

Madison at the First Congress: Institutional Design and Lessons from the Continental Congress, 1780-1783.

Rick K. Wilson
Department of Political Science
Rice University
Houston, TX 77251-1892
rkw@rice.edu

This paper was prepared for presentation at the Conference on 250th Birthday of James Madison, University of California, San Diego, March 16-17, 2001. Thanks go to Laura Delgado, Carmen Huerta and Martin Johnson for their assistance in tracking down sources. Thanks also go to Rod Kiewiet, Gary Cox and Sam Kernell for their thoughtful comments. All of the above are absolved from errors I've persisted in committing by ignoring good advice.

Introduction.

Madison took his seat as a delegate to the Continental Congress on March 20, 1780.¹ At the time Madison was an unknown politician, regarded by many as simply another of the young planters sent by Virginia to bear the burden of representing state interests. Very quickly Madison proved his worth as a legislator. Within a year of being seated he was building legislative coalitions that would change the financing of the bankrupt government and add to its capacity to protect its fragile life.

Madison's concerns were similar to those that have been the focus of contemporary political science. Madison was enormously frustrated by the collective action problem inherent in the system of financing the war effort and paying down debts. The system allowed Congress to set requisitions for the various states. Each state, then, could choose to voluntarily pay that assessment. No contemporary political scientist would be surprised by the ineffectiveness of this voluntary contribution mechanism, and neither was Madison.²

Madison was also concerned with the collective choice problems inherent in Congress. There Madison found a system sometimes dominated by an open agenda, sometimes relying on simple majority rule and sometimes using a supermajority rule. Under an open agenda with simple majority rule, anything could happen and often did. Many of the same issues were revisited and often changed. Under supermajority rule, stalemate was the usual state of affairs. Again, neither of these things would surprise a contemporary political scientist and Madison understood the institutional sources of such problems.

Finally, Madison entered an institution that was poorly designed to handle an increasing workload or otherwise process the demands on a fledgling national government. Balancing concerns for efficiency, expertise and representativeness is always difficult. Madison found an institution that rarely met any of these goals in its day-to-day operations.

¹ At the time that Madison arrived, the delegates were still operating under the guise of the Second Continental Congress. During his tenure the Articles of Confederation were finally adopted. Relying on a convention that I have used before (and many others before us), I will refer to both Congresses as the Continental Congress.

Few realized the role Madison would play in the Congress and no one, including Madison, could realize the effect of the Congress on the ways in which Madison came to think of institutional design. This paper briefly discusses the organization of the Continental Congress, as Madison found it when he presented his credentials in 1780. Madison's role in the Congress is briefly sketched and data is brought to bear concerning his experiences in the Congress. Finally, his unpublished notes from 1786 and 1787, which reflected on the proper design of a new institution, are related to his experiences in the Congress. Although Madison returned to the Continental Congress in its dying years, this period is not touched on. Throughout, the claim is that Madison understood much of what is contemporaneously known as the "new institutionalism" and that his experiences in the early years were formative.

The Continental Congress.

Within a week of taking his seat, Madison provided a candid assessment of what was wrong with Congress. In a letter to Jefferson he outlined a set of problems that were rooted in the design of the Continental Congress. While he claimed he could not determine which problem was the most critical, in retrospect two stand out. The first had to do with insufficient checks on the actions of less than noble statesmen.

"Congress from a defect of adequate statesmen more likely to fall into wrong measures and of less weight to enforce right ones, recommending plans to the several states for execution, and the states separately rejudging the expediency of such plans, whereby the same distrust of concurrent exertions that has damped the ardor of patriotic individuals must produce the same effect among the states themselves." Letter to Jefferson, March 27, 1780. (Burnett, V: 97)

Madison was concerned not only with the fact that members seemed to be squabbling over matters that were less than important, but worse, the inability of the delegates to articulate a plan that would carry forward to the states. As a loose confederation, it was a simple matter for the individual states to pick apart any major piece of legislation -- especially weakly written legislation coming out of the Continental Congress. This was

² For a delightful and thorough discussion of this, See Dougherty (2002) in this volume.

highlighted by a second concern which pertained to a system of financing the war effort (and covering old debts). Here Madison noted:

"An old system of finance, discarded as incompetent to our necessities, an untried and precarious one substituted, and a total stagnation in prospect between the former and the operation of the latter." Letter to Jefferson, March 27, 1780. Burnett (1921-1936) V: 97.

Settled several days before Madison took his seat, the Congress had tossed out an old form of financing and moved to a system that depended on the whims of the individual states. Neither the old form of financing nor the new were optimal. Both introduced serious problems for collective action in which state contributions resembled a voluntary contribution game. Several months later, he reiterated this point to Jefferson, noting:

It is to be observed that the situation of Congress has undergone a total change from what it originally was. Whilst they exercised the indefinite power of emitting money on the credit of their constituents they had the whole wealth & resources of the continent within their command, and could go on with their affairs independently and as they pleased. Since the resolution passed for shutting the press, this power has been entirely given up and they are now as dependent on the States as the King of England is on the parliament. They can neither enlist pay nor feed a single soldier, nor execute any other pu[r]pose but as the means are first put into their hands. Unless the legislatures are sufficiently attentive to this change of circumstances and act in conformity to it, every thing must necessarily go wrong or rather must come to a total stop. (May 6, 1780, Hutchinson (1962), 2: 20)

Madison's concerns with problems of collective action were only a piece of the puzzle. The Continental Congress was also wracked with collective choice and coordination problems. As to the latter, finding experienced individuals willing to carry out the daily workload of Congress was difficult. Madison was not too far off the mark when noting that Congress by 1780 held a "defect of adequate statesmen." Even worse, the internal structure of Congress was such as to make it nearly impossible to generate consistent, coherent legislation. The Congress was wracked by factions, but of a sort that prevented coalition building. The rules not only permitted, but seemingly guaranteed, a setting in which almost anything could happen.

The institutional design of the Continental Congress, as Madison found it in 1780, was little different from the institution at the outset of the Revolutionary War. For purposes of this discussion, I focus on three components of the Continental Congress: the actors constituting the institution, the position rules embedded in the Congress and the aggregation rules.³ For more extensive details about the design of the institution the interested reader should consult Jillson and Wilson (1994).

The Actors. Central to any decision making body is the question of who is represented and who has voice. From the outset of the Continental Congress it was clear that the state delegations were merely bringing instructions from their state assemblies to Philadelphia. While the size of those delegations varied, no matter the size, each state had an equal voice. It quickly became apparent that carrying instructions from the various states was nearly impossible. Events presented to Congress quickly surpassed any instructions held by delegates. Moreover, delegates within a state were often at odds, with little agreement about the state's position.

Prior to the adoption of the Articles of Confederation in 1781, a single delegate could represent a state. This was to ensure that no state was denied a voice when balloting. Following ratification of the Articles at least two delegates were required to be present for a state's vote to be considered (see Jillson and Wilson, 1994, pp. 157-159). While a state with only as single delegate could continue to have a voice on the floor during debate and could have that delegate appointed to a committee, its vote could not count.

This definition of a state's voice presented a serious problem for the Congress in conducting day-to-day business. As part of its internal rules, members had implemented a quorum rule of nine states in July 1776. Frequent absences, however, led members to quickly lower the quorum to seven states. But, even this, failed to solve quorum problems. Throughout the 1780s attendance was erratic, with many delegates who were appointed to represent their state failing to show up. The Congress was powerless to compel attendance, even though it continuously sent letters to the various states urging

³ This manner of thinking of institutions is influenced by Ostrom, Gardner, and Walker (1994), particularly Chapter 2.

that the states take the responsibility to force their delegates to attend. On April 19, 1774 the Congress adopted a resolution prodding the states. The resolution tried to detail the consequences for lax attendance.

Resolved. That the legislatures of the several states be informed, that whilst they are respectively represented in Congress by two delegates only, such an unanimity for conducting the most important public concerns is necessary as can be rarely expected. That if each of the thirteen states should be represented by two members, five out of twenty-six, being only a fifth of the whole may negative any measure requiring the voice of nine states: that of eleven states now on the floor of Congress, nine being represented by only two member from each, it is in the power of three out of twenty-five, making only one-eighth of the whole, to negative such a measure, ... that therefore Congress conceive it to be indispensably necessary, and earnestly recommended, that each State, at all times when Congress are sitting, be hereafter represented by three members at least; as the most injurious consequences may be expected from the want of such representations. (*Journals*, 26: 245-46).

Aside from preventing Congress from being able to tackle its business, the quorum rules enhanced the capacity of a handful of members to obstruct action.

To complicate matters, in 1784 Congress appointed a committee to determine which of its members, usually members in good standing and dutiful attendance, were now in violation of another feature of the Articles of Confederation. One of the articles mandated a form of term limits in which no member could serve longer than three years in any six year period. James Madison, although not reported by the committee, departed Congress as an early victim of these limits on service.

In short, states constituted the key actors in Congress. However, state interests were manifested through individual agents who often spoke with a mixed voice.

Positional Rules. The Continental Congress was an institution of equals in which no delegate enjoyed any positional advantage. The only position defined by the Congress was its President. However, that position was toothless. A series of precedents, norms, and expectations were developed in the first Congress, and then maintained through the history of the institution, that gave the president no assignment powers, no power to appoint members to standing or ad hoc committees, and no power to control the flow of business out of committees and back to the floor. Assignment and committee appointment powers were exercised on the floor of Congress. Resolutions, bills, and

reports coming out of committee and returning to the floor were taken up in the order in which they were delivered to the secretary. Any questions arising over the priority among items lying on the table were settled by a majority vote of the states. Once the floor decided what it would consider, the president monitored the conduct of the debate and little more (Sanders, 1930, p. 39). The office of president was largely ceremonial and it was sufficiently innocuous that through most of its history it passed in yearly rotation among the states. Indeed, the office had so little importance that John Hancock, re-elected as President in November 1785, declined to attend. He took seven months to finally resign the post and the post was filled by an interim Chairman, David Ramsay (Jillson and Wilson, 1994, pp. 87-88).

While most activity took place on the floor, Committees were omnipresent and created a potential position of privilege. In the modern Congress, committees enjoy clear property rights over issues, hold considerable expertise and can exercise important forms of agenda control. Such a system, however, never developed in the Continental Congress. The Congress continually relied upon an extensive network of ad hoc committees to handle its workload. At various stages in its history the committee system was supplemented by standing committees, boards, and executive departments. These variations on the committee system proved to be less successful than hoped, largely because myriad ad-hoc committees were created to oversee and investigate them. In addition, ad hoc committees invariably were charged to reconsider and often recast the reports and recommendations that the standing committees, boards, and departments sent to the Congress. As a result, ad hoc committees always remained the standard mechanism employed by the Congress to prepare issues for final deliberation on the floor.

The open nature of the committee system is demonstrated by the method for calling new committees into existence and selecting members to them. Committees were appointed when a majority of the states voted in favor of a motion to appoint a committee. When passed, nominations to fill positions on the committee were offered from the floor (*Journals*, 2:79 3:266; Burnett, *Letters*, 2:74; 2:83-84). Once nominations closed each delegate cast a secret ballot for one of the nominees. The Secretary of Congress tabulated the ballots and the President announced the names of the members elected. The individuals receiving the most votes were elected to the committee, with the top vote-getter serving as committee chair. “Grand Committees,” composed of one member from each state, were occasionally selected to consider critical issues. In these instances, each delegation was allowed to nominate their own member and then the slate was approved by a ballot of all members. These procedures guaranteed that the members

on the floor controlled the committees of the Congress and that any significant divisions on the floor would be reproduced in each committee. Jillson and Wilson (1994) provide evidence suggesting that over much of the life of the Continental Congress, committees were a reflection of the floor (pp. 124-127). This is a directly result of the process of selection and election.

Delegates to the Continental Congress were relentless in insuring that specialized positions of power did not evolve. This is partly demonstrated by the pervasiveness of committees. Jillson and Wilson (1994) note that 3,249 separate committees were *elected* between 1774 and 1788. The vast majority of the committees employed each year were small ad hoc committees. More than three-quarters (76.8%) had only three members and another 17.7% had five members. For a body that rarely had more than 35 members present, this proliferation of ad hoc committees generated an enormous and varied workload for most delegates. At the extreme delegates like Abraham Clark (NJ), Hugh Williams (NC) and James Duane (NY) served on more than 300 committees during their time in Congress.

As early as 1776 the delegates experimented with standing committees, and later with Boards, Commissions and even Executive Departments. However, none of these innovations brought relief to delegates who continued to be appointed to ad hoc committees (this point is detailed in Jillson and Wilson, 1994, Ch. 4). There was such concern with long standing Boards and Departments that Congress formalized oversight, resolving:

that on the first Monday in July and the first Monday in January in every year, five committees composed each of five members, shall be appointed; which committees shall have in charge to enquire fully, ... and to report the result of their enquiries to Congress. (*Journals*, 22: 334).

The lesson here is that delegates jealously guarded their prerogative to handle work on the floor.

Aggregation Rules. The Continental Congress was the quintessential egalitarian institution. Most of its work took place in the Committee of the Whole and its procedures guaranteed open discussion on the floor, ensured that no faction gained monopoly agenda setting powers, and provided delegates with ample opportunity for discussion, amendment, obstruction, and delay. Instead of adopting rules that awarded subsets of delegates special agenda powers (the leadership or an equivalent of the modern

Rules Committee), rules that narrowly proscribed when motions and amendments were in order (closed or modified rules), or rules that allowed the formulation of complex legislative packages (omnibus bills), the Continental Congress's rules were minimal.

Minimal rules meant that the process could oftentimes be maddening. On September 5, 1777, less than two months before he was elected President of Congress, Henry Laurens wrote to fellow South Carolinian John Gervais that he had

"been witness to a Report made by a Committee of the Whole, which had been entered upon the Journal, superseded by a new Resolution even without reference to the Report. A Resolution carried almost *Nem Con* -- entered, and half an hour after reconsidered and expunged. When I add that such irregularity is the work of almost every day, you will not wonder that I wish to be any where but in Congress" (Smith, *Letters*, 2:482).

Seven months later, while serving as President, Laurens complained to James Duane (NY) that: "Long and warm debates for many a day had led us to the threshold of the Report from the Committee of the Whole. We had Entered fairly the Door, by reading the whole for information, the first Clause for debate, and received an amendment which was read by the Chair and the question half put, when we were turned out by a New Motion - debates arose upon the point of order" (Burnett, *Letters*, 3:170; see also 6:21). Debates upon points of order were frequent in the Congress precisely because so little order existed. As Thomas Burke (NC) noted in an August 1779 letter to the North Carolina Assembly "circumstances make rules of order...very arbitrary and uncertain, hence frequent disputes arise thereon...and the decisions at length depend upon the Integrity of the Majority. Thus Rules of order cease to be, what they ought, common checks upon excesses" (Burnett, *Letters*, 4:367-368). Rules could not constrain willful majorities.

The cyclic nature of majority rule processes under an open agenda procedure characterized the Congress prior to the adoption of the Articles of Confederation. Once ratified, however, the rules under which Congress operated were decisively altered. The new rules changed the dynamics of the institution from pervasive fluidity to an equally pervasive rigidity.

Following the adoption of the Articles of Confederation in 1781 the problems facing delegates to the Continental Congress were compounded by several changes in floor procedures. From the outset the Continental Congress operated under the "unit rule" in which each state was accorded a single vote that was a function of a simple majority of each state's delegation. Each member of the state delegation cast a separate ballot. The Secretary tallied the ballots and the State's vote was announced. The Articles

changed the number of positive votes needed to decide issues in Congress. Before the Articles were approved a simple majority of the states present and voting could decide matters. After the Articles were ratified, seven positive votes were required to conclude regular business, nine positive votes were required to decide important business. The latter included the ratification of treaties and all matters of great financial concern.

This change in the Articles had a dramatic effect on the capacity for delegates to build legislation. The status quo was now privileged because requiring a seven or nine state majority effectively meant imposing a near unanimity rule. Even though simple majority rule was all that was required for minor matters, that meant a simple majority of 13 states. When only 9 states were in attendance, simple majority rule demanded 7/9ths of the states vote for passage. While technically requiring a simple majority, in practice this led to the imposition of near unanimity rule as attendance fell. Jillson and Wilson (1994) calculate that prior to March 1, 1781, 60% of the motions offered in Congress passed. Following the change in rules only 30% of the motions offered in Congress passed. (p. 141). Delegates turned almost immediately from complaining about instability to complaining just as vociferously about deadlock.

In early-March 1784 Thomas Jefferson explained to a correspondent what the rules embedded in the Articles meant for the conduct of business in the Congress. Jefferson wrote that, "a ninth state appeared today, but eight of the nine being represented by two delegates each, all important questions will require not only an unanimity of states, but of members, for which we have no reason to hope. I very much apprehend we shall be unable to get through even those [questions] which seem indispensable" (Burnett, *Letters*, 7:458). Fixed supermajority requirements, in the face of low attendance, pushed what would have been a stiff supermajority requirement (9 of 13 states or 69%), toward a requirement of virtual unanimity both of states and individuals. The result, not unexpectedly, was a perverse form of stalemate.

Madison in Philadelphia.

To this point the institution has been discussed independently of Madison's involvement. However, it is important to note the context within which he entered in 1780. At the outset, Madison arrived as a relative unknown. While he held legislative credentials, his competence in the Virginia House was not carried with him to Philadelphia. Once he took his seat at the Continental Congress he became known as a dependable legislator. A number of scholars have debated the content of Madison's activities in the Continental Congress. Debates have centered on whether Madison

became a nationalist, striving to build a strong national government (see the traditional view by Brant (1948)) or whether Madison sought to maintain state sovereignty (see the challenge posed by Banning (1995)). The interest here is less with Madison's accomplishments within the Continental Congress and more with his experiences. My argument is that those experiences shaped the way he viewed institutional design.

Madison quickly became an important member of the Congress. While his first year was spent learning the ropes, by 1781 Madison was in the thick of the major disputes in Congress. It is possible to objectively see his involvement grow. Figure 1 shows the number of committees to which Madison was assigned by Congressional year.⁴ As can be seen, Madison quickly surpassed the average number of committee assignments. As noted above his assignments were not so much a function of his expertise, but rather a function of his competence. Members were elected to committee assignments and Madison's continual election was a sign that others valued his abilities.

<Figure 1 About Here>

Madison's voting record usually was in line with his counterparts, both in the South and in Virginia. The most useful way of viewing Madison's voting behavior within Congress is to consider how he voted relative to others. This is easily accomplished by using a multidimensional scaling technique across all votes in order to uncover common dimensions that capture the voting patterns of delegates. This technique is detailed in Jillson and Wilson (1994) and resembles the more ubiquitous Nominat scores developed by Poole and Rosenthal (1997). Throughout the period examined here, a two-dimensional scaling structure does quite well in capturing the relative positions of delegate votes. The scaling technique used here allows delegates to be compared with one another. The resulting scale can be considered a proximity measure, with delegates who are closer to one another typically voting with one another. Delegates further apart in the two dimensional space are least likely to have voted together.

Figures 2 through 5 produce delegate positions for each Congressional year from 1780 through 1783. In each instance Madison's position is labeled as is a sampling of

other notable members of Congress. The diamond shaped marks on the figure represent delegates from the Northern states, the rectangles represent delegates from Middle Atlantic states and the circles are delegates from Southern States. In Figure 2 (1780) it is clear that Madison is voting at variance with the southern delegation. His position is most closely aligned with the Northern delegates. In 1781 his general voting pattern had moved toward the Southern delegation – at least along dimension 1 (which nominally is a north/south basis for cleavage), although Madison continues to stand out with respect to the southern delegation. By 1782 Madison is tightly clustered with the southern block. In 1783 Madison is again at odds with the Southern delegates and more closely aligned with delegates from the Middle Atlantic. Of course, throughout this period the regional divisions are not as strong as they would be in the mid and later 1780s.

<Figures 2-5 About Here>

From the outset of his service Madison was concerned with the problems of financing the country's debt. While interested in finding some mechanism for funding debt, Madison was deeply concerned with expanding federal powers. Because of the logic of collective action, Madison had a difficult time thinking of any way out except to invoke a central state. His early thinking on this came in a letter to Jefferson in which he argued

The necessity of arming Congress with coercive powers arises from the shameful deficiency of some of the states which are most capable of yielding their apportioned supplies, and the military extractions to which others already exhausted by the enemy and our own troops are in consequence exposed. Without such powers too in the general government, the whole confederacy may be insulted and the most salutary measures frustrated by the most inconsiderable State in the Union. April 16, 1781. Hutchinson (1962) 3: 72

Taxation handed to the central government, of course, would concentrate both the power of the sword and the purse. This was a major expansion of national power and one with which Madison struggled. But Madison also understood that the states were unlikely to

⁴ A Congressional year ran from November of the preceding year through October. So, the Congressional year 1780 began in November 1779 and ran through October 1780. Madison, by arriving in March 1780 had already missed a portion of the year.

voluntarily provide contributions to the public good. The logic of collective action clearly pointed to what was not going to succeed.

Madison, from 1781 through 1783, undertook a number of actions to resolve the problems he saw facing the country. While voting against a 5 percent impost on foreign trade, levied by the Congress, he proposed an amendment that would have the states impose a 5 percent impost, with collections made by agents of Congress. In the summer following ratification of the Articles, he wrote a committee report recommending that the Congress turn the army loose on states to compel them to pay their delinquent requisitions. Throughout 1781 and 1782 Madison routinely backed the efforts by secretary of Finance, Robert Morris (if not advocating those efforts). In 1783 Morris threatened resignation if something was not done to provide a steady income to the Congress. Again Madison recognized that none of the states, individually, were likely to contribute to the central treasury. As Madison noted to Edmund Randolph “If there are not revenue laws which operate at the same time through all the states and are exempt from the control of each, the mutual jealousies which already begin to appear among them will assuredly defraud both our domestic and foreign creditors.” (January 22, 1783. Hutchinson (1962) 6: 55). Following a famous dinner with Hamilton, among others, on February 20, 1783 (which foreshadowed another famous dinner seven years later that cemented a deal fixing the location of the capital and finally resolved the problem of retiring the debt) Madison took a direct lead in fighting for a national impost. It appeared to be the only solution to ensuring a steady source of funding.⁵

Scholars have since debated whether the logic of collective action led Madison to advocate centralization in the form of a strong national government. The important point is that Madison understood the implications behind provisioning public goods.⁶ Whether he was an unreconstructed nationalist or sought to preserve state sovereignty remains open to interpretation.

⁵ For discussions of this period, see Banning (1995; Rakove (1990). As well, Dougherty (2001) gives an excellent overview of the general issues at stake.

⁶ See Dougherty (2002) for an excellent discussion of this point.

Madison and Western Lands

Several issues occupied Madison and the Congress during the early 1780's. Dougherty (in this volume) pays some attention to the problem of resolving the national debt and provides some sense of the frustrations experienced by Madison. Madison also keenly understood the benefits of low attendance and what amounted to a supermajority rule. Madison was sufficiently clever to understand the strategic value of such rules in preventing legislation that was harmful to his state's interests. Throughout late 1781 and into 1783 Madison worked to protect Virginia's claims to Western lands. Here I digress a bit to visit the problem of Western lands and the efforts by Virginia (and Madison) to cede claims to parts of the Western lands, while protecting their own interests. As a number of authors have noted, the issues were terribly convoluted (see for example Abernethy (1937)). Each of the states – particularly New York, Connecticut and Virginia -- had differing interpretations of what was granted them by their colonial charters. At the same time a number of land companies had long been engaged in a brisk business of selling lands in the west and wanted to make certain that state claims did not intrude on their own flimsy claims to the lands. Congress cast an eye toward the western lands as an asset that could be used to help pay off debts from the war. Finally there was a question whether the states could define their boundaries and make room for additional states. Into this fray Madison was given the responsibility to ensure that Virginia's claims were not undermined.

By 1781 the major claimants to the Western lands had proposed cessions in their claims. In part this was to encourage Maryland to ratify the Articles of Confederation and in part each state was jockeying for a favorable status. Virginia, for example, gave up claims to northwest, but wished to preserve claims to its immediate west that would preserve land titles that had been issued by the state. As Jensen (1936) notes, however, New York's cession, which gained that state a very favorable western boundary, abandoned claims that overlapped with those by Virginia. Many states, particularly those in the northeast, felt that the New York cessions trumped those offered by Virginia and consequently voided claims to territory that Virginia insisted on preserving. This set the stage for a showdown in Congress that most delegates thought could be resolved, though perhaps not easily.

Madison was part of a group that fought, following the adoption of the Articles, to insist that a bare majority of five states (a majority of a quorum), rather than seven states, was all that was needed in order to pass legislation. This was not to be and Madison, among others, was defeated in his efforts. But, by late October 1781 Madison was pleased by the need for an oversized majority. The initial battle over the cessions of western lands was beginning to heat up at this point. In a letter to Edmund Pendleton, Madison noted:

Since the close of the Confederation however, it has been understood that seven votes are necessary to carry every question. This rule in proportion to the thinness of Congress opposes a difficulty to those who attack. It will therefore I believe be impossible for the Enemies of Virginia to obtain any positive injury to her rights. Hutchinson (1962), 3: 297.

Madison felt reasonably confident that Virginia's interests would be saved by the fact that there were not enough votes to meet the oversized coalition required by low attendance and the rule mandated under the Articles.

The opening salvo took place in November 1781 when a committee report came to the floor, weighing off the various claims (for a good, general, discussion of the chronology of events, see Jensen (1939). Also, the discussion by Onuf (1977) is useful.). The report, led by a group hostile to the interests of Virginia, indicated that Congress should accept the New York cessions and reject those by Virginia. This would constrain Virginia to land east of the Alleghenies and open up the west to claims made by a number of middle state and northern state land speculators. The committee report was quickly tabled and it became clear that no quick resolution was in the offing. Madison, however, immediately began to construct a defense that would mute the worst features of the committee report. In a letter to Jefferson dated November 18, 1781 Madison admitted that it was likely that the Virginia cessions would be rejected when a vote came to the floor. However, he asked Jefferson to get very clear instructions from the Virginia Assembly about the nature and legality of State's claims. Madison thought it possible to delay and blunt some of the effects. As he noted:

it is a rule observed since the Confederation was completed, that seven votes are requisite in every question, and there are seldom more than 7, 8, 9 or 10 States presented, even the opinion of a Majority of Congress is a very different thing from a constitutional vote. Burnett (1921-1936), 6: 265.

Madison was accounting for the rules in play, anticipating how easy it would be to block efforts to impose the committee report.

By April 1782 the Virginia delegation brought up its cession. Although no one expected it to pass, Madison and others thought this would prod the Virginia Assembly to advance its claims more forcefully. By this time the issue of Western lands became entangled with the possibility that a new state, Vermont, would be added to the Confederation. In a letter to Jefferson on April 16, Madison was upbeat that the issue would not soon be resolved. He wrote

It is in the first place very uncertain when a determination will take place, even if it takes place at all; and in the next it will assuredly not be a final one, unless Virg[in]a means to be passive and silent under aggression on her rights. Burnett (1921-1936), 6: 330.

He implored Jefferson to provide any documentation that would help vindicate the claims. At the same time Madison worked with Arthur Lee to antagonize proponents of the committee report. In a series of motions, Lee asked that on each vote on the committee report (or consideration of the Virginia cessions) that each member, before voting, stand and affirm that he had not financial stake in the western lands. While the series of motions never passed, they did demonstrate to all the members the extent to which it would be impossible to resolve the committee report. In a private letter to Samuel Adams dated April 21, Arthur Lee (never shy in his opinions) wrote that he was returning to Virginia to serve in the legislature and that he did not think he could do much more in Congress on the issue. He noted

I can only lament what I cannot prevent and make vain efforts to redeem an infatuated Majority from the bondage of folly and private interest. For what can be expected from an Assembly in which a Member is allowed to sit, who is avowedly an Agent for the Enemies to our cause and Country, an Insolvent, and a profligate Adventurer. Burnett (1921-1936), 6: 331.

Lee was referring to Samuel Wharton of Delaware, but his ire was directed at a large number of people. Madison was much more circumspect, working diligently to ensure that the issue would remain focused on the Virginia cessions or that the committee report would remain blocked. Finally, on May 6, 1782, after numerous votes, the report was postponed *sine die*. This was what Madison was seeking, because it meant that the Virginia Assembly would now have the time to develop a case for its cessions (or try another angle of attack).

The point to this digression is to illustrate the fact that complex issues could be easily sidetracked under the rules. Madison was fully willing to use those rules to the advantage of Virginia. Madison's efforts proved to be useful. Although the issue was revisited again in the fall of 1782 and the New York cessions were accepted, this led to questions about the status of cessions from the other states. Madison continued to press for Virginia to revisit its earlier cessions and ultimately the Virginia Assembly brought forward a new set of cessions for consideration by the Congress. The issue was not resolved until March 1, 1784.

Discussion

The basic point to take away from this discussion is that Madison had plenty of experience within the Continental Congress. He became a well respected legislator, he was at the forefront on all the major issues driving Congress, and he was instrumental in building coalitions to pass (and sometimes obstruct) major pieces of legislation. Madison also experienced all of the turmoil that followed ratification of the Articles, the end of the War with Britain and the rapid inflation that made the Congress' money worthless. His experiences, once he departed Congress in 1783, prepared him for considering an alternative institutional arrangement.

Madison and Post-Congressional Concerns.

Both during and following his service in the Continental Congress, Madison was concerned with several general problems that have commanded the attention of the new institutionalists. Foremost was Madison's running concern with the collective action problem inherent in requisitions from the states. A second class of problems concerned

super-majoritarianism. This took two forms: concerns with achieving an oversized majority and concerns with minority blocking coalitions that prevented majorities from implementing their will. This was intimately tied to considering social choice rules and what would encourage shifting majorities (preventing permanent factions), while at the same time yielding coherent outcomes.

In 1786 undertook a lengthy study of confederated systems. His notes detailed what was positive and what was disastrous for the different confederacies he studied. In April 1787 Madison then collected his thoughts on the "Vices of the Political System of the United States" in which he reflected on the problems attendant with the Continental Congress. Madison's ruminations are important not only because of his encyclopedic study of other confederacies, but also because of his experiences in the Continental Congress and because this sketch of ideas foreshadowed his participation in the Constitutional Convention.

Madison's first point concerned the recurring problem of funding the fledgling government. The impost was never agreed to by all the states and the collective action problem of getting voluntary contributions was never going to succeed (for an excellent discussion of the problems of funding the Continental Congress, see Dougherty (2001)). Madison stated the point in a straightforward manner.

"1. Failure of the States to Comply with the Constitutional Requisitions. This evil has been so fully experienced both during the war and since the peace, results so naturally from the number and independent authority of the States and has been so uniformly exemplified in every similar Confederacy, that it may be considered as not less radically and permanently inherent in than it is fatal to the object of the present system." Meyers (1973) (p. 83)

He well understood that the failure to comply was not simply a matter unique to the Continental Congress. Rather it was endemic in any Confederacy. Voluntary contributions simply would not work and would inexorably lead to the demise of the institution.

How such an institution might fail was also very clear. His seventh point turned to the inability of the Continental Congress to sanction and coerce the various states. Instead, the Continental Congress depended on unanimity – especially when it came to

making fundamental changes to the process of funding a government. Madison's statement on the unanimity principle is not surprising to anyone who has read Buchanan and Tullock (1962).

It is no longer doubted that a unanimous and punctual obedience of 13 independent bodies, to the acts of the federal Government ought not to be calculated on. ... How indeed could it be otherwise? In the first place, Every general act of the Union must necessarily bear unequally hard on some particular member or members of it, secondly the partiality of the members to their own interests and rights, a partiality which will be fostered by the courtiers of popularity, will naturally exaggerate the inequality, where it exists, and even suspect it where it has no existence, thirdly a distrust of the voluntary compliance of each other may prevent the compliance of any, although it should be the latent disposition of all. here are causes & pretexts which will never fail to render federal measures abortive." Meyers (1973) (p. 86)

Here Madison offers a statement about self-interest and its sources. He expresses no doubt that the various states will always have different interests and that those differences will always allow any state to object to carefully constructed legislation by the Continental Congress. Even if unanimity could be achieved in the Continental Congress (a nearly impossible task) when sent forward to the states for consideration, careful deliberation would likely give way to incautious expressions of self-interest. The sources, in his mind, were obvious.

Madison was uncomfortable in pressing for a national government that could possibly be taken over by a unified majority faction. Banning (1995) is quite right when painting Madison as a less than enthusiastic nationalist. Madison had spent too much time in the Continental Congress not to have learned the possibilities for faction in a purely majoritarian institution. In his eleventh and final point on the "Vices" Madison turned to the problem of factionalism. In the prior points Madison detailed the problems of a multiplicity of laws in the various states – many of which covered the same legal point, but led to confusion. Even worse, coupled with a multiplicity of laws was the fact that such laws were in a constant state of flux. The various state courts constantly changed their rulings and this was viewed as a threat to trade. Madison's eleventh point concerned the "Injustice of the Laws of the States." This section anticipates Federalist #10 (in fact segments were lifted directly and inserted into Federalist #10). He argues

there are two sources to unjust laws: representative bodies and people themselves. His first point fixes on the interests of representatives.

Representative appointments are sought from 3 motives. 1. ambition. 2. personal interest. 3. public good. Unhappily the two first are proved by experience to be the most prevalent. Hence the candidates who feel them, particularly, the second, are most industrious, and most successful in pursuing their object: and forming often a majority in the legislative Councils, with interested views, contrary to the interest and views of their constituents, join in a perfidious sacrifice of the latter to the former. Meyers (1973), (pp. 88-89)

On this score Madison is not optimistic that representative bodies will constrain themselves. Certainly the capacity to build majority factions with no concern for other constraints is most likely to undermine the common interest.

However, the most likely cause of unjust laws stems from human nature. In a now familiar argument, Madison contends

A still more fatal if not more frequent cause. lies among the people themselves. All civilized societies are divided into different interests and factions ... In republican Government the majority however composed, ultimately give the law. Whenever therefore an apparent interest or common passion unites a majority what is to restrain them from unjust violations of the rights and interests of the minority, or of individuals? Three motives only 1. a prudent regard to their own good as involved in the general and permanent good of the community. This consideration although of decisive weight in itself, is found by experience to be too often unheeded. ... 2dly. respect for character. however strong this motive may be in individuals, it is considered as very insufficient to restrain them from injustice. In a multitude its efficacy is diminished in proportion to the number which is to share the praise or the blame. Besides, as it has reference to public opinion, which within a particular Society, is the opinion of the majority, the standard is fixed by those whose conduct is to be measured by it. ... 3dly. will Religion the only remaining motive be a sufficient restraint? It is not pretended to be such on men individually considered. Meyers (1973), (pp. 89-90)

Obviously, in Madison's mind, men are not angels. An institution that little constrains the behavior of individuals is likely to give rise to narrow self-interest. This in turn will give rise to permanent factions through individuals joining together to pursue their private interests, unchecked by other institutions. Madison picked up on this theme by arguing

"The great desideratum in Government is such a modification of the sovereignty as will render it sufficiently neutral between the different interests and factions, to controul one part of the society from invading the rights of another, and at the same time sufficiently controuled itself, from setting up an interest adverse to that of the whole Society. Meyers (1973), (p. 91).

The trick is the appropriate design of an institution.

Conclusion

The Continental Congress was an institution that lacked the capacity to pit interests against one another. By the time Madison re-entered the Continental Congress the Congress was severely split by a north/south line of cleavage. When coupled with supermajority rules and low attendance it was virtually impossible to accomplish anything of substance. Madison's earlier experiences had attuned him to the importance of institutional mechanisms for ameliorating private passions. The hodgepodge mechanism of the Continental Congress was inadequate for the task. As such it was no wonder that Madison pressed so hard to have it replaced in the Convention and worked so diligently to see it ratified.

Bibliography

- Abernethy, Thomas P. 1937. *Western Lands and the American Revolution*. Vol. 25, *University of Virginia Institute for Research in the Social Sciences*. New York: D. Appleton-Century Company.
- Banning, Lance. 1995. *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic*. Ithaca, NY.
- Brant, Irving. 1948. *James Madison: The Nationalist, 1780-1787*. Indianapolis, IN: Bobbs-Merrill Co.
- Burnett, Edmund C., ed. 1921-1936. *Letters of the Members of the Continental Congress*. 8 vols. Washington, DC: Carnegie Institution.
- Dougherty, Keith. 2001. *Collective Action under the Articles of Confederation*. New York: Cambridge University Press.
- Dougherty, Keith. 2002. Article for Kernell volume. In *Sam's Book*.
- Hutchinson, William T., ed. 1962. *The Papers of James Madison*. Charlottesville, VA: University of Virginia Press.
- Jensen, Merrill. 1936. The Cession of the Old Northwest. *Mississippi Valley Historical Review* 23:27-48.
- Jensen, Merrill. 1939. The Creation of the National Domain. *Journal of American History* 26:323-342.
- Jillson, Calvin, and Rick K. Wilson. 1994. *Congressional Dynamics: Structure, Coordination and Choice in the First American Congress, 1774-1789*. Palo Alto, CA: Stanford University Press.
- Meyers, Marvin, ed. 1973. *The Mind of the Founder: Sources of the Political Thought of James Madison*. Edited by L. W. Levy and A. F. Young, *The American Heritage Series*. Indianapolis: The Bobbs-Merrill Company.
- Onuf, Peter S. 1977. Toward Federalism: Virginia, Congress, and the Western Lands. *William and Mary Quarterly* 34 (3):353-374.
- Ostrom, Elinor, Roy Gardner, and James Walker. 1994. *Rules, Games and Common-Pool Resources*. Ann Arbor: University of Michigan Press.

Rakove, Jack N. 1990. *James Madison and the Creation of the American Republic*.
Edited by O. Handlin, *Library of American Biography*. Glenview, IL: Scott,
Foresman/Little, Brown Higher Education.

Figure 1

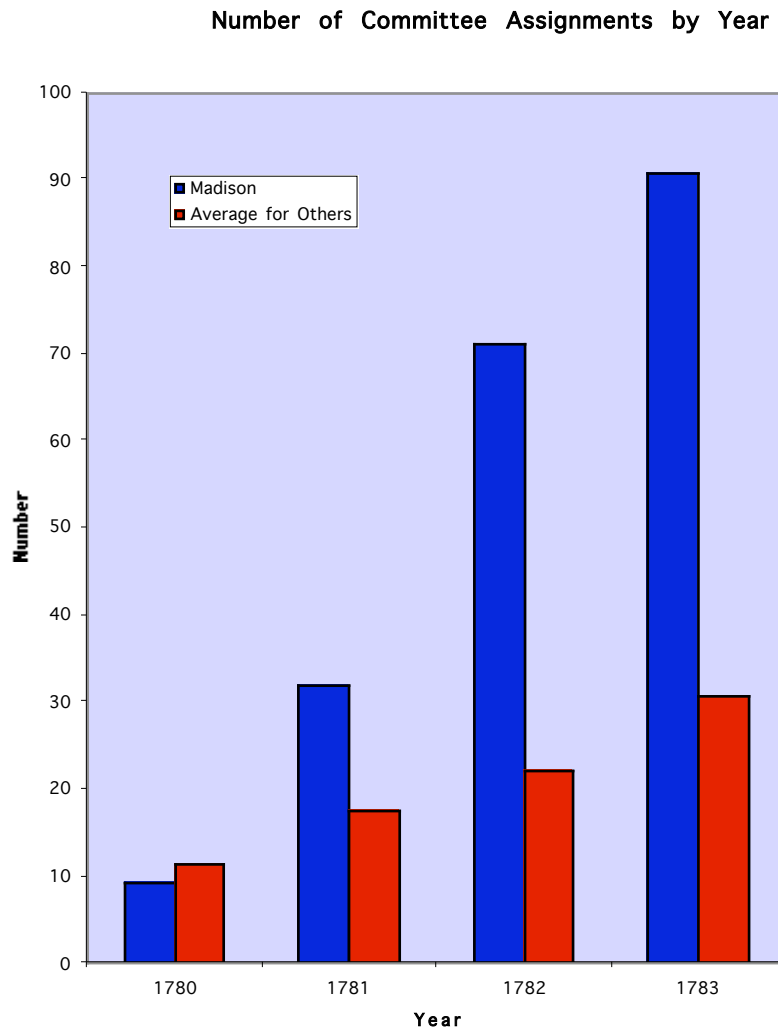


Figure 2
Delegate Voting Positions -- 1780

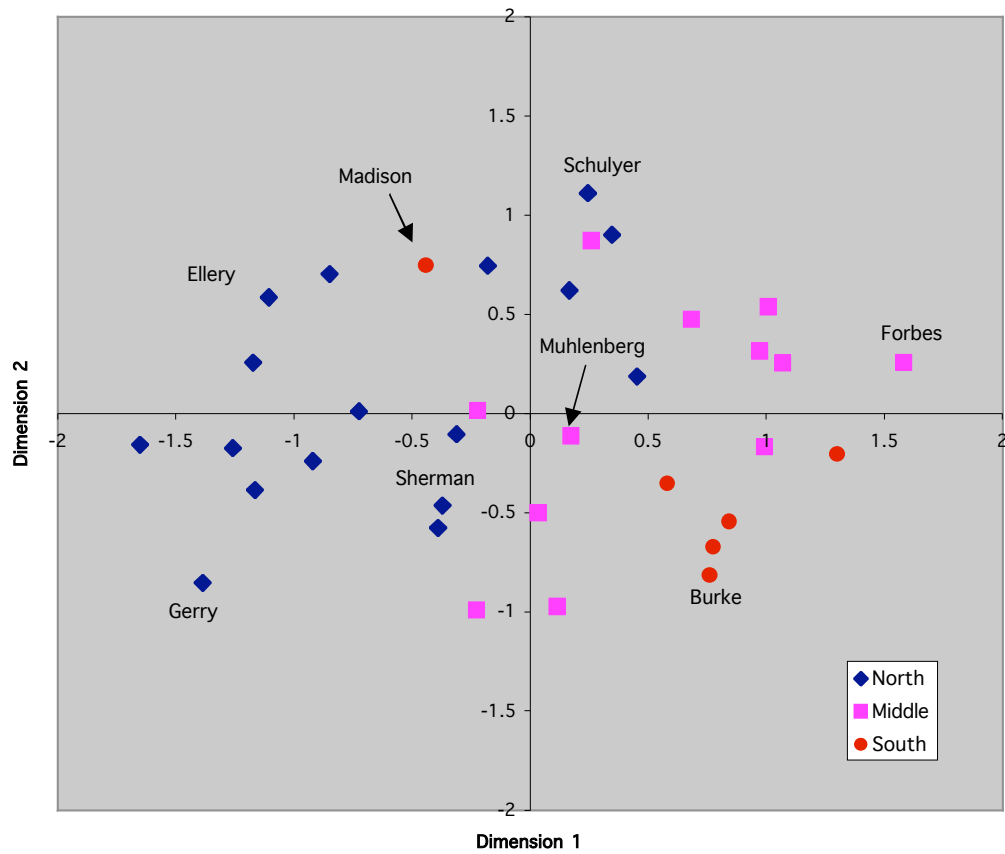


Figure 3
Delegate Voting Positions -- 1781

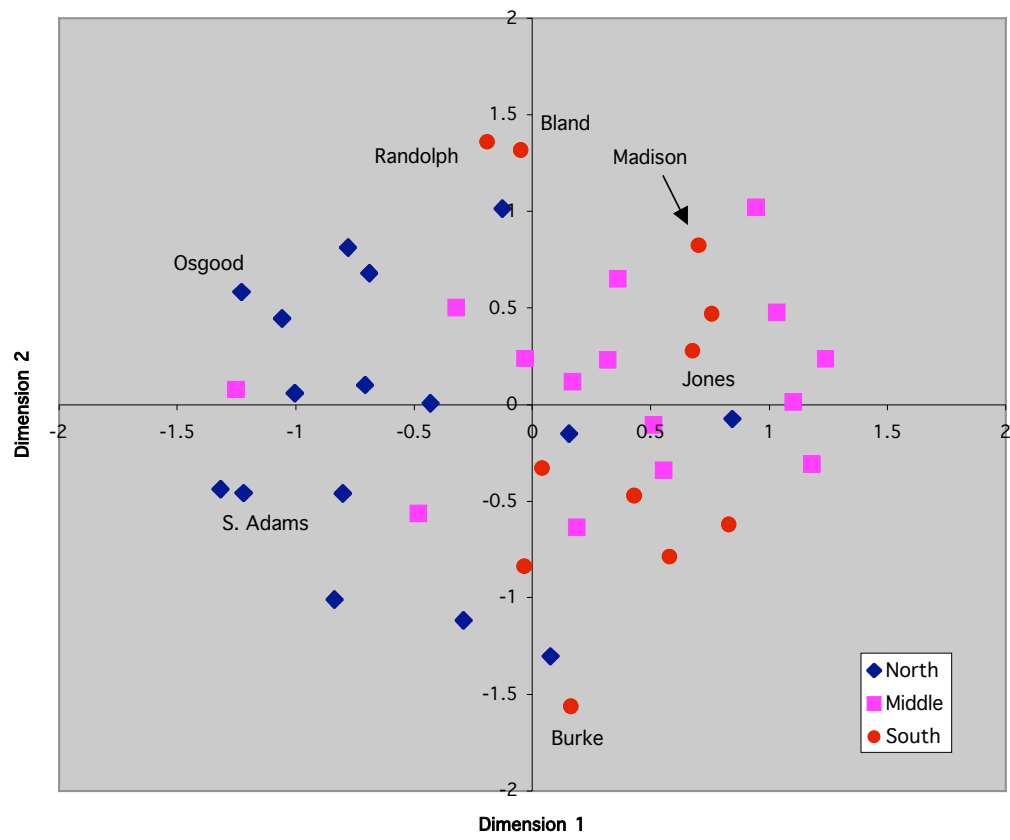


Figure 4
Delegate Voting Positions -- 1782

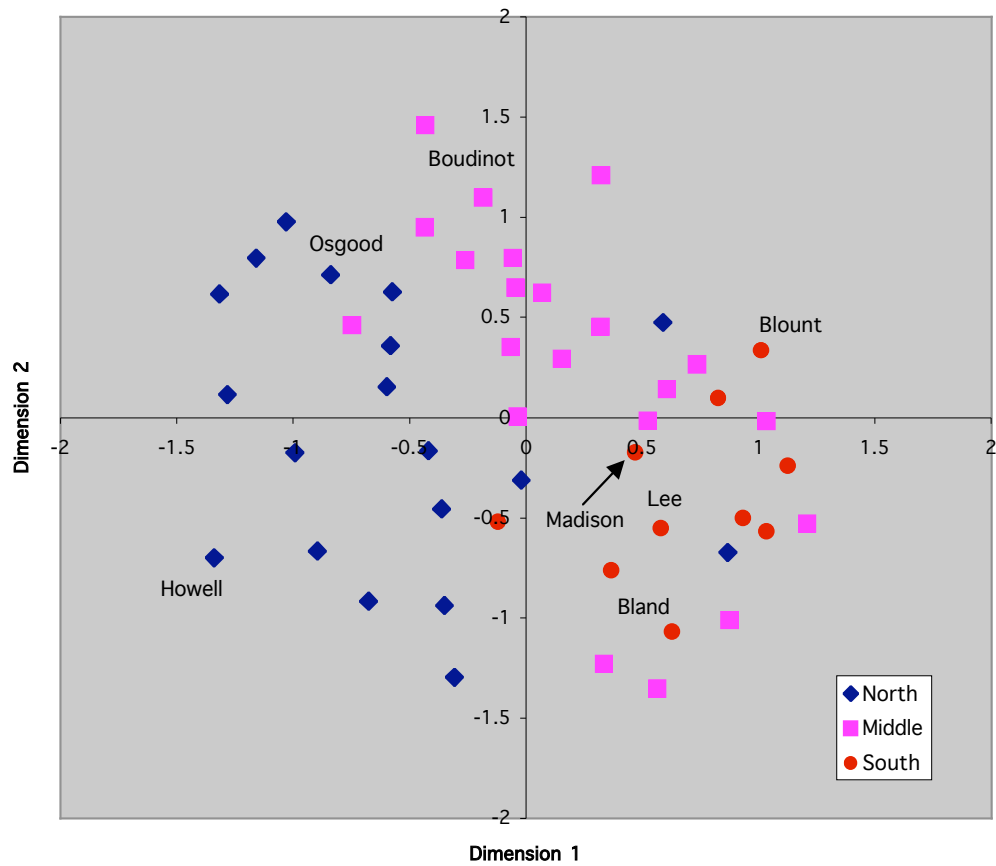


Figure 5
Delegate Voting Positions -- 1783

