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From Interposition to Nullification: Peripheries and Center in the Thought of James Madison

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In 1836, the expiring James Madison offered "Advice to My Country":

The advice nearest to my heart and deepest in my convictions, is that the Union of the States be cherished and perpetuated. Let the open enemy to it be regarded as a Pandora with her box opened, and the disguised one as the serpent creeping with deadly wiles into Paradise.1

Madison's concern for the future of the union had been piqued by the Nullification Controversy and the growing appeal of states' rights.

There is a certain irony in Madison's worries: the states' rights strain of Jeffersonianism owed much to the actions and public writings four decades earlier of Madison himself. The story of Madison's career can be seen as that of a creative politician whose very creativity came, at the end of his life, to threaten his foremost achievement. After his death, his intellectual heirs would rend the union asunder; the doctrine of state sovereignty under the federal constitution, which Madison had helped formulate in response to a perceived threat to republicanism, would be used to truncate the union, the extended sphere Madison had been instrumental in creating and in which he had long lodged his fondest hopes.

James Madison's thinking about federalism prior to 1800 reflected the relative strengths of the federal and state governments at different times. Consistent theory yielded to political imperative; understanding was altered by perspective and experience. Madison had a consistent vision of the ideal polity, but the events of those years

elicited the enunciation of doctrines and the support of constitutional interpretations of which, on sober second thought, he disapproved.2

James Madison was integrally involved in the conception, drafting, and passage of the Virginia and Kentucky Resolutions of 1798. Yet, he had emerged from the Philadelphia Convention eleven years earlier convinced that the old British imperium in imperio had been recreated, concerned that the federal government had not been given enough power vis-a-vis the states. To rectify the situation, he had proposed a constitutional amendment making certain basic freedoms enforceable by the federal judiciary against the states.3

This apparent inconsistency need not be viewed as a sign of opportunism. The Virginia Plan and the Virginia Resolutions were both devices Madison hoped would preserve the hard-won gains of the Revolution. He did not want mere union, but a certain type of union; he did not want mere federalism, but federalism which would return control of the republic to those who could be trusted to act continentally. In the context of 1787, this desire led to advocacy of firmer union in the Virginia Plan; in that of 1798, to assertion of states' rights in the Virginia Resolutions.

Thus, Publius could point to the reservation of rights to the states as a positive feature of the proposed federal edifice: while he would have preferred a more centralized union, Madison believed the union in prospect was superior to the Confederation government. As a statesman, improvement was Madison's goal; as an heir to the thought of St. Augustine, Madison thought that imperfection was to be expected in any human creation; as a practical politician, he adopted popular arguments with which he did not necessarily agree in order to secure his aim.

Madison, like his friend Thomas Jefferson, partook of the ambient partisan excess of the 1790s. Because he tended to see the actions of the Federalist administrations in an extremely negative light, his enunciation of Republican values in the Virginia Resolutions of 1798 and "clarification" in the Report of 1800 were inconsistent with his statements and behavior both before and after the Federalist period. Madison undermined the prospects for long-term durability of his work in the Philadelphia Convention of 1787 by acting as he did in 1798-1800.4

It was to the "Principles of '98" that James Madison's successors in leadership of the Southern interest in federal politics turned until, in the 1960s, the South as an insular political entity was eliminated from American life. Despite what Madison said in his later years, the states' rights tradition was firmly based on his and Jefferson's writings in 1798.5

THE VIRGINIA PLAN

On the eve of the Philadelphia Convention, Madison composed a document entitled "Vices of the Political system of the U. States."6 It was a distillation of all the experience and thought of the Confederation period (the preceding seven years). The first vice he listed was the "Failure of the States to Comply with the Constitutional requisitions." Also included were "Encroachment by the States on the federal authority," "Trespasses of the States on the rights of each other," "want of sanction to the laws, and of coercion in the Government of the Confederacy," "Want of ratification by the people of the articles of Confederation," "Multiplicity of laws in the several States," and "mutability of the laws of the States," among others. A good plan of union should counter these vices, each of which could best be remedied by delegation of more power to the center.

Madison's Virginia Plan was calculated to remedy each of the shortcomings of the Confederation catalogued in "Vices of the Political system of the U. States." As to federalism, Madison said of the Plan:

Conceiving that an individual independence of the States is utterly irreconcilable with their aggregate sovereignty, and that a consolidation of the whole into one simple republic would be as inexpedient as it is

unattainable, I have sought for middle ground, which may at once support a due supremacy of the national authority, and not exclude the local authorities wherever they can be subordinately useful.[7]

These are the words of a nationalist cognizant of the fact that the federal government would be too distant to perform all the functions traditionally filled by the states. The Virginia Plan addressed all these concerns.

Although many of his plan's provisions were adopted, Madison's experience at the Convention was an unhappy one. The "Father of the Constitution"[8] was dissatisfied with the final product because the new Senate was to be an un-republican institution.[9] The decision that states would be represented equally, in lieu of apportionment by population, made him wary of delegating new powers to the government: had both houses been apportioned in the "republican" way, according to population, as in the Virginia Plan, Madison would have supported a far more national system than the Convention produced.[10]

It is difficult to reconcile the public Madison of the Federalist Papers with the author of Madison's correspondence in 1787. Publius's arguments stressed the reserved rights of the states and the limited nature of the newly minted federal government; in his correspondence, Madison not only decried the structure of the Senate, but was especially aggrieved by the omission of a federal veto over state statutes.

As he would explain in Federalist 10, Madison hoped that extending the sphere would reduce the possibility that faction could result in harmful statutes; the veto was a device for extending the sphere in all areas of governmental activity, not just those over which Congress had been given legislative authority.[11] In a letter to Thomas Jefferson dated October 24, 1787, Madison lamented that the veto's defeat had removed the possibility of putting an end to the pernicious ascendancy of local factions.

As it stood, the constitution "involve[d] the evil of imperium in imperio." This evil had been absent from the old imperial constitution, but it had afflicted several other confederacies, including Revolutionary America. "[T]he impossibility of dividing powers of legislation, in such a manner, as to be free from different constructions by different interests, or even from ambiguity in the judgment of the impartial, requires some such expedient as I contend for." He added almost as an afterthought that such a negative also held out the promise of protecting individual rights, especially by rendering state statutes less evanescent. The extension of the sphere made the federal government a more trustworthy guardian of rights than the states, and the veto would have perfected American federalism.[12]

Madison's proposal to give the federal legislature a veto over state statutes was the single provision on which he was most insistent in the Convention. When it was watered down, then removed from the Virginia Plan, he brought it up again (he did not press in this way for his preferred manner of apportionment of the federal senate).[13] He seems to have regarded this device as a panacea for the ills of the Confederation period. As mentioned above, he believed it would lessen the influence of faction. This ameliorative effect would be felt both on the federal level and in the states, where insidious laws would be negated. One result would be a new flowering of support for republicanism.[14]

Madison was convinced the omission of this feature from the federal plan insured its failure; the courts' new role as enforcers of the federal constitution against state executives and legislatures seemed a poor substitute.[15] Still,

[t]he great desideratum in Government is, so to modify the sovereignty as that it may be sufficiently neutral between different parts of the Society to controul [sic] one part from invading the rights of another, and at the same time sufficiently controuled [sic] itself, from setting up an interest adverse to that of the entire Society.

All that, he averred, had been achieved,[16] so there was merit in the whole.

Madison believed that failure to secure ratification would entail the dissolution of the American union, and, to a nationalist Virginian, that meant disaster.17 He remained unreconciled to the federal features on which the small states' delegates had insisted, but he thought a union of all thirteen states essential. The Convention left Madison in the middle ground: he supported the constitution despite its flaws, yet, if the Antifederalists' insistence on strict construction would force some Federalists to yield the point even before the Tenth Amendment was added,18 Madison was headed in their direction by the time the Philadelphia Convention adjourned.

THE PUBLIUS PROJECT

On leaving Philadelphia, Madison undertook the Publius project. Some have said that his contribution displayed the political philosophy that would mark the rest of his career.19 Given the grave misgivings he had about the document, it seems more likely that Madison's performance was simply what was necessary to secure ratification.20 To that end, Madison, like his co-authors, marshalled the most telling arguments available, often without wholly believing in them himself. Several would later prove useful to him in the crisis he perceived in the administration of John Adams; however, those very arguments were prominent among those of his own utterances whose meaning he disputed, even distorted, in the context of the Nullification Controversy. One must handle the Publius letters with care, for it is often unclear whether Madison's contribution was solely instrumental.

Perhaps the most formidable objection Publius had to overcome came from Montesquieu. In *The Spirit of the Laws*, the Baron had argued that if republican government were adopted by a large state, diversity of interests would lead to faction and civil strife; the homogeneous populations of successful (small) republics had homogeneous interests.21 The "esteemed Mr. Montesquieu" was taken as an authoritative source by lettered Americans in the eighteenth century, and this argument was oft-cited.22 Madison adopted David Hume's argument that a larger republican polity would be less apt to suffer domestic unrest because difficulties of communication and diversity of interests would render the ascendancy of one faction unlikely.This argument was perfectly suited to his need for a response to Montesquieu's position.

In Publius's thirty-ninth letter, Madison asked whether the new government would be national or federal, answering,

it appears, on one hand, that the Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but . . . that this assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State — the authority of the people themselves. The act, therefore, establishing the Constitution will not be a national but a federal act . . . Each State, in ratifying the Constitution, is considered as a sovereign body independent of all others,25 and only to be bound by its own voluntary act.26 [Madison's emphasis]

Madison would contradict this statement of the union's nature in the Nullification controversy a half-century later.27

In Madison's Federalist 44, Publius considered the possibility of latitudinarian constructions of the new charter. He held that successful congressional usurpations would require cooperation by the executive and judiciary; if each of them failed to impede the usurpation,

in the last resort a remedy must be obtained from the people, who can, by the election of more faithful representatives, annul the acts of the usurpers. The truth is, that this ultimate redress may be more confided in against unconstitutional acts of the federal than of the State legislatures, for this plain reason that as every such act of the former will be an invasion of the rights of the latter, *these will be ever ready to mark the innovation*,

to sound the alarm to the people, and to exert their local influence in effecting a change of federal representatives.28[emphasis added]

Perhaps the most important Madisonian constitutional precept appears in Federalist 45. There, Madison averred that, "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."29 Here we have the crux of the later jurisprudential dispute between Federalists and Republicans. He went on to say,

ambitious encroachments of the federal government on the authority of the State governments would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm. Every government would espouse the common cause. *A correspondence would be opened. Plans of resistance would be concerted.*30 One spirit would animate and conduct the whole. The same combinations, in short, would result from an apprehension of the federal, as was [sic] produced by the dread of a foreign, yoke; and unless the projected innovations should be voluntarily renounced, *the same appeal to a trial of force would be made in the one case as was made in the other*. [emphasis added]31

The cooperation of Kentucky and Virginia in 1798 bore a striking resemblance to this scenario, but with this important distinction: they were only two states, but each spoke as if it could act unilaterally.

CENTRALIZATION IN THE 1790s: VIRGINIA AND KENTUCKY RESPOND

Madison and Jefferson were at the center of the political turmoil of the 1790s. Jefferson, the former Minister to France, had many friends and acquaintances among the French intelligentsia, and this helped to insure that he would receive the French Revolution enthusiastically. Hamilton, Adams, and other Federalists were skeptical of the possibilities for good inherent in the activities of the revolutionaries, especially as events progressed. They therefore tended to tilt toward England in the European wars. Jefferson and Madison, on the other hand, believed through most of the 1790s that France's cause was America's: republicanism. For them, it was not a long leap of logic to seeing Americans who were unsympathetic with the French cause, even old colleagues Adams and Hamilton, as monarchists. When conditions in France became unpalatable to the Republicans, they remained distrustful of the "Anglomen."

Jefferson and, particularly, Madison thought they saw a love of aristocracy and centralization at work in the Washington administrations' economic policies. Thus, while Madison supported some expenditures given constitutional warrant only by the broadest of interpretations of the general welfare or the necessary and proper clause,32 he insisted on strict construction when Congress considered establishment of a national bank33 and when Hamilton submitted his famous "Report on Manufactures"34; he also proposed an impracticable alternative to Hamilton's plan for repayment of the war debts.35

This disposition on the part of the Republican leaders carried over into military policy, where Madison and Jefferson read the Washington and Adams administrations' calls for military preparedness as attempts to corrupt the constitution (and American society generally36). They thought the Federalists' desire to augment the standing military force smacked of Walpole; they called the supporters of the Bank of the United States "Tories" (as early as 1791)37; they marvelled at President Washington's farewell warning against foreign entanglements (anti-French, therefore anti-republican); they saw Hamilton's insistence that the union's credit depended on prompt repayment of the war debts as an excuse for corruption. The evolving hideousness of the French Revolution was of secondary importance to the Republicans, whose prime concern was that European militarism not infect America.38

The retirement of General Washington, whom Madison had long admired, even revered, reinforced Republicans' worries. The Federalists quickly enacted legislation creating a standing army and navy, buttressing the nation's coastal defenses, and imposing direct taxes to pay for it all. With the uproar over the XYZ Affair and the passage of the Alien and Sedition Acts, the Quasi-War appeared to have arrived on the

home front in earnest.[39] His first reaction to the draft Alien Act had been that it was a "monster that must for ever [sic] disgrace its parents";[40] when Adams signed the Act, Jefferson and Madison responded with their resolutions.

The potential for division inherent in the doctrines of 1798 was obvious. Still, Madison's trimming did not serve, and his worst fears about the long-term consequences of the Virginia and Kentucky Resolutions were realized: they provided the ideological underpinnings for several subsequent campaigns against claims of authority by the federal government. As was his custom, Madison seized the most powerful arguments available for bringing the state of the polity closer to his ideal.

The Virginia Resolutions were an extreme states' rights statement. Virginia called on the states to insist on a narrow interpretation of the necessary and proper clause of Article I, Section 8 of the United States Constitution. After nearly a solid decade of political defeats, Madison was casting about for some means of constitutionalizing protection of minority rights against what must have seemed a perpetual Federalist domination.

Jefferson's version, which Madison had seen in draft and which was adopted (in slightly amended form) by the legislature of Kentucky, was substantially too clear for Madison.[41] Relying on the Tenth Amendment, Jefferson insisted that the Alien and Sedition Acts were unconstitutional intrusions on the rights of the states;[42] the states were obliged to nullify them within their respective boundaries.[43] Madison was hesitant to put the matter that plainly. Whether that was a result of disagreement with Jefferson's formulation, because of a wish to avoid driving off moderate sympathizers, or a means of avoiding Federalist accusations of usurpation is unclear. The contemporary evidence suggests the last of the three possibilities is closest to the mark, although the second probably also played a role.[44]

Despite their reputed moderation, the Virginia Resolutions had a threatening air.[45] They opened with a statement of Virginia's "firm resolution to maintain and defend the constitution . . . against every aggression, either foreign or domestic" and a pledge of support to the United States government when its laws were constitutional.[46] Then, after a second resolution reiterating the support for the constitution plighted in the first, came the central resolution:

That this Assembly doth explicitly and peremptorily declare, that it views the powers of the federal government, as resulting from *the compact to which the states are parties*; as limited by the plain sense and intention of the instrument constituting that compact; as *no farther valid than they are authorised [sic] by the grants enumerated in that compact*, and that in case of a deliberate, palpable and dangerous exercise of other powers not granted by the said compact, the states who are parties thereto *have the right, and are in duty bound, to interpose for arresting the pro[gress] of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them*. [emphasis added]

Thus, like Jefferson's draft Kentucky Resolutions, Madison's final Virginia Resolves asserted that the state had a "duty" to maintain its "rights and liberties" within its boundaries. To read the Virginia Resolutions, and especially the third one, as a moderate statement of civil libertarianism or a mere campaign platform for 1800[47] is to read them in the light of Madison's later gloss. It seems more reasonable to read them, as many Federalists and Republicans alike did, as more ominous. The arch-Federalist Theodore Sedgwick called them "little short of a declaration of war."[48]

Pennsylvania's legislature decried them as part of a move toward disunion,[49] and with good reason: John Taylor of Caroline, their sponsor in the Virginia legislature, was privately advocating precisely that.[50] Indeed, whatever Jefferson's and Madison's intentions, the compact theory of the constitution enunciated in the Virginia and Kentucky Resolutions had this in common with the tree of knowledge: the forbidden fruit (nullification and/or secession) likely would be eaten sometime. The distinction so often drawn between Jefferson's wording and Madison's moderate tone seems strained: What is the difference between "null, void,

and of no force or effect" and invalidity[51]? Between "nullifying" a statute and "interpos[ing]" to prevent its enforcement?

The following (fourth) resolve lamented the tendency of the federal government to interpret constitutional grants of power too broadly. The result must be a change from republican to monarchical government. The fifth resolve was dedicated in part to the argument that the Alien and Sedition Acts united executive and judicial functions in one man, thus endangering republicanism. Besides that, it said, the Sedition Act involved the exercise of powers specifically denied to the federal government by one of the amendments to the constitution; it did so in a way calculated to undermine responsibility in government.[52] The resolutions closed with an appeal to other states to concur in Virginia's position.[53]

The reaction of the public at large must have been a crushing disappointment. Only North Carolina, of the other Southern states, responded in any way, and its senate refused to endorse the resolutions.[54] North of the Potomac, the result was even worse: in total, nine states flatly repudiated the Republican manifestos, and a tenth rejected them without responding.[55]

THE REPORT OF 1800

Madison stood for the legislature in 1799 to defend the Virginia and Kentucky Resolutions. Intended as a vindication, his Report of 1800 was largely ignored at the time because of the press of the presidential campaign, on which it "probably had little effect."[56] The legislative debate over the Report of 1800 centered on the third resolution of 1798, specifically the sense in which the states were parties to the federal constitution.[57] This issue and the related question of state sovereignty, when added to the cataclysmic fallout of the XYZ Affair, cut into Republican support in the congressional elections intervening between the two documents. By the time Madison submitted his Report, the Federalists had their largest congressional majority ever.[58]

Irving Brant, Madison's leading biographer, held that the report of 1800 was merely an elucidation of the Virginia Resolutions of two years earlier,[59] but a close reading reveals greater moderation, even a touch of obfuscation, in the Report. Motivations for a change in tone are obvious: Jefferson was in the middle of a presidential campaign, and the public, even in the South, had responded unfavorably to Virginia's earlier statement.

A tactical shift in Madison's emphasis is perfectly consistent: the Virginia Resolutions had gone farther in asserting states' rights than had the *Federalist*, which had itself been less nationalist than Madison's private views. Advocacy of states' rights was a tactical move,[60] and Jefferson's election promised to allay Madison's fears. Thus, the Report opened with a statement that the General Assembly should clarify its meaning and thereby mollify those who had perceived the Resolutions of '98 as signs of "a diminution of mutual respect, confidence and affection, among the members of the union."[61]

After judging the first two resolutions of '98 unobjectionable, the Report launched into a discussion of the central, third, resolution. One of the points made there was that although the meaning of the statement that the states were parties to the constitutional compact was unclear, all would agree that the people in the states qua state were parties. Virginia (Madison) deduced, even in the wake of the other states' response in 1798, that it was obviously up to the states to decide when the compact had been violated.

However, the Report continued, interposition must not be employed "either in a hasty manner, or on doubtful and inferior occasions . . . [but] can be called for by occasions only, deeply and essentially affecting the vital principles of their political system."[62] This was not a new point, but one made in the text of the Resolutions themselves, which said only cases of a "deliberate, palpable and dangerous nature" [emphasis in the original] justified such extreme measures.[63] As to the objection that it was for the federal judiciary, not the states, to decide these questions, Virginia responded that this would mean that the delegation of powers had destroyed a party to the compact, which was an absurdity and implied that a league of the three branches of the federal

government could exercise undelegated power.64 This argument, too, assumed the states to be parties to the pact.

The perceived Federalist attack on republicanism had come in for criticism in the fifth resolution, and, since it was the gravamen of the Republican complaint, that resolution was the subject of the bulk of the Report. The main point of the explication was that the Alien and Sedition Acts were exercises of power not granted to Congress by the constitution.

RECANTING â€˜98

After 1800, the Republicans prosecuted people for seditious libel.65 With friends of republicanism and sound constitutional construction such as they in office, the crisis had passed; the extreme rhetoric Madison had employed in response to the Federalists' use of the law of seditious libel was no longer indicated.66 Principle depended on circumstance.

The closest antebellum parallel to the Republicans' state of mind in the 1790s was that of the South Carolina Nullifiers in 1831-1833.67 The Nullifiers formally propounded the theory of interposition anonymously drawn up by Vice President John C. Calhoun, which resuscitated the Principles of '98, particularly Virginia's third resolution, to prevent enforcement within South Carolina's borders of the federal tariff.68 Thus, Madison became the center of the debate over state sovereignty and nullification. Each side requested his support; he explained why his past pronouncements did not mean what they seemed to mean.

Left unclear by Madison's letters during this period is the reason he chose to recant his position of 1798. Seemingly, it would have been easy for him simply to state that he had been concerned in the 1790s with the prospect of the imposition of an unrepublican police state, so state interposition was appropriate. The tariff, he could have said, might be inequitable, even unconstitutional, but it did not justify "calculat[ing] the value of the union."69 Instead, after saying that, he went on to lay out a consolidationist view.

Instead, Madison's response was to insist that the Virginia Resolutions and the Report of 1800 had not meant that any state had the right to nullify a federal policy. The Madison of 1830 was much more like the Madison of the Philadelphia Convention than like that of 1798; while Madison the opposition politician had participated in the partisan extremism of the 1790s,70 since 1800 he had become increasingly convinced that federalism, the "extension of the sphere," held out the promise of secure republicanism to as many as would take advantage of it, rhetorically inquiring,

May it not be regarded as among the Providential blessings to these States, that their geographical relations[,] multiplied as they will be by artificial channels of intercourse, give such additional force to the many obligations to cherish that Union which alone secures their peace, their safety, and their prosperity?71

In 1830, Senator Robert Y. Hayne, Carolina's champion in the famous Webster-Hayne Debate, sent Madison a copy of his speeches. Hayne obviously expected the author of the Virginia Resolutions to endorse the doctrine of nullification. In response, Madison adopted totally different ground.72 He disapproved of the notion that a single state could nullify any statute which was not so oppressive as to absolve that state of all responsibility to the union. He added, "[T]he Constitution of the U.S. . . . must be its own interpreter according to its text and *the facts of the case*.73 [Madison's emphasis] The charter was that of *one people* [emphasis added] and could not be negated but by the whole people."74

This was a modification in doctrine that had been rendered necessary by Calhoun's strict fidelity to Virginia's formulation of 1798. Madison feared that one state would act to nullify through a specially chosen convention (as South Carolina eventually did); he felt compelled to deny the legitimacy of such action. It was exactly the opposite of the view he had taken as Publius forty years before and later in the Report of 1800, when he had called ratification a federal act (thus recognizing state sovereignty).75

He next stated that the supremacy clause governed the question; if that failed, impeachment might be tried, then amendment. Madison closed with the incongruous statement that the failure of all these remedies would entitle a state to resort to the law of self-preservation, but that that was a right the government need not respect.[76]

Referring to the debates over the Virginia Resolutions, Madison told Hayne:

the tenor of them does not disclose any reference to a constitutional right in an individual State to arrest by force the operation of a law of the U.S.[77]

Interstate cooperation, he said, had been the aim of the General Assembly. If either the understanding of the other political actors of 1798 or the plain meaning of the section of Virginia's third resolution reproduced above is to be trusted, this statement, with its implication of exclusivity, was simply untrue.[78] The phrase "null[,] void & of no power or effect" had been deleted, showing, claimed Madison, that nullification had not been in Virginia's mind. As for Kentucky, he incorrectly stated,[79] "nullification" had never been part of its resolutions.

Then followed a passage dealing with the mutual cessions of authority to the federal government by the states, which proved that they were all yet equal, an argument which ignored the question of what would happen if one state or a minority of states were discriminated against via a power not granted to the Congress by the constitution or through employment of a constitutional power in an unintended fashion (the circumstance Hayne claimed to face).[80] Madison then arrived at what must have been for him the central problem with nullification: it presaged the end of the union. He referred Hayne to Federalists 39 and 44.

In his August 28, 1830 letter to Edward Everett,[81] Madison gave a glimpse of the reasons for his change of mind since 1798. The episode of the Alien and Sedition laws, in his opinion, showed that republicanism itself was an adequate check if the people were properly informed. The Nullifiers' complaint, he said, was that the people at large disagreed with them; no good republican could grant them that.[82] The notion of a preemptory veto by one state, valid until disapproved by three-fourths of the states, was dismissed for the same reason.[83] The constitution had been ratified by all, he said, and must be amendable only as provided, adding, "nothing is said [in the Report] that can be understood to look to means of maintaining the rights of the States beyond the regular ones within the forms of the Constn." [sic]

In his March 27, 1831 letter to James Robertson,[84] Madison made the point that interposition by individual states had never been contemplated; this was shown by the use of the word "states" throughout the Virginia Resolutions and Report of 1800. That reference to states' rights, even if the rights of individual states were under consideration, also might be in the plural seems not to have occurred to him.[85] The Nullifiers read such language as we would.

In still another letter about nullification, Madison said:

The essential difference between a free Government and Governments not free, is that the former is founded in compact, the parties to which are mutually and equally bound by it. Neither of them therefore can have a greater right to break off from the bargain, than the other or others have to hold them to it.[86]

He continued that the use of the word "respective" in Virginia's third resolution did not connote rights of individual states, an incredible construction. The letter closed with regrets about the Nullification Proclamation, which Madison thought had spurred fears of consolidation,[87] but did not suggest a way to offset the trend.

The result of Madison's volte-face was, as he regretted, that he was "denounced as Innovator, heretic & Apostate."[88] He should not have been; the doctrine of secession and nullification was absurd, especially in light of the fact that no foreign government recognized any capacity for international action in any of the states.[89]

His most extreme anti-Nullifier statement, the March 12, 1833 letter to Virginia's Senator William Cabell Rives,90 stated that the states had transferred their sovereignty to the federal government and that the transfer was permanent; the federal government was the final arbiter of its own powers. Assuming the inerrancy of Supreme Court (thus of federal) interpretation, he said, "As this is a simple question whether a State, more than an individual, has a right to violate its engagements, it would seem that it might be safely left to answer itself."

Madison went to his grave insisting that Virginia's third resolution of 1798 had been misrepresented by the Nullifiers: — it must be understood as a mere introduction of the seventh (which called for interstate cooperation).91 The states, he admitted (in contradiction of his earlier statement in the same letter), were the final arbiters of constitutional meaning, but should exercise that authority only in extreme cases such as that presented in 1798.92 Immediately contradicting himself, he said interposition was extra-legal, for it would lead to a multiplicity of federal regimes (a different one in each state).93 1798's "interposition" had simply meant petitioning, followed by resort to the ballot.94

The most striking thing about Madison's "Notes on Nullification" of 1836 is that it approved virtually every argument that could be considered against nullification, the most baffling of which was that sovereignty has been divided in the American system, therefore the states must obey the federal government.95 What aspect of sovereignty that leaves the states is not clear; that it leaves the Tenth Amendment out of the Constitution is.

One last time, Madison stated that the constitution had been ratified by one people acting in thirteen states, thus contradicting again his statements to the opposite effect in Publius's thirty-ninth letter and in the Report of 1800. The difference was "interesting, but as an historical fact of merely speculative curiosity."96 Madison's final pronouncement on nullification closed with a statement of his political faith, a recapitulation of the experience that had left him a firm advocate of union:

Thus far, throughout a period of nearly half a century, the new and compound system has been successful beyond any of the forms of Govt., ancient or modern, with which it may be compared; having as yet discovered no defects which do not admit remedies compatible with its vital principles and characteristic features. It becomes all therefore who are friends of a Govt. based on free principles to reflect, that by denying the possibility of a system partly federal and partly consolidated, and who would convert ours into one either wholly federal or wholly consolidated, in neither of which forms have individual rights, public order, and external safety, been all duly maintained, they aim a deadly blow at the last hope of true liberty on the face of the Earth.97

Madison here ignored the preceding pronouncements in the same document, which comprised a consolidationist statement worthy of Daniel Webster.

Political theorists had long insisted that sovereignty must be located in one place. Madison's fifty-year attempt to prove them mistaken had failed. His failure would have cosmic repercussions.

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NOTES

1. Saul Padover, "Madison as a Political Thinker," 20 *Social Research* 32, et seq. (Spring 1953), at 54, citing "an 1853 manuscript in New York Public Library Manuscript Division." [sic]

2. I disagree with, e.g., Colleen Sheehan, "The Politics of Public Opinion: James Madison's 'Notes on Government,'" *William and Mary Quarterly* 49 (1992), 609- 627 in that I do not believe there exists a single

(public) writing of James Madison while he was still active in politics in which his political philosophy is revealed clearly. Since all his public writings had tactical purposes, to glean his political philosophy, one must either read his private letters in conjunction with his public writings or consider his post- retirement statements. (The latter course obviously may not accurately reflect the beliefs of the earlier, active Madison.) For a similar view, see Padover, "Madison As a Political Thinker," 33.

3. *Papers of James Madison*, vol. 12, ed. Robert Rutland, et al. (Charlottesville: University of Virginia Press, 1962), 201.

4. Madison's suspicions of the Federalists were even stronger than Jefferson's. John R. Howe, "Republican Thought and the Political Violence of the 1790s," *American Quarterly*, vol. XIX (Summer 1967), 147-165, at 149.

5. For contrary views of historians, see Drew McCoy, *The Last of the Fathers: James Madison & the Republican Legacy* (New York: Cambridge University Press, 1989), 119-170; Adrienne Koch and Harry Ammon, "The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties," *William and Mary Quarterly* 5 (1948), 147-176. For a hint at the reason why my reading is usually rejected by historians, see Ibid., editors' note, 145-146.

6. "Vices of the Political system of the U. States," April 1787, *Papers of James Madison*, vol. 9, 348-357.

7. Ibid., 187-188.

8. *Cf.* Ibid., 229.

9. Ibid., 228 details Madison's objections.

10. The structure of the Senate also led Madison to favor allocating powers to the Executive he had previously favored giving the Senate. *Cf. Notes of Debates in the Federal Convention of 1787 Reported by James Madison*, ed. Adrienne Koch (New York and London: W.W. Norton, 1966), 344, where he agreed that the Executive, not the Senate, should appoint judges.

11. Lance Banning was mistaken in saying the proposed federal veto was to be wholly defensive. Lance Banning, "The Practicable Sphere of a Republic," in Beeman, et al., *Beyond Confederation*, fn. 19, 170-171. Rather, Congress would have been able to employ it even when the federal position was not threatened.

12. Madison to Thomas Jefferson, *Papers of James Madison*, vol. 10, 206-214.

13. Charles Hobson, "The Negative on State Laws: James Madison, the Constitution and the Crisis of Republican Government," *William and Mary Quarterly*, vol. XXXVI, no. 2 (April 1979), 235.

14. Ibid., 218, 225.

15. Ibid., 228-230. Madison expected violence if a state statute were ever declared unconstitutional. Madison to Thomas Jefferson, October 24, 1787, *Papers of James Madison*, vol. 15, 206-214, 211.

16. Madison to Thomas Jefferson, October 24, 1787, *Papers of James Madison*, vol. 10, 206-214.

17. *Cf.* Lance Banning, "Virginia: Sectionalism and the General Good," *Ratifying the Constitution*, ed. Michael Gillespie and Michael Lienesch (Lawrence, Kansas: University Press of Kansas, 1989), 274. As a Virginian, he had a powerful incentive to perpetuate the union: Virginia was militarily vulnerable.

18. Peter Onuf, "Reflections on the Founding: Constitutional Historiography in Bicentennial Perspective," *William and Mary Quarterly* XXIII (1989), 341-375.

19. E.g., by Clinton Rossiter, *The Federalist Papers*, ed. Clinton Rossiter (New York and Scarborough, Ontario: Mentor Books, 1961), xv. The view that Madison's contribution reflected his true beliefs is reflected in a plethora of articles and books, including Lance Banning, "The Hamiltonian Madison: A Reconsideration."

20. This notion is elaborated in Albert Furtwangler, *The Authority of Publius: A Reading of the Federalist Papers* (Ithaca and London: Cornell University Press, 1984), passim., especially 17-44, 112-148. Also see Federalists 62 and 63, in which Madison defended the composition of the Senate.

21. Charles Secondat, Baron de Montesquieu, *The Spirit of the Laws*, tr. Thomas Nugent (New York and London: Hafner Publishing Company, 1966), 120.

22. As Madison and Hamilton conceded, several opponents of the constitution raised this objection to the proposal for establishment of a single government over such a large area. *The Federalist*, 52-53, 83-89.

23. The consonance between Madison's essay and Hume's was first noted by Douglass Adair in "'That Politics May Be Reduced to a Science': David Hume, James Madison, and the Tenth Federalist," *Huntington Library Quarterly*, XX (1957), 343-360.

24. *Cf.* Peter Onuf, "James Madison's Extended Republic," 2380.

25. A position Madison had long held. *Cf.* "Report on Washington-Carleton Correspondence about Treason," *Papers of James Madison*, vol. 5, 42.

26. *The Federalist*, 243.

27. See the discussion of Madison's "Notes on Nullification," infra.

28. *The Federalist*, 305. Madison put theory into practice in the wake of the Jay Treaty's ratification, but the Virginia General Assembly refused to cooperate. *Papers of James Madison*, vol. 16, 95- 104.

29. *The Federalist*, 313. Madison made this point again in Federalist "55, in which he argued, inter alia, that members of Congress need not be as numerous as if it "possessed the whole power of legislation." Ibid., 374..

30. He reiterated this point in "Political Reflections," February 23, 1799, *Papers of James Madison*, vol. 17, 237-243, at 242.*The Federalist*, 320.; see also Federalist 55, Ibid., 376. Madison went on to detail the manpower advantage the state militias must always have over federal forces. Once again, he incautiously laid the groundwork for states' rights extremism. For Madison's more candid appraisal of the relative military strengths of the center and the states, see fn. 12, supra.

31. *Papers of James Madison*, vol. 12, 30 n.2, 91-92; *Papers of James Madison*, vol. 13, 348.

32. Congressional Debate (Madison's notes), February 2, 1791, *Papers of James Madison*, vol. 13, 374; Madison to Edmund Pendleton, February 13, 1791, Ibid.; Irving Brant, *James Madison: Father of the Constitution, 1787-1800*, 327-333.

33. Ibid., 348-349. Madison's constitutional inconsistency was a popular target of Federalist attack, most famously in Hamilton's opinion to President Washington on the constitutionality of the bank. Ralph Ketcham, *James Madison: A Biography*, 321-322.

34. Paying both the original and the current holders of debt instruments was not feasible, Madison admitted: "A composition, then, is the only expedient that remains; let it be a liberal one, in favor of the present holders; let them have the highest price which has prevailed in the market; and let the residue belong to the original sufferers . . . It will be said, the plan is impracticable; . . . but it does not appear to me in that light . . . having never been a proselyte to the doctrine, that public debts are public benefits." *Papers of James Madison*, vol. 13, "Discrimination between Present and Original Holders of the Public Debt," 34- 38, at 37, 38.

35. Ralph Ketcham, *James Madison: A Biography*, 312-315, 331; Drew McCoy, *The Elusive Republic: Political Economy in Jeffersonian America* (New York: W.W. Norton and Co., 1980), passim. Madison to Thomas Jefferson, March 14, 1794, *Papers of James Madison*, vol. 15, 284; "Political Observations," April 20, 1795, 511-533, fn. at 511-512.

36. Madison to Thomas Jefferson, May 1, 1791, cited in Franklyn Bonn, Jr., *The Idea of Political Party in the Thought of Thomas Jefferson and James Madison*, Ph.D. diss., University of Minnesota (1964), 160.

37. For Madison's reaction over time, see Irving Brant, *James Madison: Father of the Constitution, 1787- 1800*, 371-388. For his lack of moral outrage, Madison to Thomas Jefferson, April 12, 1793, *Papers of James Madison*, vol. 15, 6-8, at 7 (approving of the regicide). For outright approval of the French Revolution, Madison to Thomas Jefferson, June 13, 1793, Ibid., vol. 15, 28-30, at 30. The pro-Revolution resolutions drawn up by Madison c. August 27, 1793 for the endorsement of Virginia county governments (any criticism of France = love of England = monarchism, a recurrent Madisonian theme of the 1790s) are at Ibid., 79- 80.*Papers of James Madison*, vol. 17, xx.

38. Madison to Thomas Jefferson, May 20, 1798, *Papers of James Madison*, vol. 17, 132.

39. Jefferson's draft of the Kentucky Resolutions is at *The Portable Thomas Jefferson*, ed. Merrill Peterson (New York: Viking Press, 1975), 281-289.

40. Thus also of the people, who have the right to be governed only by a government of their own device; when the federal government ignores the Tenth Amendment, it deprives the people of government by consent.

41. The editors of Madison's papers aver that Madison's version was therefore "more carefully crafted." *Papers of James Madison*, vol. 17, 186. It is unclear why simple reliance on the Tenth Amendment signifies craftsmanship less careful than Madison's, even though Madison's version was "purposely vague about the recourse left open to a state in protesting such acts." Ibid., 187. Perhaps the editors mean that Madison's version was more politic than Jefferson's.

42. Madison to Thomas Jefferson, December 29,1798, *Id.*, 191-192 contains the famous question, "Have you ever considered thoroughly the distinction between the power of the State, & that of the Legislature, on questions relating to the federal pact." [sic] This is usually read as implying some special Madisonian insight into the nature of the union. However, the following two sentences say: On the supposition that the former is clearly the ultimate judge of infractions, it does not follow that the latter is the legitimate organ[,] especially as a Convention was the organ by which the Compact was made. This was a reason of great weight for using general expressions that would leave to other States a choice of all the modes possible of concurring in the substance, and would shield the Genl. Assembly agst. the charge of Usurpation in the very act of protesting agst [sic] the usurpations of Congress.

43. *Cf.* Neal Riemer, "James Madison's Theory of the Self-Destructive Features of Republican Government," *Ethics*, vol. LXV (October 1954), 40 (text at fn. 24). For a statement of their moderate nature, see "Virginia Resolutions: Editorial Note," *Papers of James Madison*, vol. 17, 188.

44. The Virginia Resolutions of 1798 are at Ibid., 188-190.

45. E.g., Drew McCoy, *Last of the Fathers*; Adrienne Koch and Harry Ammon, "The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties;" Adrienne Koch, *Madison's "Advice to My Country"* (Princeton: Princeton University Press, 1966); Irving Brant, *James Madison: Father of the Constitution, 1787-1800*. If, as Koch and Ammon said, Madison did not "believe that the state was the ultimate judge of both the violation and the mode of redress," he certainly did not make that clear in either the resolutions themselves or the Publius letters. Adrienne Koch and Harry Ammon, "The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties."

46. John Miller, *Crisis in Freedom: The Alien and Sedition Acts*, (Boston: Little, Brown & Company, 1951), 171.

47. Ibid., 172.

48. Ibid., 172-173.

49. "Null: . . . 1: having no legal or binding force: INVALID." *Webster's New Collegiate Dictionary* (Springfield, Massachusetts: G. & C. Merriam Company, 1979).

50. While this is usually read as a matter-of- fact statement, it was probably a misrepresentation of the law of press freedom at the time. Leonard Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* (Cambridge: Harvard University Press, 1960), viii and passim. The uncertainty results from the impossibility of saying whether the doctrine of desuetude had changed the law by 1787.

51. At the end of the eighteenth century, Americans could be expected to be familiar with the long English tradition of enforcing law agreed to be "legal," though not "constitutional." John Reid, *In Defiance of the Law: The Standing-Army Controversy, the Two Constitutions, and the Coming of the American Revolution* (Chapel Hill: University of North Carolina Press, 1981). Thus, Virginia's statement that theses laws were unconstitutional did not necessarily imply that they were "of no force or effect;" that implication came from the "interposition" proposal in the third resolution.

52. North Carolina's legislature had been Jefferson's first choice for the role of junior partner eventually filled by Kentucky's in adopting his resolutions. Adrienne Koch and Harry Ammon, "The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties," 167; Richard Buel, *Securing the Revolution: Ideology in American Politics, 1789-1815* (Ithaca, New York: Cornell University Press, 1972), 223- 224.

53. Ibid., 223.

54. Richard Buel, *Securing the Revolution: Ideology in American Politics, 1789-1815*, 224; Irving Brant, *James Madison: Father of the Constitution, 1787- 1800*, 470; "The Report of 1800: Editorial Note," *Papers of James Madison*, vol. 17, 306.

55. Ibid., 305; Madison to Thomas Jefferson, January 4, 1800, Ibid., 302.

56. John Miller, *Crisis in Freedom: The Alien and Sedition Acts*, 179.

57. Irving Brant, *The Fourth President: A Life of James Madison* (Indianapolis and New York: Bobbs- Merrill, 1970), 299.

58. Lance Banning, *The Jeffersonian Persuasion: Evolution of a Party Ideology*, fn. 29, 284.

59. Report of 1800, *Papers of James Madison*, vol. 17, 307.

60. If interposition consists merely of replacing representatives and instructing senators, why not resort to it on the slightest provocation?

61. Ibid., 310. The analogy of a simple treaty between states was used, implying that each state stood on its own; Madison never raised this analogy in the Nullification Crisis context.

62. Ibid., 311-312.

63. Ibid., 303.

64. John R. Howe, "Republican Thought and the Political Violence of the 1790s."

65. The foremost account is William Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816-1836* (New York and Oxford: Oxford University Press, 1965). The collapse of the (Madisonian) middle position between state sovereignty and consolidation is the topic of Richard Ellis, *The Union at Risk: Jacksonian Democracy, States' Rights and the Nullification Crisis* (New York: Oxford University Press, 1987). Also useful is John C. Calhoun, *A Disquisition on Government and Selections from the Discourse* (Indianapolis: Bobbs-Merrill Educational Publishing, 1953).

66. Madison insisted that the federal tariff, the purported aim of which was to encourage domestic manufactures, was constitutional. Madison to Joseph C. Cabell, September 18, 1828, *Writings of James Madison*, vol. IX (New York and London: G.P. Putnam's Sons, 1910), 316, et seq. His protestation that the distinction between regulatory and revenue tariffs drawn in the Revolutionary crisis did not apply would convince except that it overlooks his doctrine that the states are the parties to the compact (and thus the final arbiters of its meaning). Ibid., 326.

67. William Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina*, 130. This point was tacitly made in Madison to Alexander Rives, January 1833, *Writings of James Madison*, vol. IX, 495.

68. John R. Howe, "Republican Thought and the Political Violence of the 1790s."

69. Madison to Joseph Cabell, September 18, 1828, *Writings of James Madison*, vol. IX, 339-340.

70. Madison to Robert Y. Hayne, Ibid., fn. 2, 383.

71. A point he repeated in Madison to Edward Everett, August 28, 1830, *Writings of James Madison*, vol. IX, 384.

72. This point was reiterated in Madison to Alexander Rives, January 1833, Ibid., 495.

73. See the discussion of Publius' thirty-ninth letter, supra.

74. This point was repeated in Madison to Everett, September 10, 1830, *Writings of James Madison*, vol. IX, 395 (note), and in "Notes on Nullification," Ibid., 573, 539, fn. 1., where he interpreted Thomas Jefferson's reference to nullification as an appeal to natural rights. The notion that governments may of right ignore natural rights seems only to have been applied by Madison in the context of state opposition to federal action. It may appear to be drawn from John Locke's argument that each is on his own when those who have been authorized to make laws see their right to do so usurped. John Locke, *Second Treatise of Civil Government* (Chicago: Henry Regnery Company, 1955), 179. However, Locke was speaking of a unified, not a federal, polity. In the

American case, as Madison said, the constitution of the general government was a federal act; the Lockean conclusion is that federal usurpation would leave the *states* on their own (as is implicit in Virginia's third resolution). In that light, nullification becomes a moderate remedy. Also see Ibid., 184-190, where a discussion of the proper remedies to governmental overreaching puts the people in the right and the government in the wrong (thus contradicting Madison's statement). In neither situation did Locke (or the Carolinians) say that each constituent was free to dissolve the compact: only the government in question (in 1798 and 1830, the federal government) could do that. However, only the constituents could decide when that had occurred, for who else was there? (Madison himself agreed in his Report of 1800.) The central attribute of Locke's compact theory of government is that *delegation is always contingent*: the constituents' rights always remain paramount to those of their creature, the government. The alternative is unlimited government.The foremost practitioner of the Websterite theory of an organic union antedating the federal constitution, President Abraham Lincoln, said the people's existence preceded the constitution and made it possible. If not, "The United States [would] be not a government proper, but an association of States in the nature of a contract [or pact] merely." Garry Wills, *Lincoln at Gettysburg: The Words that Remade America* (New York: Simon & Schuster, 1992), 130, citing Abraham Lincoln, *Speeches and Writings*, vol. 2, ed. Don E. Fehrenbacher (New York: Library of America, 1989), 217. Madison, by saying that the ratification of the constitution was a "federal" act undertaken by "independent" states, said that the states were once distinct. In fact, the United States were referred to in the plural for nearly nine decades, which shows that the people at large understood the situation thus (as does their adoption of the word "federal" to denominate the general government).

75. This point, like the letter generally, was repeated in Madison to Edward Everett, August 28, 1830, *Writings of James Madison*, vol. IX, 383, 402.

76. A threat of force was also implicit in Virginia's and Kentucky's manifestos. Neal Riemer, "James Madison's Theory of the Self-Destructive Features of Republican Government," *Ethics*, vol. LXV (October 1954), fn. 24, 40.

77. *The Portable Jefferson*, ed. Merrill Peterson, 281-289, at 286.

78. Madison insisted that the United States' government was neither national nor federal, but a blend of both, and refused to recognize that one or the other must have the final word on constitutional construction. *Cf*. Madison to Edward Everett, August 28, 1830, *Writings of James Madison*, vol. IX, 384.

79. Ibid., 383.

80. See also Madison to Alexander Rives, January 1833, Ibid., 495, 496. Implicit in this notion is the idea that a congressional majority may legislate as it will, regardless of the Tenth Amendment's reservation of some powers to the states.

81. This argument was repeated in Madison to C.E. Haynes, August 27, 1832, Ibid., 482, et seq.

82. Ibid., 444, et seq.

83. He repeated this argument in Madison to C.E. Haynes, August 27, 1832, Ibid., 482, 483; in Madison to N.P. Trist, December 23, 1832, Ibid., 489, 490; in "Notes on Nullification," 1835-1836, Ibid., 573, 575-576, 580-581, and elsewhere. Using Madison's logic, assertions of "the free speech rights of men" would raise only claims to such rights when exercised corporately, for only the plural is there used.

84. The standard understanding of performance contracts is that absent a fixed term, they can be terminated by any party with reasonable notice.

85. Ibid.

86. Madison to William C. Rives, March 12, 1833, Ibid., 511.

87. If sovereigns agree to act federally in, e.g., foreign affairs, do they cease to be sovereigns, or are they simply sovereigns acting federally in foreign affairs? Whether conventions of the people in each state or the legislatures were the bodies authorized to speak in sovereign capacity, Madison had held in The Federalist that thirteen sovereigns had made the constitution – – that ratification was a federal act, not the act of one people.

88. Ibid., 511, et seq.

89. Ibid., 574.

90. Ibid., 575.

91. Ibid., 575, 577.

92. Ibid., 595-597.

93. Ibid., 599.

94. Ibid., 603.

95. Ibid., 606.