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### That Honorable Determination

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In *Federalist* 39, James Madison asks whether the proposed Constitution is truly republican. “It is evident,” he says, “that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government.”<sup>1</sup> If the new government is not strictly republican, he argues, its friends will have to abandon it as indefensible. Madison’s powerful and definitive claim on this point is the *Federalist Papers*’ central statement of principle and purpose. It connects the Constitution to the Revolutionary Declaration of Independence in an unbroken script that tells the story of the American cause.

For over a century, the character of the American republic has been a matter of considerable dispute among scholars of the founding. Despite Madison’s staunch assertion regarding the synergistic relationship between the principles of the Revolution and the form of the Constitution, several contemporary historians have contended otherwise. According to Richard Hofstadter, the American Revolution’s radicalism was tempered by the conservative emphasis on order and control in the Constitution.<sup>2</sup> Historians Charles Beard and Howard Zinn have portrayed the relationship between the Declaration and Constitution as rather more like one of enemies than one of friends.<sup>3</sup>

More recently, Gordon S. Wood has argued that the Constitution represents a significant ideological departure from the Declaration of Independence and the spirit of 1776, though in Wood’s work we find a

much more nuanced and richer account of the founders' thought than in that of Beard, Hofstadter, or Zinn. According to Wood, the American revolutionaries adopted a neoclassical form of republicanism, emphasizing virtue, common interests, and the common good over private desires. However, this classical ideal proved unsustainable in the vast, diverse, and burgeoning commercial society of late 18th-century America, which led them in more modern, liberal directions.

Wood highlights Madison as a pivotal figure in this ideological shift; his writings in the *Federalist Papers* underscore the change from classical republicanism to a more modern, liberal conception of politics and political association. In *Federalist* 10, for example, Madison argues that the seeds of faction are inherent in human nature and that government's role is not to eradicate factions but to mitigate their impacts through a large republic, diverse interests, and strategic institutional arrangements.<sup>4</sup> Though he was part of the Revolutionary generation, Madison's thoughts evolved with the practical realities of governing a new and expanding nation.

Wood sees Madison as partly practical, partly idealistic, the latter evident in his optimistic reliance on the wisdom and virtue of "liberally educated, rational men . . . 'whose enlightened views and virtuous sentiments render them superior to local prejudices, and to schemes of injustice.'" Essentially, these are Madison's "enlightened statesmen" (defined in *Federalist* 10), who are capable of neutralizing clashing interests and passions "to decide questions of the public good in a disinterested adjudicatory manner."<sup>5</sup> Hofstadter also claims Madison was a romantic who relied on gentleman representatives of wisdom and virtue, including the virtue of disinterestedness. This expectation, Hofstadter claims, fails to account for the force of personal and class interest in politics and may well be a false expectation, given the inevitable influence of economic and social interests in politics.

Political theorists such as Martin Diamond, Ralph Lerner, and Thomas Pangle have explored the character of the American founding and the question of the influence of classical versus modern political philosophy

on the American founders. Like Wood, these theorists see Madison as pivotal in establishing modern liberalism and its collateral acquisitive commercial spirit in the extended republic of the United States. For Diamond, Madison's republic is "solid but low"—a political scheme that deliberately capitalizes on "the selfish, the interested, the narrow, the vulgar, and the crassly economic." In recent years, Patrick Deneen has emphasized a similar critique of Madison and the founders, depicting America as a regime of soulless modernists and crass materialists.<sup>6</sup>

What these assessments have in common is the critical nature of their conclusions regarding the low-minded purpose of Madison's constitutional architecture. For them, and indeed for many academics still, Madison's theory of human nature, the extended republic with its multiplicity of interests, and constitutional politics is deeply troubling, if not contemptible.

### **1776 and 1787: Thomas Jefferson and James Madison**

The aspirations and spirit of '76 and those of the constitution-making era are captured in the central work of two of America's Founding Fathers, Thomas Jefferson and Madison. For Jefferson, that work consisted of the major role he played in writing the Declaration of Independence. For Madison, it was his contributions to envisioning, drafting, and ratifying the Constitution, including his intensive scholarly preparations for the Philadelphia Convention, his authorship of several significant essays in the *Federalist Papers*, and his continued work on constitutional republicanism in the early 1790s.

This is not to say that Jefferson was the only author of the Declaration or that Madison was the only or even most important framer of the Constitution. They themselves said otherwise, acknowledging that the Declaration was an "expression of the american mind" and the Constitution the work of "many heads and many hands."<sup>7</sup> However, it is to say that their labors and ideas are woven into the fabric of these documents,

which would be very different without them. After all, Jefferson was the prime author of the Declaration and, as Lincoln reminded us, introduced into this “merely revolutionary document” the “abstract truth” that all men are created equal.<sup>8</sup> This proposition applies to all human beings at all times and places and is the central idea of the American republic. By situating the movement for independence within this larger picture of the cause of humanity, Jefferson conveyed that the American Revolution was about more than a single people at a moment in time; it was about a new order of the ages.

In respect to Madison’s contribution to the constitutional order, it is certainly fair to say that, while the Constitution’s provisions have many sources, Madison’s Virginia Plan stands out among them. Just as we sometimes forget the genuinely radical and trailblazing message of the Declaration of Independence, something similar is true of the United States Constitution. It marked the first time in history that a people, on the basis of their sovereign authority, established government by constitutional compact. The commitment to the experiment in republican self-government, however, was hardly a first—it had been attempted numerous times throughout the ages, but it had never really succeeded. As “Publius” (Alexander Hamilton) remarked in *Federalist* 9,

It is impossible to read the history of the petty republics of Greece and Italy, without feeling sensations of horror and disgust at the distractions with which they were continually agitated, and at the rapid succession of revolutions, by which they were kept in a state of perpetual vibration between the extremes of tyranny and anarchy.<sup>9</sup>

The American founders were determined to give the experiment another try. Although Madison did not achieve all he wanted in Philadelphia, in terms of the big picture of constitutional republicanism, more than any of the other founders, he confronted its challenges and thought through its purpose, design, and dynamics. His labors paid off: He

discovered how republican self-government could succeed and flourish in America.

Although fellow Virginians and good friends, Jefferson and Madison did not always see eye to eye on political and philosophical issues. In fact, in two of the Federalist Papers essays, Madison took issue with an idea Jefferson had proposed concerning constitutional conventions. In September 1789, while serving as minister to France, Jefferson wrote Madison a letter setting out the principle that informed his proposal regarding calling constitutional conventions—namely, that “the earth belongs always to the living generation.”<sup>10</sup> Arguing that each generation has the right to make its own constitution and laws, he reiterated his idea to hold a constitutional convention every 19 or so years. Decades later, Jefferson was still mulling the idea over in his mind. “Some men look at Constitutions with sanctimonious reverence, & deem them, like the ark of the covenant, too sacred to be touched,” he wrote to Samuel Kercheval.

They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well: I belonged to it, and labored with it. it deserved well of it's country. . . . I am certainly not an advocate for frequent & untried changes in laws and constitutions. . . . but I know also that laws and institutions must go hand in hand with the progress of the human mind.<sup>11</sup>

For Jefferson, a country and citizens' views change and grow over time, much like a boy grows into a man. You might as well make the man wear the same coat he wore as a boy, Jefferson argued, as keep the society “under the regimen of their barbarous ancestors.”<sup>12</sup>

Madison disagreed with Jefferson's proposal to call constitutional conventions, whether periodically or on an ad hoc basis.<sup>13</sup> The use of ad hoc conventions to correct governmental usurpations of power, Madison argued, would not answer the purpose intended. The problem could

be more effectively treated with a system of separation of powers and checks and balances that enabled the government to control itself. Periodical conventions would tend to destabilize the political order. Moreover, if the idea that the earth belongs to the living generation were carried to its logical extreme, there would be an endless constitutional convention (a kind of Jeffersonian Groundhog Day). And as much as he agreed with the basic premise of Jefferson's principle, Madison reminded him that the living also owe a certain debt to their progenitors, given the benefits they inherit from them.

Overall, Madison warned that we should understand what "ticklish" experiments constitutional conventions are, especially because delegates to them represent the people in their most fundamental and sovereign capacity, meaning they cannot be limited in the scope of their proposed changes to the current law.<sup>14</sup> Even if radical changes are not afoot or unlikely to succeed, holding such public conventions routinely or too often tends to send the message that the Constitution is defective, perhaps even dispensable.

The first order of business for any polity is stability. As Madison learned from David Hume (and also discovered in Aristotle), "all governments rest on opinion," and to attain the requisite stability, a certain level of respect for the laws and government is required, which is generally attained in societies by an appreciation for what is tried and true. The confidence and trust in government that flows from what we are habituated to—things we may have a salutary opinion about despite not having given a great deal of thought to—are powerful influences in civil society. And "when the examples which fortify opinion are ancient as well as numerous, they are known to have a double effect," Madison wrote in *Federalist* 49. In the context of the need for a stable and steadying opinion to ground the regime, Madison argued that it would be unwise to needlessly disturb "the public tranquility by interesting too strongly the public passions." And unfortunately, this is precisely what Jefferson's recommendation of "a frequent reference of constitutional questions to the decision of the whole society" would do.<sup>15</sup>

### Ongoing Consent of the Governed

The purpose of Jefferson's periodical constitutional conventions was to empower the people's voice by providing for their active and continual consent, or, as we say today, by activating popular sovereignty in real time. *Federalist* 49 is part of the string of essays—which begins with 47 and culminates in 51—throughout which Jefferson's presence looms large. While these essays are addressed to the people of New York, in another sense, they are a conversation Madison is having with Jefferson, politely but firmly criticizing his friend's impracticable (and rather radical) stance to set the stage for an alternative proposal. In response to Jefferson's potentially disruptive plan to activate the people's opinion on an ongoing basis via frequent constitutional conventions, Madison proposed to make the will of the government dependent on the will of the society and to form and shape the will of the society into "the reason, of the public."<sup>6</sup> This is Madison's theory of the politics of public opinion. It is his answer to the question of how to rescue republican government from the mortal disease of faction while preserving its form and spirit.

The politics of public opinion is the layered, dynamic process of filtering out factious demands, collating the multiplicity of interests as much as possible, and refining public views. Madison directed his energies in the more theoretical *Federalist* Papers essays to a discussion of the means to accomplish these objectives, though his presentation in 1787–88 is less than "a full development."<sup>7</sup> In a letter to Jefferson on October 24, 1787, in which he set forth at considerable length his theory of republicanism, he again added the caveat that his argument was incomplete: "A full discussion of this question would, if I mistake not, unfold the true principles of Republican Government."<sup>8</sup> Madison continued to work out his theory of republicanism and the politics of public opinion in the pages of his 1791 "Notes on Government" and the 1791–92 party press essays.

The multifaceted process Madison envisioned to transform raw public views into a refined and reasonable public opinion entails a host of circumstances, institutions, and procedures. These factors include the

extent of the territory, separation of powers, bicameralism, federalism, checks and balances, a free press, and, in general, the free “commerce of ideas” that flows between representatives and their constituents and throughout “the entire body of the people.”<sup>19</sup> The process also requires a certain degree of human judgment and integrity, generally in the form of a critical mass of political leaders competent to the moral and political task at hand, though what constitutes this critical mass depends on times and circumstances.

In the *Federalist Papers*, Madison expressed the aim of his labors: to build “a coalition of a majority of the whole society” whose opinion is based on “justice and the general good.”<sup>20</sup> In the party press essays, he spoke of finding a “common cause” in spite of “circumstantial and artificial distinctions.”<sup>21</sup>

Consistent with the form and genuine spirit of republican government—which he juxtaposed to the false claim of republicanism that some apply to the British government—Madison argued that, in the extended, representative republic of the United States, the will of the government derives its energy from the will of the society; “by the reason of its measures,” it works on, shapes, and hones—negating some interests and views and modifying others—the “understanding and interest of the society.” Triumphant, Madison proclaimed America to be pursuing a new and more noble course—the one “for which philosophy has been searching, and humanity been sighing, from the most remote ages.” This is the republican form, “which it is the glory of America to have invented, and her unrivalled happiness to possess.”<sup>22</sup>

### **The Conditions of the Social Compact**

Unlike Hobbesian social contract theory, Jefferson’s conception of popular sovereignty was substantive as well as procedural. Grounding the authority of the people in traditional natural law doctrine, in his first inaugural address, Jefferson celebrated the “sacred principle” that

the “will of the majority is in all cases to prevail.” At the same time, he reminded his fellow citizens that in order for their “will, to be rightful,” it “must be reasonable.”<sup>23</sup>

Jefferson’s insistence on both majority rule and rightful rule reflects the fusion of rights and responsibilities. His inaugural message is a continuation of the teaching of the Declaration of Independence, reminding the people that their collective right to govern is legitimate only if it is grounded in reason and the recognition of their moral obligation to protect the equal rights of others. This is why it is not merely the right but the duty of the people to alter or abolish a government whose design is to reduce humanity under the power of despotism.

The Declaration thus contains two fundamental claims: that the people are sovereign *and* that the exercise of their sovereignty is conditional—it must accord with natural law. Violations of the rights of others are contrary to the natural rights of mankind embedded in “the Laws of Nature and of Nature’s God.” While human beings are by nature free and independent, they do not possess the license to “feel power and forget right.”<sup>24</sup> Indeed, they are free and “inherently independant of all but moral law.”<sup>25</sup> While power and right do not easily come together in the practical world of politics, natural law nonetheless fixes the standard by which to judge the extent and seriousness of acts of oppression so that prudence can assist statesmen and citizens in choosing the best possible way forward.

In general, the majority is the more powerful group in society. What it demands, however, is not always guided by the precepts of justice and respect for the rights of the minority. Nonetheless, republican theory postulates that power and right are synonymous. Madison highlighted the dissonance between republican theory and practice as the political problem to be solved. He showed that this problem was fatal to the small Greek polities of the ancient world, whose factious, oppressive majorities ran roughshod over the resident minority. The challenge, he claimed, was no less pressing in his time if popular government was ever to be vindicated and recommended as respectable.

Madison wrote in “Notes on Vices of the Political System of the United States” that “according to Republican Theory, Right and power being both vested in the majority, are held to be synonymous.” He further noted that, in reality, a minority can sometimes overpower a majority, due to greater wealth or military strength. Or in the exclusion of some people from suffrage, because of factors such as property qualifications, the constitutional majority may be a minority of persons in society. Indeed, “where slavery exists,” Madison wrote, “the republican Theory becomes still more fallacious.”<sup>26</sup> These examples show that the majority does not always possess power and power does not always align with justice.

Republicanism’s essential principle requires that the majority rule and that it rule justly. The fact that this principle often fails to be achieved leaves the regime susceptible to legitimate opposition based on its core principles. Such injustice is alarming—even “more alarming” than the lack of wisdom shown in the “multiplicity and mutability of laws” of the United States, Madison claimed, not merely because it is a greater evil in itself but “because it brings more into question the fundamental principle of republican Government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights.”<sup>27</sup>

Since the people are “the only earthly source of authority,” republicanism demands that the majority rule.<sup>28</sup> But the ultimate earthly source of authority is not the ultimate authority, according to Madison. We know from “Vices” that the majority is accountable to a standard of right, and we know from the “Memorial and Remonstrance Against Religious Assessments” and *Federalist* 43 that this standard of right is transcendent and above all earthly authority.

In *Federalist* 51, we are presented with an illustration of the problem of power and right in which the more powerful group or faction in a society ignores the rules of justice and oppresses the weaker group. Comparing this situation to a state of nature, Madison wrote, “In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature,

where the weaker individual is not secured against the violence of the stronger.”<sup>29</sup>

When might is the sole basis for right, republican government has lost its purpose and failed. “Justice is the end of government. It is the end of civil society,” Madison asserted. “It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in its pursuit.”<sup>30</sup> Power without right is tantamount to anarchy—that is, to the absence of any government or civil society.

Rule by majority faction, then, is destructive of the republican social compact. Whatever legal requirements are outlined in the agreement, there are a priori limits to what the majority can rightfully do, by the nature of the republican compact itself. Stated differently, the compact’s source of authority is the people, who, because all are by nature their own ruler and in this sense equal, can be under the obligations of government only with their own consent. In the original contract, unanimity is required. (Those who do not leave the state are presumed to have given tacit consent.) The consent of the people is necessary to legitimate government, but it is not sufficient. “Consent of the governed” is not identical with mere will; it also involves the elements of understanding and responsibility.

This follows logically from the nature of humanity. Since all humans share the same nature and in this sense are equal, each possesses the natural rights of human beings, and each is concomitantly required to recognize and respect the possession of those same rights by other human beings. Informed consent entails a pledge to abide by the mutual moral responsibilities inherent in the social pact. Its principles result from the fact of human equality and the rights and concomitant obligations that flow from it. Legitimate compact is thus the pledge to govern oneself and protect the rights and liberties of one’s fellow citizens. In the exercise of power, one is not at liberty to forget right.

In an article titled “Property” published in the *National Gazette* in 1792, Madison argued that at the core of the social compact is a “debt of protection” to which “the public faith is pledged.”<sup>31</sup> We have rights of property,

he said, and we also have property in our rights. The most sacred of all property is conscience:

To guard a man's house as his castle, to pay public and enforce private debts with the most exact faith, can give no title to invade a man's conscience which is more sacred than his castle, or to withhold from it that debt of protection, for which the public faith is pledged, by the very nature and original conditions of the social pact.<sup>32</sup>

We recall the discussion in *Federalist* 10, in which Madison claimed that the government's primary purpose is the protection of the human faculties. From this, the rights of property originate. Because the human faculties are as diverse and distinct as people themselves—people simply do not think, feel, or want the same things—protecting their free exercise leads to different kinds and amounts of property, and from this, different interest groups tend to form in society.

Madison's argument in *Federalist* 10 is not that the government's main purpose is the protection of property, nor is it a paean to diversity per se (as Deneen seems to believe). Rather, Madison's chief concern is to safeguard what makes us human, the core of which is our ability to reason and choose for ourselves how to live our lives. In a word, at the core of humanity is the capacity for self-government, whose realization depends on the free exercise of the human faculties. As Montesquieu put it, every human being has a self-governing soul. Self-governing souls, however, are not unanswerable souls.<sup>33</sup>

Republican government is *the* government dedicated to the experiment in self-government. It aims to secure the inherent rights of humanity, including life, liberty, and property, but its foremost purpose is to protect the very essence of humanity, the freedom of the mind or soul. The human faculties can be divided into those of the mind and those of the body. The intellectual faculties include reason, perception, memory, imagination, will, and conscience. As sharing the same human nature is

the basis for natural equality and natural rights, the nature of humanity is the foundation for human obligation. It imposes certain conditions on the sovereign authority it creates. The social compact is thus both a legal and a moral agreement.

The formation of the new United States under this pact was based on a “pledge” of civic reciprocity, in which each individual promised to protect the rights of his fellow citizens, who were equally free and self-governing souls. This requirement of civic reciprocity is grounded in the “Laws of Nature and of Nature’s God.” In Madison’s view of the American compact, the consent of the governed is the foundation of political legitimacy. This concept combines the procedural act of giving consent with a substantive, moral commitment to a way of life that aligns with human nature and natural law.

In Jefferson’s “earth belongs to the living” letter to Madison, dated September 6, 1789, he argued that the living generation is “by *natural right*”<sup>34</sup> (emphasis in original) independent of the decrees of past generations; it is morally answerable only to “the Laws of Nature and of Nature’s God.” In response, Madison asked, “On what principle does the voice of the majority bind the minority?” He then answered his own question:

It does not result I conceive from the law of nature, but from compact founded on conveniency. A greater proportion might be required by the fundamental constitution of a Society, if it were judged eligible. Prior then to the establishment of this principle, *unanimity* was necessary; and strict Theory at all times presupposes the assent of every member to the establishment of the rule itself.<sup>35</sup> (Emphasis in original.)

Madison thus reminded his friend that majority rule is not a natural right or principle of natural law but rather is derived “from compact founded on conveniency” or “utility.”<sup>36</sup> The principle of human equality and the principle of majority rule are not the same thing, nor do they have the same standing in the court of nature.

In Madison's view, justice and legitimacy are associated with the will of the whole society, which ensures that decisions reflect the common good. However, since unanimous agreement is unrealistic in a diverse society, the will of the majority acts as a plenary substitute for unanimity. This can result in the majority imposing its will and disregarding minority interests or rights—or, in other words, the tyranny of the majority.

Thus, while the will of the majority prevails in republican government, its legitimacy is contingent on adherence to limits that ensure justice and safeguard the rights of all individuals. In "Vices" and *Federalist* 43, Madison's juxtaposition of power and right refers to this challenge of bringing the process of majority rule and the moral substance of justice and the common good together in republican decision-making. The majority's authority is derived from the social compact, which, in theory, is necessarily based on the consent of the entire body of the people.

In an essay titled "Sovereignty," Madison set forth the terms of the social compact, further explaining his disagreement with Jefferson's view that majority rule is a right of nature akin to original consent in the social compact. In forming republican government based on consent, he said, a "moral person" has been created and a pledge of protection issued. The "moral person" that constitutes republican society is as accountable to the laws of nature as each individual is. I quote from this essay at length:

All power in just & free Govts. is derived from Compact, . . . where the parties to the Compact are competent to make it, and where the Compact creates a Govt, and arms it not only with a moral power but the physical means of executing it. . . .

[One view on the subject supposes] that each individual, being previously independent of the others, the compact which is to make them one Society, must result from the free consent of *every* individual.

But as the objects in view could not be attained, if every measure conducive to them, required the consent of every member of the Society, the theory further supposes, either that

it was a part of the original compact, that the will of the majority was to be deemed the will of the whole; or that this was a law of nature, resulting from the nature of political society, itself the offspring of the natural wants of man.

What ever be the hypothesis, of the origin of the *lex majoris partis*, it is evident that it operates as a plenary substitute of the will of the majority of the Society, for the will of the whole Society; and that the Sovereignty of the Society as vested in & exerciseable by the majority, may do any thing that could be *rightfully* done, by the unanimous concurrence of the members; the reserved rights of individuals (of Conscience for example), in becoming parties to the original compact, being beyond the legitimate reach of Sovereignty, wherever vested or however viewed.<sup>37</sup> (Emphasis in original.)

In Madison's republican theory, majority rule is an exercise of power that must be tempered by justice. The unanimous people or will of the whole society is sovereign, while the majority is a plenary substitute for that will. As such, the majority practically exercises sovereignty in the ongoing operations of the polity. However—and this is a huge “however”—the majority has the authority to do only those things that “could be *rightfully* done” by the whole society—that is, by the unanimous concurrence of its members. Some things are simply beyond the reach of any earthly power—beyond the scope of politics.

Apart from this, what the majority may legitimately do depends on the terms of the contract, presuming it is grounded in the consent of the people. Such is the case of the United States under the 1787 Constitution, Madison argued, whose constitutional compact was created by “an act of the *majority* of the people in each State in their highest sovereign capacity equipollent to a *unanimous* act of the people composing the State, in that capacity.” In forming the social compact, the people created a “*moral being*,” designating sovereignty to the compact of union for some purposes and retaining the sovereign power to the states for other objects. “Now

all Sovereigns are equal,” Madison argued, “the Sovereignty of the State is equal to that of the Union; for the Sovereignty of each is but a *moral person*. That of the State and that of the Union are each a moral person; & in that respect precisely equal.”<sup>38</sup> (Emphasis in original.)

### Madison’s Guarantee of Republican Government

What constitutes republican government has spawned lively discussion and debate for centuries. Madison offers his most succinct definition of republicanism in *Federalist* 39:

A government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behaviour. It is *essential* to such a government, that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic. It is *sufficient* for such a government, that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified.<sup>39</sup> (Emphasis in original.)

It is well-known that the plan Edmund Randolph proposed on May 29 at the Philadelphia Convention of 1787 was chiefly the brainchild of fellow Virginian Madison. Known as the Randolph or Virginia Plan, the slate of resolutions included “Res[olve]d. that a Republican Government & the territory of each State, except in the instance of a voluntary junction of Government & territory, ought to be guarantied by the United States to each State.”<sup>40</sup> The bulk of the consideration and discussion devoted to

this provision occurred on June 11 and July 18. On June 11, George Read of Delaware objected to guaranteeing states' territory (in fact, he wanted to abolish the states entirely!), claiming this was a major cause of jealousy and discord in the Union. Madison responded by removing the territorial guarantee so that the revised resolution read: "that a republican Constitution & its existing laws ought to be guaranteed to each State by the U. States."<sup>41</sup>

On July 18, debate on the provision resumed. When Gouverneur Morris objected to guaranteeing the existing laws of Rhode Island (later, William Houston would cite Georgia's constitutional system as especially noxious), James Wilson argued that the clause was simply a protection against foreign and domestic violence. Madison offered an amended version that stated "that the Constitutional authority of the States shall be guaranteed to them respectively agst. domestic as well as foreign violence."<sup>42</sup>

In response to Wilson, Randolph, who had originally introduced the provision, spoke up to clarify that the clause had two purposes: to secure a republican form of government and to protect against domestic insurrections. Wilson heeded Randolph's interpretation, proposing wording that would make clear its dual purpose: "that a Republican form of Governmt. shall be guaranteed to each State & that each State shall be protected agst. foreign & domestic violence."<sup>43</sup>

Madison withdrew his motion and supported Wilson's wording, which was unanimously agreed to. It was essentially this version that was submitted to the Committee of Detail on July 26. On August 6, the committee reported Resolution XVIII: "The United States shall guaranty to each State a Republican form of Government; and shall protect each State against foreign invasions, and, on the application of its Legislature, against domestic violence."<sup>44</sup> On September 12, the Committee of Style reported the final wording of the clause, which, with minor adjustments on September 15, became Article IV, Section 4 of the United States Constitution:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of

them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.<sup>45</sup>

The purpose of the republican guarantee provision, as discussed during the Constitutional Convention, remains a topic of debate even today. Scholars such as Ryan C. Williams and Jonathan Toren argue that the clause has the limited purpose of guaranteeing national succor to quell violence within a state's borders, when that assistance is requested by the state. Williams's research into the 17th- and 18th-century understanding of the term "guarantee," especially through Emer de Vattel's work and the theory of the law of nations, suggests that the provision is probably a "quasi-diplomatic, treaty-like commitment on the part of the federal government to its quasi-sovereign component states." This interpretation supports the idea that the clause is nonjusticiable.<sup>46</sup>

Toren provides a broad overview of the clause's development during the founding era, concentrating on its author, Madison, and concluding that "the particular function of this provision is neither the protection of liberty itself nor the particular virtues of republicanism, but the protection of a republican union from violence, upheaval, and ultimately, tyranny."<sup>47</sup> In contrast, Akhil Reed Amar argues against the nonjusticiability of the republican government clause. For Amar, other clauses of the Constitution are also "big" and require a similar hermeneutical exercise but are nevertheless considered justiciable.<sup>48</sup>

Amar is particularly concerned with understanding and explicating the "republican government" aspect of this clause. To do this, he focuses on Madison and lays out that founder's conception of popular sovereignty, majority rule, and the right of the people to alter or abolish government. Amar then merges popular sovereignty, the act of ordaining and establishing the Constitution, with majority rule to form what he calls "majority rule popular sovereignty." From this convergence of majority rule with popular sovereignty, he traces many of the nation's trials and tribulations from the founding to the present, observing how

this principle has been plagued by the lack of inclusiveness, or what he dubs “the denominator problem.”<sup>49</sup>

Amar is certainly correct that the rights of revolution, popular sovereignty, and majority rule are key to Madison’s understanding of republican government and that Madison was committed to “the republican principle which refers the ultimate decision to the will of the majority.”<sup>50</sup> In the final analysis, however, Amar parts ways with Madisonian republicanism. We recall that for Madison, majority rule is neither a principle of natural law nor equivalent to the social compact requirement of unanimous consent and that he criticized Jefferson for making these errors in his “earth belongs to the living” musings. Amar, however, takes Jefferson’s position:

In his First Inaugural Address, Thomas Jefferson described majority rule as “the vital principle of republics”—a point he later formulated as follows: “the first principle of Republicanism is, that the *lex majoris partis* is the fundamental law of every society of equal rights. *To consider the will of the society announced by the majority of a single vote as sacred as if unanimous is the first of all lessons of importance.*”<sup>51</sup> (Emphasis added.)

Like Jefferson in this instance (but not in Jefferson’s inaugural address), Amar equates majority rule with the original act of consent required by republican social contract theory. For Amar, majority rule popular sovereignty and its sidekick, the denominator problem, is about who is included in the sovereign authority and has the right to vote, and this constitutes the central consideration of republican government. This is the procedural issue of republican theory. The substantive issue of republican theory concerns the ends that should be pursued by the sovereign authority, which is given scant attention and analysis in Amar’s studies.<sup>52</sup>

In fact, Amar’s fairly extensive treatment of Madison’s thought does not include Madison’s emphatic insistence that majority rule is not synonymous with the original act of popular sovereignty, nor does it treat in

any depth the challenge of republican government that Madison considered of prime importance, namely, the substantive aspect of the problem when power and right are discordant.

In a genuine republic, the people rule via a coalition of a majority of the whole society. This majority's voice is the outcome of the politics of public opinion and its multifaceted processes that filter, shape, and refine the public views to cancel out or temper demands contrary to the rights of others or to the permanent and aggregate interests of the society. Stated differently, the aim of the politics of public opinion is, via deliberative republicanism, to achieve legislative decisions in accordance with the claims of justice and the rights of individuals. In this manner, republican government founded in social compact is the continuous formation of the collective moral being.

At the time of the compact's establishment of government, and in the ongoing exercise of sovereignty through the constitutional majority, the challenge of making power and right coincide is ever present. In the founding era, the incongruity between the principles and practice of republican government was particularly evident in the despicable practice of slavery in the Southern states. How to remedy this grave contradiction continued to occupy Madison's thoughts throughout his life. When he put pen to paper to design an outline for a comprehensive treatise on republican government, he included a chapter about the influence of slavery on public opinion and government, emphasizing that the institution of slavery meant the Southern states of America were actually aristocracies rather than republics.<sup>53</sup>

The republican guarantee clause nonetheless makes clear that the states permitting the practice of slavery are to be considered legitimate members of the American Union. If the republican guarantee allows slavery, which is as anti-republican a policy as one can imagine, is the idea of republicanism in the Constitution simply an empty one? According to Madison, the authority of the clause does not extend beyond that of "a *guaranty* of a republican form of government," which leaves existing state constitutions as they are. (Emphasis in original.) The clause

supposes a pre-existing government of the form which is to be guaranteed. As long therefore as the existing republican forms are continued by the states, they are guaranteed by the federal constitution. Whenever the states may chuse to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange republican for anti-republican constitutions; a restriction which it is presumed will hardly be considered as a grievance.<sup>54</sup>

In *Federalist* 43, Madison said that the clause is merely a “harmless superfluity”—though he qualified this by adding, “if the interposition of the general government should not be needed”—and he indicated that, in closely knit federations, members have a “right to insist that the forms of government under which the compact was entered into, should be *substantially* maintained.”<sup>55</sup> (Emphasis in original.)

It is not an exaggeration to say that the republican guarantee clause embodies the toughest and thorniest challenge of American republican constitutionalism. Essentially, it declares that the Constitution is rooted in the principles of republicanism, and then it protects the existence of state constitutions and laws that violate those principles in the most egregious and inhumane way. The contradiction between law and justice—between legal right and natural right—in the circumstances present in pre-Civil War America could not be made starker than in the words and implications of this clause.

According to the classics, the synchronization of power and justice is *the* challenge of politics. In the proem to the first book of *The Republic*, Plato recounts an encounter between Polemarchus and Socrates that illustrates the juxtaposition of power and justice (based on reason and persuasion). Aristotle treats the challenge of natural right in the fifth book of the *Nicomachean Ethics*. Thomas Aquinas, John Locke, Samuel von Puffendorf, and Vattel address the issue in their investigations, in general arguing that in the application of the precepts of natural law, prudence is

required of the statesman. What is the right thing to do when current laws or circumstances essentially prohibit one from doing the right thing or when doing the right thing will make matters worse, not better?<sup>56</sup>

The traditional understanding of natural justice (whether natural right or natural law) is that politics should promote human flourishing, the aims of which are eternal and unchanging, but that the practical realities, laws, and customs of the day must also be considered. Out of this complex and nuanced consideration, a prudential decision fitting the specific circumstances must be made. This teaching is reflected in the passage of the Declaration regarding the dictates of prudence, which instruct “that Governments long established should not be changed for light and transient causes.”

Because nothing could be done to immediately change the practice of slavery in the states where it existed in 1787, and because attempting to do so would have resulted only in those states refusing to join the Union, thereby not freeing a single slave, the framers accepted the existing laws of the states under the Constitution. Still, the presence of the republican guarantee clause also pronounces the overarching principles of the Union, revealing the moral contradiction in the document and casting a bright, harsh light on the compromises made to bring it about. By implication, the anti-republican inconsistencies in the Constitution are answerable to the higher standard of right that infuses the document’s architectonic republican character.

The republican character of the United States Constitution is present with or without the republican guarantee clause, based on the nature of the original social compact. In an essay touching on this subject, Madison claimed that at the core of the social compact was a debt or moral obligation accompanied by a pledge (guarantee) of protection, of each citizen to every other, to respect the freedom of conscience at the core of our humanity. In “Property,” he wrote,

To guard a man’s house as his castle . . . can give no title to invade a man’s conscience which is more sacred than his

castle, or to withhold from it that debt of protection, for which the public faith is pledged, by the very nature and original conditions of the social pact.<sup>57</sup>

By its very nature, Madison argued, the social compact creates conditions that must be met for it to constitute a legitimate agreement. It is legitimate when and only when the nature of humanity is recognized and respected, including especially the protection of the free exercise of conscience and the other faculties, which constitute the core of self-government.

The social contract or compact entails moral obligation, but it does not create obligation *ex nihilo*. It entails obligation because of natural law, because social compact doctrine itself is derivative from natural law and reasoning about human nature. Accordingly (and contrary to Thomas Hobbes's view), natural right exists whether or not there is a social contract or civil society or government; it exists everywhere and always. In *Federalist* 43, Madison asked what the relationship between the dissenting and assenting states would be if one or more of them chose not to enter into the compact. He answered,

The moral relations will remain uncanceled. The claims of justice, both on one side and on the other, will be in force, and must be fulfilled; the rights of humanity must in all cases be duly and mutually respected.<sup>58</sup>

In this essay, which falls at the precise center of the *Federalist Papers*, Madison's discussion of the "claims of justice" and moral obligations that exist among independent political orders in the absence of any social compact reveals his embrace of classical natural right teaching.

For Madison, in the absence of conventional justice and the rule of law, natural justice remains in force and sets the standard for political societies and the individuals within them. These claims of natural justice are part of the rights and moral obligations inherent in our humanity.

### The Blessings of Self-Government

Despite the many differences between Jefferson and Madison in character and outlook, they were best friends. They understood and trusted one another's principles and aspirations for their country. Toward the close of his life, in February 1826, Jefferson wrote Madison about the "harmony" of their views and purposes:

The friendship which has subsisted between us, now half a century, and the harmony of our political principles and pursuits, have been sources of constant happiness to me thro' that long period. . . . It has also been a great solace to me to believe that you are engaged in vindicating to posterity the course we have pursued for preserving to them, *in all their purity*, the blessings of self-government.<sup>59</sup> (Emphasis in original.)

In response, Madison also recalled the many years of personal and political accord between them. "You cannot look back to the long period of our private friendship & political harmony, with more affecting recollections than I do," Madison wrote. "If they are a source of pleasure to you, what ought they not be to me? We can not be deprived of the happy consciousness of the pure devotion to the public good, with which we discharged the trusts committed to us."<sup>60</sup>

Monticello and Montpelier are two of the most frequently visited presidential and founders' homes in the country. The relatively short distance between the two residences means that many people who visit one, if they have time, visit the other as well. Of course, it took longer on horseback in the 18th century, but for the two Virginians, it was a road they traveled frequently, with cheerful anticipation of the time they would spend together. Today, for those of us touring the ribbon of roadway that connects the homes of Jefferson and Madison, the close bond between them that impelled their frequent visits becomes palpable.

And like them, the Declaration of Independence and the Constitution are also connected by this unbroken ribbon, with the miles between them hardly worth mentioning, for distance is nothing when it means the gathering of friends.

### Notes

1. *Federalist*, no. 39 (James Madison).
2. Richard Hofstadter, *The American Political Tradition and the Men Who Made It* (Alfred A. Knopf, 1948).
3. In 1913, historian Charles Beard published *An Economic Interpretation of the Constitution of the United States*, in which he argues that the framers designed the Constitution to protect their own selfish economic interests, diverging from the democratic spirit of the Revolution and Declaration of Independence. In 1980, historian and activist Howard Zinn published *A People's History of the United States*, which, like Beard's interpretation, argued that the Constitution was the product of elites at the expense of the working class. To the economically underprivileged, Zinn added the categories of race, ethnicity, and sex or gender, claiming that the wealthy, white, Anglo-Protestant males who dominated politics in the founding era excluded such folk from the halls of power.
4. *Federalist*, no. 10 (James Madison).
5. Gordon S. Wood, *Revolutionary Characters: What Made the Founders Different* (Penguin Books, 2007), 164; and *Federalist*, no. 10 (Madison).
6. Martin Diamond, "Ethics and Politics: The American Way," in *The Moral Foundations of the American Republic*, ed. Robert H. Horwitz (University Press of Virginia, 1977), 59. See Patrick J. Deneen, *Why Liberalism Failed* (Yale University Press, 2019).
7. Thomas Jefferson to Henry Lee, May 8, 1825, Founders Online, <https://founders.archives.gov/documents/Jefferson/98-01-02-5212>; and James Madison to William Cogswell, March 10, 1834, Founders Online, <https://founders.archives.gov/documents/Madison/99-02-02-2952>.
8. Abraham Lincoln to Henry L. Pierce and Others, April 6, 1859, in *The Collected Works of Abraham Lincoln*, ed. Roy P. Basler, vol. 3, 1858-1860 (Rutgers University Press, 1953), 376.
9. *Federalist*, no. 9 (Alexander Hamilton).
10. Thomas Jefferson to James Madison, September 6, 1789, Founders Online, <https://founders.archives.gov/documents/Madison/01-12-02-0248>.
11. Thomas Jefferson to Henry Tompkinson [Samuel Kercheval], July 12, 1816, Founders Online, <https://founders.archives.gov/documents/Jefferson/03-10-02-0128-0002>.
12. Jefferson to Tompkinson.

13. See *Federalist*, no. 49 (James Madison); *Federalist*, no. 50 (James Madison); and James Madison to Thomas Jefferson, February 4, 1790, Founders Online, <https://founders.archives.gov/documents/Madison/01-13-02-0020>.

14. See *Federalist*, no. 49 (Madison).

15. *Federalist*, no. 49 (Madison).

16. *Federalist*, no. 49 (Madison).

17. *Federalist*, no. 51 (James Madison).

18. James Madison to Thomas Jefferson, October 24, 1787, Founders Online, <https://founders.archives.gov/documents/Jefferson/01-12-02-0274>.

19. James Madison, “Public Opinion,” in Colleen A. Sheehan, *The Mind of James Madison: The Legacy of Classical Republicanism* (Cambridge University Press, 2015), 245. See also Colleen A. Sheehan, *James Madison and the Spirit of Republican Self-Government* (Cambridge University Press, 2009). Compare Jack N. Rakove’s excellent discussion of legislative deliberation in Jack N. Rakove, *A Politician Thinking: The Creative Mind of James Madison* (University of Oklahoma Press, 2017), 54–95. Here Rakove argues that Madison viewed legislative debate and deliberation as a crucial component of republican government. Allowing for the consideration of diverse opinions and interests, Madison saw deliberation as essential for achieving consensus and making informed decisions that reflect the will of the people.

20. *Federalist*, no. 51 (Madison).

21. James Madison, “A Candid State of Parties,” in Sheehan, *The Mind of James Madison*, 268.

22. James Madison, “Spirit of Governments,” in Sheehan, *The Mind of James Madison*, 257.

23. Thomas Jefferson, “First Inaugural Address,” speech, US Capitol, Washington, DC, March 4, 1801, Founders Online, <https://founders.archives.gov/documents/Jefferson/01-33-02-0116-0004>.

24. Jefferson, “First Inaugural Address.”

25. Thomas Jefferson to Spencer Roane, September 6, 1819, Founders Online, <https://founders.archives.gov/documents/Jefferson/03-15-02-0014>.

26. James Madison, “Notes on Vices of the Political System of the United States,” in Sheehan, *The Mind of James Madison*, 198.

27. Madison, “Notes on Vices of the Political System of the United States,” 201.

28. Madison, “Charters,” in Sheehan, *The Mind of James Madison*, 247.

29. *Federalist*, no. 51 (Madison).

30. *Federalist*, no. 51 (Madison).

31. James Madison, “Property,” in Sheehan, *The Mind of James Madison*, 263.

32. Madison, “Property,” 263.

33. Montesquieu’s “*The Spirit of the Laws*”: A Critical Edition, trans. W. B. Allen (Anthem Press, 2024), bk. 11, chaps. 2–3.

34. Thomas Jefferson to James Madison, September 6, 1789, Founders Online, <https://founders.archives.gov/documents/Madison/01-12-02-0248>.

35. James Madison to Thomas Jefferson, February 4, 1790, Founders Online, <https://founders.archives.gov/documents/Madison/01-13-02-0020>.

36. Madison to Jefferson, February 4, 1790.

37. James Madison, “Essay on Sovereignty,” December 1835, Founders Online, <https://founders.archives.gov/documents/Madison/99-02-02-3188>.

38. Madison, “Essay on Sovereignty.”

39. *Federalist*, no. 39 (Madison). The claim that Madison further limits “republican” government to representative government and thus excludes democratic processes such as referendum and recall does not fit with his overall argument in the *Federalist Papers*. It mistakes Madison’s solution to the problem of republican government for his definition of republican government. Madison uses “republic” to mean “popular” government. However, he argues that to rescue popular government from “the opprobrium under which it has so long labored” will require an extensive territory and representation. See *Federalist*, no. 10 (Madison).

40. *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* (Ohio University Press, 1984), 32.

41. *Notes of Debates in the Federal Convention of 1787 Reported by James Madison*, 117.

42. *Notes of Debates in the Federal Convention of 1787 Reported by James Madison*, 321.

43. *Notes of Debates in the Federal Convention of 1787 Reported by James Madison*, 322.

44. *Notes of Debates in the Federal Convention of 1787 Reported by James Madison*, 395.

45. US Const. art. IV, § 4.

46. Williams claims that although the meaning of “guarantee” is critical to understanding the clause, it has been given scant attention. Moreover, the term is “something of a constitutional anomaly.” It does not appear in the main documents before the drafting of the Constitution, the Constitution itself, or any of the earlier amendments. “In the absence of more definitive clues regarding the term’s originally understood meaning,” Williams writes, “most scholars” have either declared the term “hopelessly ambiguous” or ignored the problem of defining it. Ryan C. Williams, “The ‘Guarantee’ Clause,” *Harvard Law Review* 132, no. 2 (2018): 608, <https://harvardlawreview.org/print/vol-132/the-guarantee-clause/>. It should be noted, however, the term is employed 25 times in the Pacificus–Helvedius debates, penned by Hamilton and Madison, respectively. The first *American Dictionary* by Noah Webster, though not published until 1828, defines the terms “guaranty” and “guarantee” using examples from the Pacificus–Helvedius exchange and the Franco-American Treaty of 1778 (which was at issue during the debate over Washington’s Neutrality Proclamation). *An American Dictionary of the English Language* [...] (1828), under “guarantee,” “guaranty.”

47. Jonathan Toren, “Protecting Republican Government from Itself: The Guarantee Clause of Article IV, Section 4,” *NYU Journal of Law & Liberty* 2 (2007): 385, [https://www.law.nyu.edu/sites/default/files/ECM\\_PRO\\_060952.pdf](https://www.law.nyu.edu/sites/default/files/ECM_PRO_060952.pdf). Madison also discusses the problems of unions in which some states are republican and others not in his 1792 *National Gazette* essay “Universal Peace,” criticizing Rousseau on this point, specifically. “Among the various reforms which have been offered to the world, the projects

for universal peace have done the greatest honor to the hearts, though they seem to have done very little to the heads of their authors,” Madison argued. “Rousseau, the most distinguished of these philanthropists, has recommended a confederation of sovereigns, under a council of deputies, for the double purpose of arbitrating external controversies among nations, and of guaranteeing their respective governments against internal revolutions. He was aware, neither of the impossibility of executing his pacific plan among governments which feel so many allurements to war, nor, what is more extraordinary, of the tendency of his plan to perpetuate arbitrary power wherever it existed; and, by extinguishing the hope of one day seeing an end of oppression, to cut off the only source of consolation remaining to the oppressed.” James Madison, “For the *National Gazette*, 31 January 1792,” Founders Online, January 31, 1792, <https://founders.archives.gov/documents/Madison/01-14-02-0185>.

48. According to Amar, “It is hard to see how other big clauses—from Section One of the Fourteenth Amendment, for example—are so different from the Republican Government Clause in their potential breadth, and their need for judicial mediating principles.” Akhil Reed Amar, “The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem,” *University of Colorado Law Review* 65, no. 4 (1994): 753, <https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=2016&context=lawreview>.

49. Amar, “The Central Meaning of Republican Government,” 750–51.

50. Madison to Jefferson, October 24, 1787, quoted in Amar, “The Central Meaning of Republican Government,” 763.

51. Amar, “The Central Meaning of Republican Government,” 765 (cleaned up). Here Amar cites Thomas Jefferson to Baron F. H. Alexander Von Humboldt, June 13, 1817, <https://founders.archives.gov/documents/Jefferson/03-11-02-0361>. Compare Akhil Reed Amar, “Popular Sovereignty and Constitutional Amendment,” in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*, ed. Sanford Levinson (Princeton University Press, 1995), 89–90.

52. Amar does acknowledge that for Madison, “not everything a majority does is lawful.” It must follow certain procedures and niceties, rather than operate by brute force, he argues. Amar, “The Central Meaning of Republican Government,” 769. But this hardly answers the purpose, since majority factions can follow unjust procedures as well as just ones and still achieve their vicious ends. In another article on popular sovereignty, though, Amar cites Wilson’s belief that a majority was “not entitled to do simply whatever it pleased,” for they are beholden to “God and natural law.” Akhil Reed Amar, “The Consent of the Governed: Constitutional Amendment Outside Article V,” *Columbia Law Review* 94, no. 2 (1994): 501, <https://scispace.com/pdf/the-consent-of-the-governed-constitutional-amendment-outside-a256qx8bqb.pdf>. This leaves the full force of popular sovereignty intact, according to Amar, since the people remain the only source of earthly authority. The reference to Wilson’s appeal to the higher-law standard by which to measure the people’s authority begins to fill in Amar’s popular sovereignty argument, but it would be fuller and stronger in terms

of Wilson's, Jefferson's, Madison's, and the founders' sense in general, if there were substantially more discussion of the conditions of the social compact, consent of the governed, and majority rule.

53. Madison, "Notes on Government," in Sheehan, *The Mind of James Madison*, 139–40.

54. *Federalist*, no. 43 (James Madison).

55. *Federalist*, no. 43 (Madison).

56. The classical response to this requires understanding that natural right is part of political right; legal right is part of political right as well. Natural right refers to principles of justice and moral order that are inherent in nature and can be discovered through reason. In contrast, legal right is constructed by human societies and can vary depending on the laws and conventions of a particular time and place. Political right is the point of coincidence.

57. Madison, "Property," 263.

58. *Federalist*, no. 43 (Madison).

59. Thomas Jefferson to James Madison, February 17, 1826, Founders Online, <https://founders.archives.gov/documents/Jefferson/98-01-02-5912>.

60. James Madison to Thomas Jefferson, February 24, 1826, Founders Online, <https://founders.archives.gov/documents/Jefferson/98-01-02-5934>.