> *The Federalist* No. 10, 62 -63.

<sup>45</sup> On July 10<sup>th</sup> at the Constitutional Convention, Madison motioned to double (from 65- the number eventually accepted) the number of national representatives. On September 8<sup>th</sup>, he seconded a motion to reconsider the clause fixing the number of representatives at 65 with an eye to increasing that number. See *Notes of Debates in the Federal*

continued his broader effort of balancing the qualities of connectedness, attachment, and general sympathy between the government and the people with impartiality and independence from them and thus to guard against both governmental tyranny and factional influence.

A corollary claim that Madison made for elections from large districts was that this electoral procedure would decrease the likelihood that “unworthy candidates” would be chosen. If “fit characters” were gentleman who would adhere to the “patrician code of disinterested public leadership” and refuse to use public office for selfish pursuit and private advantage, “unworthy candidates” included men of little or middling ability, those excessively fastened to local prejudices, and corrupt and demagogic leaders who sought to secure election by flattering the people and then to use public office for their own benefit.<sup>46</sup> In this dimension of his argument, Madison defended elections from large districts as a means of liberating *voters* from such poor choices.

In the next place, as each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried; and the suffrages of the people being more free, will be more likely to centre in men who possess the most attractive merit and the most diffusive and established characters.<sup>47</sup>

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*Convention of 1787 Reported By James Madison*, Adrienne Koch ed. (New York: W.W. Norton, reissued 1987), 263, 608.

<sup>46</sup> Wood, “Interests and Disinterestedness,” 83-92. Quote on page 92.

<sup>47</sup> *The Federalist* No. 10, 63. Madison also made this point in the Virginia Ratifying Convention when he said: “The greatest degree of treachery in representatives is to be apprehended where they are chosen by the least number of electors; because there is a greater facility of using undue influence, and because the electors must be less independent.... We may therefore conclude, that our representatives being chosen by such extensive districts, will be upright and independent.” “Speech of June 11, 1788,” Virginia Ratifying Convention, *PJM*, XI, 114.

While it is impossible to know the full list of electoral practices that “unworthy candidates” might employ, Madison drew the connection between bribery and expanded electoral districts directly in *The Federalist* No. 57. Elections from large electoral districts, he observed, would help insure that the selection of “fit” representatives because the choice will be “less likely to be diverted from him [the elector], by the intrigues of the ambitious, or the bribes of the rich.”<sup>48</sup> Obviously, bribery becomes more difficult in a large electoral district because it would be more expensive and less easily concealed.<sup>49</sup>

In evoking the Shakespearean term of witchcraft the “vicious arts” to describe the techniques that unworthy candidates used to gain office, Madison also likely had in mind the effects of spellbinding speeches. Madison’s quintessential example of a demagogue was Patrick Henry. Madison had seen Henry stupefy his fellow legislators in Virginia on numerous occasions. Madison may also have had in mind the intimidations that surrounded *viva voce* elections in which voters were required to declare their preference directly in front of the candidates.<sup>50</sup> Madison’s broadest point is that demagogues might be able to sway small pools of voters, but were less likely to bribe and beguile a large body of them.

Scholars have used several helpful metaphors - including skimming, filtering, and distilling - to describe Madison’s defense of elections from large districts.<sup>51</sup> Whatever metaphor we employ to understand it, it should be emphasized that elections from

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<sup>48</sup> See also *The Federalist* No. 57, 388.

<sup>49</sup> David Epstein, *The Political Theory of The Federalist* (Chicago: University of Chicago Press, 1984), 96.

<sup>50</sup> *The Federalist* No. 10, 63.

<sup>51</sup> For skimming see Amar, *The Bill of Rights*, 10; for filtration see Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: The University of North Carolina Press, 1969, 1998), 506-518; for distillation see Wills, *Explaining America*, 223-247, especially 242-247.

expanded districts were an *indirect* and *procedural* route to securing elite public leaders and acted as an alternative to strictly formal means.<sup>52</sup> Madison and his Federalist colleagues might have sought to secure the selection of elite representatives directly by writing formal qualifications into the Constitution which either restricted eligibility for membership in the House of Representatives or which limited the size of the electorate. Such qualifications could have been formulated easily and some were considered at the Convention. The architects of the Constitution might, for example, have tied eligibility for office or the right to vote directly to wealth or property holdings, family status, or education. Instead, the constitutional requirements to become a representative were easily met. Representatives had only to be 25 years old and 7 years a citizen of the United States. No property qualifications were required for membership in the House, representatives had only to be "inhabitants" of the districts they represented (not residents), and salaries were paid to members of Congress (there was no presumption that national office holders would be wealthy).<sup>53</sup> Similarly, no property qualifications or other restrictions were passed which limited the right of suffrage. Madison and his Federalist colleagues hoped that free voting, open access to office, but fewer offices would cause greater competition and consequently the election of better representatives. In this manner, republican concerns for formal equality and openness of opportunity were not sacrificed in order to meet the republican commitment to rule by the natural elite.

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<sup>52</sup> This discussion amplifies but also qualifies the insights in Jack N. Rakove, "The Structure of Politics at the Accession of George Washington," in *Beyond Confederation* Beeman et, al. eds., 267 – 271 and Akhil Reed Amar, *America's Constitution: A Biography* (New York: Random House, 2005), 64-76. Neither Rakove nor Amar, however, discusses the informal advantages of wealth, connections, and reputation that were underneath the Federalists' "faith" in electoral prospects of cosmopolitan elites in elections from expanded electoral districts.

<sup>53</sup> The United States Constitution, Article I, Section II.

In addition to these interrelated benefits of elections from large districts that Madison defended directly in *The Federalist* No. 10, two additional ones can be identified. The first – only hinted at in *The Federalist* No. 10, but more fully developed in Madison's correspondence - was that representatives elected from large and reasonably diverse consistencies would be less likely to become unduly attached to local interests and conversely would come to know and favor broader public interests. Whereas Madison's second hypothesis suggested that large electoral districts would free *voters* from the wiles of demagogues, this one suggested that large districts would free *representatives* from an undue attachment to the interests and views of their constituents and condition them to comprehend and pursue a broader public interest. "The most effectual remedy" for "local bias" in representatives, Madison argued in "Observations on Jefferson's Draft of a Constitution for Virginia," was to elect them from a larger and more diverse segment of the society. This would "impress upon the mind" of the representative an attention to a greater part of the society by making him responsible to a greater number of voters. In fact, Madison believed that local bias in representatives would diminish in "direct proportion to the number of electors to which they were responsible."<sup>54</sup>

A fourth and final technical argument for expanded electoral districts involves tying Madison's case for expanded electoral districts to his understanding of the dynamics of legislative bodies, especially his claim that reducing the number of representatives to a moderate number would make it more likely that laws would be formed within Congress through a process of deliberation and mutual concessions rather

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<sup>54</sup> "Observations On Jefferson's Draft of a Constitution for Virginia," *PJM*, XI, 286.

than through the arts and actions of a few legislators advancing their own interests. Underlying this hypothesis was a more general theory that Madison held about the relationship between the size of legislative assemblies and the nature of their internal operations.<sup>55</sup>

Specifically, Madison argued that excessively large legislative assemblies often produced inconsistent and even contradictory legislation, contained many members who had limited capabilities, were controlled by a few members (usually demagogues), were actuated by passion and thus were often oligarchic in their operations, failed to insure that representatives were held accountable for their policies, and often reflected the factional divisions that were present in the electorate. In contrast, if there were too few representatives in the assembly, the interests of the nation would not be adequately represented, the likelihood that the representatives could be corrupted or would establish an interest independent of the people was increased, and the confidence between the people and their representatives that was necessary to stability in republican governments was undermined. Against these opposing tendencies, Madison sought to find the correct number of representatives so as to secure information about all the interests of the nation, to prevent the assembly from simply mirroring the divisions of the electorate, to prevent Congress from being corrupted or bribed, to maintain the confidence of the electorate and responsibility in representatives, and finally to enhance free and constructive debate about what policies would best promote the common interest.

Madison placed considerable hope on the prospect of elections from large districts. Along with generous salaries and the possibility of serving in a stable and

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<sup>55</sup> Madison's understanding about the size and the internal dynamics of legislative districts is set forth in *The Federalist* Nos. 55 and 58, 374, 395-396. Quote on 374.

respectable government, this electoral procedure promised to entice many of the best and brightest men into public service, reversing what Madison and several of his fellow delegates had seen as a central problem of the Confederation era: the “defect of adequate Statesmen” in office.<sup>56</sup> Nevertheless, the election of elite statesman from expanded electoral districts was simply not the primary means in which Madison sought to reconcile impartial administration and popular sovereignty.<sup>57</sup> Nor does Madison’s theory of an extended republic or his vision of impartial administration hinge on a lost but “noble vision” of “hope for a heroic impartiality in the people's representatives.”<sup>58</sup> Madison understood that “enlightened statesmen will not always be at the helm.”<sup>59</sup> Extent of territory, however, would help to reconcile impartial administration with popular sovereignty even when more ordinary men occupied office. Simply put, Madison wanted to construct institutional structures that would steer more ordinary officeholders toward an impartial perspective and promote the passage of impartial policies by the body as a whole.<sup>60</sup> An extended republic afforded a greater likelihood that this would take place.

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<sup>56</sup> Madison’s earliest correspondence identifies this as one of the problems of the Confederation government. See Madison to Jefferson, March 27, 1780, *PJM*, II, 6.

<sup>57</sup> Using carefully chosen words, Lance Banning calls the “filtration of talent” component of Madison's argument in the Tenth *Federalist* a “secondary and subsidiary point” which was “more than an afterthought, but much less than the vital core of Madison's thinking.” Quotes are on 13. Banning, “The Hamiltonian Madison: A Reconsideration,” *Virginia Magazine of History and Biography* 92 (1984): 13 - 15 and notes 15 and 16. See also Banning, *Sacred Fire*, 208-209.

<sup>58</sup> Wood, “Heroics,” Review of Garry Wills, *Explaining America: The Federalist in The New York Review of Books*, April 2, 1981, 17-18; Wills, “Introduction” in *The Federalist Papers*, ed. Garry Wills, xxi-xxiv.

<sup>59</sup> *The Federalist* No. 10, 60.

<sup>60</sup> The secondary status of elections from large districts was made explicitly in the tenth *Federalist* where Madison wrote: “The other point of difference is, the greater number of citizens and extent of territory which may be brought within the compass of Republican,

In particular, extent of territory raised four principal "obstacles" or "impediments" to the communication, consolidation, and concert of majority factions.<sup>61</sup> These were the greater space or distance (including both the greater distance between citizens and the distance between citizens and their representatives), the greater number of citizens, the greater variety of interests and religious sects, and the public or civic consciousness which Madison maintained would be embedded in the society and would act as a barrier to the open communication of factious schemes. Most important, if majority factions could be prevented from gaining control of Congress, then impartial or non-factious majorities could be formed within Congress. At this point, diversity would help insure the formation of impartial majorities in Congress and extent of territory - sheer distance - would enhance the independence of representatives and promote the formation of a national perspective on national issues in Congress.

To understand Madison's point fully, however, we need to analyze this argument in two stages, examining first how extent of territory serves to "break and control the violence of faction" and secondly how preventing majority factions from taking over the legislature would promote the formation of impartial majorities within it.<sup>62</sup> Briefly stated, Madison believed that one of the central problems with majority factions was that they were governed by a dynamic of group irrationality. Acting alone or in a small group, men know that they cannot avoid responsibility for their actions. Conversely, in a large group or a majority faction, personal responsibility is lost in numbers. Furthermore, majority

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than of Democratic Government; *and it is this circumstance principally which renders factious combinations less to be dreaded in the former, than in the latter.*" *The Federalist* No. 10, 63 - 64.

<sup>61</sup> *The Federalist* No.10, 64.

<sup>62</sup> *The Federalist* No. 10, 56.

factions were governed by the reinforcing opinions of the members of the group, not restrained by the opinions of the minority or those outside of the society. Here, then, was the problem of the dynamics of majority factions and large legislative assemblies. Fortified by the “sympathy of the multitude,” men “join [in public] without remorse in acts, against which their consciences would revolt if proposed to them under the like sanction, separately in their closets [their places of study]”<sup>63</sup>

In 1787, Madison hoped to break and control majority factions by transferring the locus of decision making over a number of vital issues – especially economic policies - to the national government. Factions that were a majority within the small sphere of the state governments would now have to form national majorities across the obstacles created by the extended republic to take over the national legislature. Majority interests or factions might still be present and would be publicly expressed as factious sentiments. Nevertheless, in a "large society 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.*" Most important, the greater space between interests, the greater number of individuals, the civic consciousness against factious schemes that Madison presupposed would be present among the citizenry, and the greater diversity of interests in the extended republic would invert the psychological dynamic behind group opinion. Dispersed across the nation, factious sentiments would not be compounded and result in irrational group activity. Instead, extent of territory would isolate discontent and

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<sup>63</sup> “Vices,” *PJM*, IX, 355-356.

diminish the likelihood that “schemes of oppression” would be communicated and orchestrated.<sup>64</sup>

If all of this seems by now unduly complex and technical, a concrete example from the Virginia church – state struggle may be helpful. Specifically, during the most crucial part of this contest, a coalition between Presbyterians and Episcopalians was formed in favor of a broad tax for teachers of the Christian religion – a bill that Madison considered an establishment of religion and a threat to religious liberty in Virginia. The coalition between the Presbyterians and Episcopalians, however, was short-lived. According to Madison, the "mutual hatred" and "jealousy" of these two sects flamed up and the coalition broke apart. Madison was "far from being sorry" for the antagonism of these sects, but instead welcomed it because this coalition "alone could endanger our religious rights and a tendency to such an event had been suspected."<sup>65</sup>

So far this discussion has focused upon the role of extent of territory in breaking majority factions. But how would impartial *legislative* majorities form *inside* the House of Representatives? Like the discussion above, this question draws us into several quite technical points that cannot be fully covered in this essay. Briefly put, however, Madison hoped that impartial majorities might be formed by less than heroic and disinterested men as a result of several dynamics. The most important of these is that coalition building process itself would push Congress toward the formation of impartial majorities. In *Federalist* 51, Madison famously wrote, “In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than

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<sup>64</sup> *The Federalist* No. 10, 61.

<sup>65</sup> Madison to Jefferson, Aug. 20, 1785, *PJM*, VIII, 345.

those of justice and the general good.”<sup>66</sup> This often quoted passage is best understood as suggesting that Madison believed that representatives would often begin by advancing the partisan interests of their constituents. After all, these interests have a claim in relation to the common interest.<sup>67</sup> Even as they advanced such claims, however, representatives would realize that they did not have the votes to get their way. At this point, deliberations and concessions among representatives would create a broadening of the coalition necessary to form a majority. Aware that they could not successfully advance purely partisan or partial schemes, representatives would be lead to adopt a broader understanding of what policies are in the interests of the whole nation based upon a more accurate view of and sympathy for all these interests. Impartial legislation would result from the "mutual concession[s]" and "equitable sacrifices to the general weal" that diversity would require.<sup>68</sup>

Finally, in addition to elite statesmanship and the broadening dynamics of the legislative process, Madison counted upon the personal character of public officials in the less directly elected branches of the government – especially the Senate - and the structure and powers of their offices to help achieve impartiality. In particular, Madison predicted at the Convention that the Senate would be composed of “generally a more capable set of men” than the House of Representatives.<sup>69</sup> Indeed, much of what has been said about Madison’s expectations regarding representatives elected from expanded electoral districts is a better description of his hopes for Senators and the Senate.

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<sup>66</sup> The *Federalist* No. 51, 352-353.

<sup>67</sup> See "Observations on Jefferson's Draft of a Constitution for Kentucky," Oct. 15, 1788, *PJM*, XI, 286 -287 for a direct statement on how Madison believed that local interests should be related to the common interest.

<sup>68</sup> Quotes are from “Speech of April 9,” *PJM*, XII, 70; *The Federalist* No, 58, 397.

<sup>69</sup> “Power of Originating Money Bills in the Legislature,” June 13 1787, *PJM*, X, 54.

Composed of sagacious men, elected for relatively long terms of office, the Senate, Madison hoped and expected, would be peculiarly qualified to serve as a central bulwark against the mutability, multiplicity, and injustices of the state laws. The Senate, he assured himself and his fellow delegates at the Convention, would act as “a firm, wise and impartial body” that “might not only give stability to the Gen[era]l. Gov[ernmen]t in its operations on individuals, but hold an even balance among different States.”<sup>70</sup> Most remarkably, Madison stretched the idea of impartiality to new lengths in considering the role of Senators as Publius. Senators, he now argued in *The Federalist* No. 63, would possess a unique “sensibility to the opinion of the world” and would be well-advised to consider whether or not a measure was wise by contemplating how it would be viewed by the impartial opinion of the world. Rather than simply extolling the virtues of wise Senators, Madison now asked these same wise men to consult the view of unaffected and thus impartial nations when devising American policy.<sup>71</sup>

If Madison’s expectations for the role of Senators were high, his thoughts on the President were murkier and less developed. Fastened to the belief that the legislative “necessarily predominates” in republics, he did not envision a strong President.<sup>72</sup> Throughout the early stages of the Convention, Madison concentrated mainly on insuring the independence of the President from legislative encroachments that might create a dangerous alliance between Congress and the Executive. Concern for executive independence led him to oppose legislative selection of the President and even to argue that a tenure of “good behavior” for the President should be given a “fair hearing &

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<sup>70</sup> “Salaries for Members of the Senate,” June 26, 1787, *PJM*, X, 78.

<sup>71</sup> *The Federalist* No 63, 422-423. Quote is on 422.

<sup>72</sup> *The Federalist* No. 51, 350.

discussion” by the Convention unless other means could be devised for insuring his independence from the legislature.<sup>73</sup> Applying the logic that supported and structured his defense of elections of representatives from large districts, Madison observed that “the people at large was in his opinion the fittest in itself [for selecting the President]. It would be as likely as any that could be devised to produce an Executive Magistrate of distinguished Character. The people generally could only know & vote for some Citizen whose merits had rendered him an object of general attention & esteem.”<sup>74</sup> Nevertheless, the problem with direct popular election, Madison hastened to add, was that Southern states would not be credited for their slave populations (obviously slaves would not become citizens and be allowed to vote). Voting would thus continue to be more widespread in the North than the South, making it more difficult for a Southerner to be elected President. This consideration led to Madison’s support of the scheme eventually set forth in the Electoral College. By making the number of electoral votes in each state equal to its number of representatives and Senators and apportioning the number of representatives based on three-fifths clause, the Electoral College augmented Southern (slaveholding) influence in the selection of the President.<sup>75</sup>

Madison’s desire for an independent and energetic President grew as the Convention progressed. After the “Great Compromise,” Madison became much more likely to favor augmentation of the powers of the President (who represented the whole nation) rather than the Senate (which now represented the states as states). He came to

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<sup>73</sup> “Term of the Executive,” *PJM*, X, 103-104.

<sup>74</sup> “Method of Appointing the Executive,” *PJM*, X, 107-108.

<sup>75</sup> “Method of Appointing the Executive,” *PJM*, X, 107-108. For the influence of slavery in the development of the Electoral College see Amar, *America’s Constitution*, 156-159.

favor the President sharing in the power to appoint judges and the treaty making power.<sup>76</sup> He also now favored the right of the President to succeed himself. Throughout *The Federalist*, he characterized the President as the indispensable constitutional agent for supplying "energy" to the government – one of three vital qualities that he attributed to good government.<sup>77</sup> Had he written on the presidency as Publius, he would doubtlessly have defended the presidential veto as a remedy to the shifting and unjust laws that were likely to be passed by the impetuous legislature.

These observations about the role and powers of the President and efforts to enhance presidential power, however, fell far short of where Madison might have gone. Tracing the reasoning of elections from large districts to their logical conclusion, Madison might have envisioned the President as a republicanized, disinterested statesman - Bolingbroke's "Patriot King."<sup>78</sup> He might, like James Wilson, have followed his reasoning that the President would be the American with the most diffusive reputation to proposition that the chief executive would be America's most virtuous citizen and that he would be conditioned by his responsibility to a vast, diverse electorate to act as the peculiar spokesman for the common interest. Instead, his experiences and republican convictions kept him from such a view of presidential responsibility and power.<sup>79</sup>

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<sup>76</sup> See Rakove and Zlomke, "Independent Executive," 298-299; Banning, *Sacred Fire*, 166-169.

<sup>77</sup> *The Federalist* No. 37, 233-234.

<sup>78</sup> For the strength of this vision of the nonpartisan President among the Founders see Ralph Ketcham, *Presidents Above Party: The First American Presidency, 1789-1829* (Chapel Hill: University of North Carolina Press, 1984).

<sup>79</sup> Rakove and Zlomke, "Independent Executive," 294-295 plausibly speculate that Madison's experiences with Robert Morris' bullying during the early 1780s influenced Madison's aversion to executive authority.

Finally, the judiciary played a limited but important role in the goal of impartial administration. Before and at the Convention, Madison had conceived of the universal veto of state laws and a revisionary council (composed of the Executive and members of the judiciary) as remedies for the excesses and injustices of republican lawmaking. The universal veto, in Madison's original plans, would be designed to strike down the unwise and unjust laws of the states before they took effect, while the revisionary council would introduce wisdom and steadiness into the national legislatures, check encroachments by the legislative branch, and enhance executive independent. The loss of both the universal negative and the revisionary council meant that the judiciary would have to soldier much of the load that Madison had envisioned for these other institutions, but, in Madison's mind, would necessarily be less effective in doing so. Only over time would Madison come to peace with the losses that deprived him of these institutions and the constitutional structure adapted in their wake.

***Madison and the First Congress: The Policies and Policies of Impartial Administration***

Madison entered Congress in 1789 still primarily concerned with the effects of majority factions and the prospect that the newly formed Congress would mirror the impetuosity of the state legislatures. The national legislature, he had predicted in *The Federalist* and his correspondence before and after the Philadelphia Convention, would most likely launch encroachments on the other branches and pass numerous, contradictory, unwise, and unjust laws as a result of its responsiveness to majority sentiment and its character as a legislative body filled with numerous lawmakers. The legislative branch, he stated most forcefully in *The Federalist* No. 48, derived a "superiority" in the new government from its popular foundations and influence among

the people, because its constitutional powers were more extensive and less susceptible to precise limitations than the Executive, and because of its control over the purse.<sup>80</sup>

Conversely, Madison predicted shortly after Congress had begun its operations that the Executive would be “the weak branch of Government.”<sup>81</sup> In March, 1789, Madison still awaited “experimental instruction“ about the character or genius of the new political system. Nevertheless, he confidently asserted that “predictions of an anti-democratic operation will be confronted with at least a sufficient number of the features which have marked the State Governments.”<sup>82</sup>

Within two years after the new government had been launched, however, Madison’s concerns had already shifted. Beginning especially in the second session of the First Congress, Madison increasingly found himself in opposition to Hamilton’s vision of economic centralization, first on the question of whether or not discrimination should be made between its original and subsequent holders in funding the public debt, then on the assumption of state debts, and then most profoundly and divisively on Hamilton’s proposal to fund a national bank and his “Report on Manufacturers.” Evaluating Hamilton’s measures through the prism of his understanding of impartiality, union, and justice, Madison increasingly saw Hamilton as the head of a minority faction that represented the interests of Eastern speculators and financiers at the expense of the rights and prosperity of ordinary Americans, especially farmers.

Madison’s primary fears now shifted to constitutional usurpations by this minority faction, the Presidential aggrandizement of power, and “consolidation” of the states into a

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<sup>80</sup> *The Federalist* No. 48, 333-334.

<sup>81</sup> Madison to Edmund Randolph, May 31, 1789, *PJM*, XII, 190.

<sup>82</sup> Madison to Thomas Jefferson, March 29, 1789, *PJM*, XII, 38.

single republic - the shibboleth of Antifederalism. No single act or program brought Madison to these conclusions, but the presentation of Hamilton's "Report on Manufacturers" culminated Madison's transition. If the measures Hamilton recommended in his report passed, Madison declared to Henry Lee in January 1792, it could no longer be said that the Constitution was being interpreted on the basis of sound construction or the sense in which it had been ratified. Instead, it would have to be acknowledged that the American republic was "no longer be a Gover[nmen]t possessing special powers taken from the General Mass, but one possessing the gen[era]l mass with special powers reserved out of it."<sup>83</sup> Perhaps most remarkably, Madison also now feared that the republic was too large for the people properly to monitor public officials and engage in collective action against an independent and tyrannical government.<sup>84</sup>

By 1792, Madison had assumed leadership of an organized opposition – the "Republican Interest" - to the policies of the Washington administration on the premise that Hamilton was conspiring to administer the government into the mixed polity along the lines of the British Constitution that he had favored at the Constitutional Convention. Most important for our purposes, Madison's initial efforts to set the new government on the right course, his engagement with a series of policy issues in the First Congresses and then his writings for the opposition newspaper *The National Gazette* brought the implications of his commitment to impartial administration into full view. First in debates on taxes, then assumption of the state debts, discrimination between the original and subsequent holders of the nation, presentation of the amendments that would become the

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<sup>83</sup> Madison to Henry Lee, January 21, 1792, *PJM*, XIV, 193. See also Madison to Edmund Pendleton, January 21, 1792, *Ibid.*, 195.

<sup>84</sup> See Alan Gibson, "Veneration and Vigilance: James Madison and Public Opinion, 1785-1800." *The Review of Politics* 67 (Winter, 2005), 5-35, especially 23-28.

bill of rights, and discussion of the location of the national capital, Madison proposed policies that followed from his understanding of impartiality and lectured his colleagues on the requirements of republican statesmanship. Madison's leadership was profoundly didactic. As he pulled delegates toward an understanding of impartiality by his example, he rebuked Hamilton and Hamiltonians with a host of arguments drawn from this same source.

In particular, promoting impartiality – understood here as a commitment to justice or proportional fairness - was Madison's core goal during debates on impost duties. After considerable delays, both branches of the first Congress finally reached a quorum on April 6<sup>th</sup>, 1789. The first concern of Congressmen was to raise money. The most innocuous and effective form of taxation, almost all the delegates including Madison agreed, was impost duties or duties on imported goods as opposed to land or excise taxes on goods produced within the nation. Members of the House also readily agreed on the proper items to tax. Duties, they agreed, should be lodged on rum, liquors, molasses, wines, teas, sugars, peppers, and coffees. As Madison's notes and his speeches indicate, however, consideration of the amount of duties that should be lodged on each of these items raised a complex series of policy questions that affected both the flow of commerce and the amount of revenue that the national government would raise. Each of these considerations was rife with the possibility for conflict. What amount of duties should be lodged against what item? Should discrimination be pursued between vessels with commercial treaties with the United States and those without to punish the British for the navigation system that they continued to impose upon their former colonies? Should discrimination also be used to encourage indigenous manufacturers? Should taxes be

lodged with flat equanimity on the rich and the poor or should the poor bear proportionally less of the burden? Should tonnage duties on ships with be used to foster American ship building? Should slaves be taxed as a form of imported property?

Madison addressed these questions by referring back to the system of tax duties that he had helped to write and that Congress had approved in 1783 and with an overarching vision of freeing the United States from the shackles of the British navigation system.<sup>85</sup> One of the most important goals of the Revolution, he had believed from its inception, had been to free American commerce from the British navigation system and allow it flow into its natural channels. The inability of the union under the Articles of Confederation to achieve that goal was one of its principal failures. Although Madison considered himself very much a friend to unfettered commerce between nations in a world in which every nation abided by this axiom, he also knew that no such world existed. He further realized that, as a fledgling nation, the United States needed perhaps to encourage native shipping and domestic manufacturing for reasons of both the development of indigenous industries and national defense.<sup>86</sup>

These considerations made Madison a strong advocate of commercial discrimination and differential tonnage duties for ships from nation's without commercial

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<sup>85</sup> See Drew McCoy, *The Elusive Republic: Political Economy in Jeffersonian America* (Chapel Hill: University of North Carolina Press, 1980), especially 120-135, 142, 155-159, 254-259; Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* (Ithaca: Cornell University Press, 1995), 58-65, 179, 212, 297-298, 347, 394, 358-359, 523, note 79; Banning, "Political Economy and the Creation of the Federal Republic," in *Devising Liberty: Preserving and Creating Freedom in the New American Republic*, ed. David Thomas Konig (Stanford: Stanford University Press, 1995), 1-49; J.G.A. Stagg, *Mr. Madison's War: Politics, Diplomacy, and Warfare in the Early American Republic, 1783-1830* (Princeton: Princeton University Press, 1983), especially 7-16.

<sup>86</sup> See particularly Madison's speech of 9 April, 1789, *PJM*, XII, 69.

treaties with the United States. Together, these policies also formed a healthy slice of Madison's conception of the common interest. Madison was very much a Virginia politician, but (as alluded to earlier) he had a vision of American empire every bit as developed as Jefferson's and not unlike it.<sup>87</sup> Within this vision, every interest in the nation deserved representation, protection of its rights, and consideration in the formation of public policies. In the Eastern states, the population had advanced to the point in which manufacturing was reasonable and its interests therefore deserved protection. Protection of navigation rights on the Mississippi was necessary to insure the settlement of the West and accommodate the generations of land hungry Americans who would settle there.

This broad vision was at the core of Madison's calculations about impost duties, but his determinations about what duties to lodge on each item were further governed by his understanding of justice as fairness and his concern to arbitrate impartially between the nations many interests. In *The Federalist* No. 10, Madison had written that "the apportionment of taxes on the various descriptions of property is an act which seems to require the most exact impartiality."<sup>88</sup> Now Madison was concerned to "distribute the public burthen with a just and equal hand."<sup>89</sup> Madison, however, had readily acknowledged throughout the ratification process that "every general act of the Union must necessarily bear unequally hard on some particular member or members of it."<sup>90</sup> An impartial distribution of taxes, however, could be achieved, Madison argued, if a "system" of duties was devised which laid taxes on a variety of items, each of which

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<sup>87</sup> For Jefferson's view of empire see Peter Onuf, *Jefferson's Empire: The Language of American Nationhood* (Charlottesville: University Press of Virginia, 2000). .

<sup>88</sup> *The Federalist* No. 10, 60.

<sup>89</sup> "Speech of 18 April, 1789" *PJM*, XII, 87.

<sup>90</sup> "Vices of the Political System," *PJM*, IX, 351-352.

affected some geographic region and interest. Thus, even though no particular tax would affect each interest equally, in general the "system" would be fair because all interests would bear a proportion of the public burden that was equal to their number. Madison also, however, did not believe that an impartial government should simply sanction the inequalities in wealth that resulted from the protection of the different and unequal faculties of acquiring property. Madison favored the taxation of salt, which would fall disproportionately hard on the poor, but only as part of a system that placed most of the burden on items consumed by the wealthy. Any system of impost duties, he announced, "would be unjust and oppressive that did not fall on the citizens according to their property and ability to pay it." The rich, in other words, would pay a greater percentage of taxes than the poor since they had the lion's share of the resources.<sup>91</sup>

Madison's position on discrimination between secondary and original holders of the national debt was likewise driven by his understanding of impartiality or justice as proportional fairness and his desire to have the national government serve as an impartial arbiter. In 1782, it will be remembered, Madison had condemned discrimination between original and current or secondary holders of government certificates. In 1790, however, he now argued that the secondary holders should be given the highest market price that the securities had demanded plus interest and the original holders the difference between the market value and the face value. Part of Madison's antagonism to paying only the current holders sprang from the antipathy that he had with speculation - an activity that, in Madison's mind, was little different than gambling. Part of it also doubtlessly resulted

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<sup>91</sup> Quote is from "Speech of April 17, 1789," In Congress, *PJM*, XII, 86.

from the fact that the debt had been transferred from ordinary citizens from all regions of the nation to monied interests in the Northeast.

Still, one of the central reasons that Madison believed that the original holders had to be compensated was because any other policy was an affront to impartial justice. Conversely, adopting a policy of discrimination would allow the government to show its “honesty and disinterestedness.” The original holders, Madison argued, had sacrificed for the union at its time of greatest peril. Nevertheless, the terms on which they had accepted these securities in payment had never been fulfilled. The securities were never worth more than one-seventh or eighth of their market value and the original holders were “forced” to accept them because the government offered these or nothing else. Most original holders were not in a position to view them as long term investments even if they could have known that the government would later insure their worth. They thus understandably sold them for whatever they could get on the market. If some recognition was not made of original holders’ claims, then not only would they have been treated unfairly initially, but they would now be asked to pay taxes to award those who had benefitted from their misfortune.<sup>92</sup> Most important, in arguing for discrimination between the present and original holders of the debt, Madison was acting as an arbiter and following the dictum that “justice ought to hold the balance between” the claims of conflicting parties.<sup>93</sup>

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<sup>92</sup> “Speech of 11 February 1789,” *PJM*, XIII, 34-38; “Speech of 18 February 1789,” *Ibid.*, XIII, 48. Quotes are from 36 and 37-38. Madison also made these points explicitly in the explanation for his changed position that he gave late in his life. See “Autobiography,” 204-205.

<sup>93</sup> *The Federalist* No. 10, *PJM*, X, 266.

A third area where impartiality, understood in this dimension as a deep-seated normative axiom that Madison had espoused in *The Federalist* No. 10 that "no man is allowed to be a judge in his own cause," arose was in the various efforts that Madison made in the First Congresses to prevent representatives from engaging in self-dealing and activities that created conflicts of interest and even the appearance of impropriety. As noted earlier, throughout the years immediately before the formation of the Constitution and at the Convention, Madison had been concerned with public officials who engaged in speculative ventures then sought public office to influence policies that affected those ventures.<sup>94</sup> Six days after the House of Representatives had gained a quorum in April, 1789, Madison served on the committee that was appointed to develop standing procedures for leadership, debate, and decorum. Most notably, this committee adopted the rule that "No member shall vote on any question, in the event of which he is immediately and particularly interested."<sup>95</sup>

Madison's most important and famous effort to place a flat constitutional prohibition on legislators' abilities to act as judges in their own cause, however, came in his prolonged effort to prevent members of Congress from raising their own salaries. At

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<sup>94</sup> The rebuke of "interested" men who sought public office to achieve economic advantage is a consistent theme in Madison's letters throughout this period. See also Madison to Thomas Jefferson, August 20, 1784, *PJM*, VIII, 103; Madison to George Washington, December 24, 1786, *PJM*, IX, 225.

<sup>95</sup> There is no way to know for sure that Madison wrote this rule, but it directly expressed the principle that he set forth in his "Autobiography" as the guiding principle of his public service. In his autobiography, he wrote: "On first entering public life, he had liad down strict rules for himself in pecuniary matters – one invariably observed was, never to deal in public property, lands, debts, or money, whilst a member of the body whose proceedings might influence these transactions." Madison felt so strongly against the use of public office for private gain that he refused to accept a pay raise that members of the House of Delegates voted for themselves in Virginia while he served in this body and that he had even refused to use stationary paid for by public monies. "Autobiography," 203-204.

the Convention, Madison had objected to James Wilson's motion that members of Congress be able to determine their own salaries. "Members," Madison argued, "are too much interested in the question. Besides, it is indecent that the legislature should put their hands in the public purse to convey it into their own."<sup>96</sup> Despite Madison's protestations, however, the Constitution did not include such a prohibition. Shortly thereafter, however, Madison used the occasion of writing the amendments that became the Bill of Rights to include a provision that prevented representatives from varying their own compensation before the next ensuing election.<sup>97</sup> This "Rip Van Winkle Amendment" making it impossible for Congressmen to vote themselves a pay raise until after an ensuing election was of course initially rejected by the states in the 1790s and slept until the late 1980s when a movement for its enactment swept the nation, leading to its ratification as the 27<sup>th</sup> amendment to the Constitution in 1992.<sup>98</sup>

A final area where Madison's commitment to impartiality arose in spades was in the debates surrounding the location of the national capital. Scholars are conditioned to treat the decision to locate the national capital on the Potomac as part of a political compromise in which Virginians agreed to accept the assumption of state debts for a location that they believed would provide them with political and commercial advantage. To be sure, Madison doubtlessly thought of the strategic advantages to his home state that

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<sup>96</sup> "Salaries for Members of the First Branch of the Legislature," *PJM*, X, 72.

<sup>97</sup> See Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998), 17-19.

<sup>98</sup> The phrase "Rip Van Winkle Amendment" is Amar's. *Ibid.*, 17. For the story of the 27<sup>th</sup> amendment see Stephen Frantzich, *Citizen Democracy: Political Activists in a Cynical Age* (Lanham, MD: Rowman & Littlefield, 1999), 11-19; David Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution* (Lawrence: University Press of Kansas, 1996), 461-470; Akhil Reed Amar, *America's Constitution: A Biography* (New York: Random House, 2005), 453-457.

a Potomac site would create. Nevertheless, throughout the long period in which Madison debated the location of the national capital, he was also concerned the capital itself as an impartial representative institution.<sup>99</sup> The capital, he argued over several years, had to be centrally positioned so that it would allow citizens from all regions of the nation including the west equal access to the seat of government and so that it could serve as an impartial perch, equally protecting and promoting the interests and protect the rights of all individuals, regions, and groups. Conversely, an eccentric position for the capital would create regional bias and stir sectional strife, returning the United States to the problems of Confederation era.

In particular, at the Constitutional Convention, Madison had observed that

The necessity of a central residence of the Govt. wd. be much greater under the new than old Govt. The members of the new Govt. wd. be more numerous. They would be taken more from the interior parts of the States; they wd. not like members of ye. present Congs. come so often from the distant States by water. As the powers & objects of the new Govt. would be far greater yn. heretofore, more private individuals wd. have business calling them to the seat of it, and it was more necessary that the Govt. should be in that position from which it could contemplate with the most equal eye, and sympathize most equally with, every part of the nation.<sup>100</sup>

In *The Federalist* No. 14, Madison defended the size of the “extended republic” by arguing that distance that representatives had to travel to the seat of the government was not excessive – a position that depended upon a centrally located capital. In his correspondence immediately before Congress convened in 1789 and throughout debates in the First Congresses, he then defended a Potomac site as the one best able to secure

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<sup>99</sup> On this point see “Capitol Mobility: Madisonian Representation and the Location and Relocation of Capitals in the United States,” forthcoming *American Political Science Review*.

<sup>100</sup> “Speech of August 11<sup>th</sup>” in Koch ed., *Notes of Debates in the Federal Convention*, 435.

impartial administration, which he now called “the vital principle of the Administration.”<sup>101</sup>

***Impartiality and the “James Madison Problem”***

This long narrative has sought to highlight the importance of impartiality in Madison’s political thought, to explore its manifold and evolving dimensions, and to establish that Madison’s commitment to impartiality and efforts to found an impartial republic form a broad thread of consistency in his political thought and goals. Madison’s earliest statement that the proper role of government is to protect the rights of all of its citizens with a just and equal hand against the threats both of government and majority factions came in 1785 in “Memorial and Remonstrance” written during the Virginia church state struggle. In 1786, Madison’s researches into the genus confederation and the American species led him to formulate his vision of the national government as a “disinterested and dispassionate umpire in the states” wielding an absolute veto to protect rights within the states and thwart off state encroachments on national prerogatives.<sup>102</sup>

The absolute veto, and along with it a strong version of Madison’s initial vision of an impartial national government, was rejected at the Convention. This failure, however, only led Madison to reconsider how the constitutional structures and mechanics set forth in the proposed constitution would allow the national government to administer impartially its newly granted powers over national objects. The half-life of impartiality in Madison’s political thought proved to be a long and full life in the First Congress. Here it structured Madison’s thoughts and policies on impost duties, discrimination between

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<sup>101</sup> Madison to Edmund Pendleton, 20 October 1788, *PJM*, XI, 306-307.

<sup>102</sup> Madison to Washington, April 16, 1787, *PJM*, IX, 384.

the original and subsequent holders of the national debt, House rules and constitutional amendments that prevented representatives from self-dealing, and the location of the national capital. From 1780 to 1792, Madison fought to strengthen and preserve the union, secure justice (including the protection of rights and the enactment of policies that distributed benefits and burdens impartially), and block self-dealings by interested public officials and majorities. These were the three essential dimensions of an impartial republic. On an abstract level, he focused across these years on creating a government that was connected to the people and sympathetic to their views, but also impartial to all segments of the society – even the majority which could still be a faction opposed to individual rights and the interests of the whole.

None of this discussion is meant to suggest that Madison was perfectly consistent. This essay only covers Madison's political career until 1792 and has bracketed the central questions of the consistency of his approach to constitutional interpretation and his understanding of the proper relations of the state and the national government. Furthermore, Madison changed his specific policy positions from the 1780s to the 1790s on discrimination between the original and subsequent holders of the revolutionary debt and on the assumption of state debts (though these changes can be explained by examining his commitment to proportional fairness). Yet another change took place in Madison's thinking about the principal threat to liberty. During the 1780s, Madison had focused upon the threat that interested majorities within the states and sectional conflicts in Congress had posed to individual rights and the preservation of the union. During the 1790s, his concerns shifted to the power of a minority faction led by Hamilton, presidential absorption of power, and "consolidation." Nevertheless, whether "interested"

majorities or “interested” minorities posed the threat and whether the proper remedy was creating a gap between the people and their representatives or closing that gap, Madison’s understanding of the proper goal of government was the same: impartial administration that equally protected the rights of all sections, interests, and classes of people in the United States and distributed benefits and burdens justly between them. Moreover, in the 1780s and the 1790s, Madison fought against self-dealings –whether by interested majorities acting through the constitutional system, interested individuals stirring them up to benefit themselves, or scheming speculators acting on insider knowledge.

Previous interpreters have failed to notice this essential continuity because – following the Progressive historians – they have interpreted Madison and other Founders as members or representatives of distinct interest groups and equate the advocacy of political centralization with Hamilton’s economic policies. Since Madison opposed debtor relief legislation in the 1780s and favored political centralization, they assume that he was a friend of wealthy creditors. Madison’s opposition to Hamilton’s economic program in the 1790s then appears as a baffling reversal. How could the man who opposed paper money as a means of defrauding creditors now rail against the speculative ventures of this same group and propose discrimination between the original and subsequent holders of the debt – a position that he opposed in 1782 and was so obviously targeted at creditors?

The brief answer to this question, which cannot be adequately answered briefly, is that Madison was never a friend exclusively of the rich or the poor or of creditors or debtors. Within his vision of an impartial republic, the national government would not to make decisions based upon who benefitted, but upon independent standards of rights,

proportional fairness, and the common interest. Thus, in an impartial republic, it was as improper for the majority (which, after all, was still a part of the whole) to fraudulently appropriate the wealth of the few as it was for the wealthy to use the government as a screen for advancing their speculative interests. If that proposition is taken seriously and explored, then Madison's opposition to paper money in the 1780s (which protected the interests of creditors) is of a piece with his advocacy of discrimination between the original and subsequent holders of the national debt (which harmed creditors and was designed to help ordinary citizens) and his rebuke of speculators (many rich) who sought to use the screen of government to increase their wealth.<sup>103</sup> If that proposition is taken seriously, "the James Madison problem" becomes much less of a problem.

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<sup>103</sup> In 1791, Madison wrote that speculation and "other abuses" made it debatable "whether the system of the old paper under a bad Government, or of the new [paper] under a good one, be chargeable with the greater substantial injustice. The true difference seems to be that by the former the few were the victims to the many; by the latter the many to the few." Madison to Thomas Jefferson, August 8, 1791, *PJM*, XIV, p. 69. See also Banning, *Sacred Fire of Liberty*, p. 314.