Introduction
Beyond Myths (Madisonian, Federalist, Nationalist, and Liberal): Different Framers and Other Intentions, 1787-1833

Within a year after Congress adopted the Bill of Rights in December of 1791 (as mandated by many of the states as a condition of their ratification of the Constitution), Thomas Jefferson wrote a most remarkable letter to James Madison. Dated October 1, 1792, Jefferson's missive contained the interesting and intriguing phrase "the counter-rights of the states" as follows:

> I have reflected on Govr. Lee's plan of opposing the Federal bank by setting up a state one, and find it not only inadequate, but objectionable highly, and unworthy of the Virginia assembly. I think they should not adopt such a milk and water measure, which rather recognises than prevents the planting among them [of] a source of poison and corruption. . . . The assembly should reason thus. The power of erecting banks and corporations was not given to the general government [but] it remains . . . with the state itself. For any person to recognise a foreign legislature in a case belonging to the state itself, is an act of treason against the state, and whosoever shall do any act . . . shall be adjudged guilty of high treason and suffer death accordingly, by the judgment of the state courts. This is the only opposition worthy of our state [to convict of high treason and sentence to murder anyone found guilty of acting against the state on behalf of the federal bank], and the only kind which can be effectual. If N. Carolina could be brought into a like measure, it would bring the General government to respect *the counter-rights of the states* [italics added]. The example would probably be followed by some other states. I really wish that this or nothing should be done.

Madison's laconic reply is equally revealing. "Your objections to it [the branch bank] seem unanswerable." Later, during the first Nullification movement in Virginia, Madison had this telling comment about organizing an opposition to

Alexander Hamilton's ambitious fiscal and economic plans: "the spirit of party revenge," he wrote to Jefferson, "may be wreaked thro' the forms of the Constitution."[1]

Although included in the modern edition of *The Papers of Thomas Jefferson* and reproduced in James Morton Smith's recent collection of the Jefferson-Madison correspondence, neither editor indicates anything unusual or out of the ordinary about this letter or its phraseology. As suggested here, however, that telling phrase highlighted above is just another way of saying "Nullification" or "State Interposition" albeit expressed in the heightened political language of the early 1790s so soon after the ratification of the Constitution. Readers should also note that Jefferson implied some kind of a state negative or veto as a general principle (inherent in the rights of states) with respect not to civil liberties but to the problematical issue of banks and their constitutionality. Could it be that Nullification was constitutional and a legitimate principle of republican and federal government in America, after all? Proving this central proposition is what this essay is all about What is more the claim is made or reiterated from Irving Brant that James Madison was the "father of Nullification" in Virginia.[2]

These contrary implications, to say the least, fundamentally challenge long-standing and still current negative interpretations of Nullification that assume its unconstitutionality in general as an idea that was beyond the presumed liberal-nationalist consensus of 1787 besides linking it even more negatively to sectionalism and disunionism. Thus the extreme characterization of Marvin Meyers, for example, calling "nullification and secession. . .bastard doctrines and none of his [James Madison's]." Thus, too, the effort to divorce Jefferson and Madison from the first Nullification movement in Virginia by explaining the Kentucky and Virginia Resolutions of 1798-1799 either as a defense of civil liberties (even if the means to this end were wrong-headed) or as electioneering propaganda as the prelude to the "Revolution of 1800."[3]

When it comes to Nullification in South Carolina, the other major political crisis of the union during the early national era (somehow events in New England from 1808-1815 are overlooked because of the fateful Hartford Convention that occurred right at the end of the War of 1812), historians have resorted to reactionary South thesis that combines the unconstitutionality of Calhoun's theories with the defense of slavery. This was the major thrust of William W. Freehling's much lauded reconsideration of the 1960s, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816-1836* (New York, 1966) which central theme continues in *The Road to Disunion: Secessionists at Bay, 1776-1854* (New York, 1990). Other historians of Nullification in South Carolina have more or less followed suit at least in emphasizing the reactionary nature of Calhoun's states' rights philosophy or other variants of states' rights vis-a-vis the liberalism and nationalism of the framers.[4]

Ironically, the key to this reconstruction of the past and of different framers and other intentions including the constitutionality of Nullification is to be found

in none other than the *Notes of Debates* recorded by James Madison during the Federal Convention of 1787. With this source as a beginning point, and almost all scholars attest to its authenticity (except for William W. Crosskey), a chain of documentary evidence emerges from 1787 that explains Jefferson's 1792 letter and the later Virginia and Kentucky resolutions of 1798 and 1799 in light of the Constitution and its ratification. Not only was the idea of Nullification as a state negative or veto raised within the Federal Convention, it was also deemed to be an integral part of an evolving understanding of federalism and the concept of checks and balances to assure separation of powers within the new American government (by function, legislative, executive, and judicial) and between governments (federal or national and state).[5]

As will be amply demonstrated below, the issue of a state veto became with the rights of states themselves the two major problems not resolved at Philadelphia and ultimately the core of the ratification debate and thus the dispute between Federalists and anti-Federalists. In the language of that time, the debate was about drawing a line of demarcation between the powers of the federal government to be and those of the states as well as providing a necessary check or balance by which the states could positively protect their rights against encroachment. Therein is to be found as well another and overlooked theory of the extended republic that was both more consistent with republican ideology and more federal in nature.[6]

So much for the myths of James Madison as "the father of the Constitution" and *The Federalist* as being the last word about the intentions of the framers. As Charles Hobson has concluded (speaking for many scholars), "The name of James Madison is inseparably linked with the United States Constitution of 1787." To quote Forrest McDonald, however, "The myth that he was the Father of the Constitution is a deeply rooted one." "But Madison himself did not accept the sweeping compliment that was often tendered to him as 'the father of the Constitution.'" Here's what Madison wrote to William Cogswell, March 10, 1834: "You give me a credit to which I have no claim, in calling me 'the writer of the Constitution of the United States.' This was not, like the fabled Goddess of Wisdom, the offspring of a single brain. It ought to be regarded as the work of many heads & many hands."[7]

The Federalist has likewise been overrated as the authoritative explication of the constitution's origins and meaning. Giving credit where credit is long overdue, Prof. Murray Dry indicates that the anti-Federalists had clear and coherent principles that "are more relevant to an understanding of the American founding and American polity. . .than has usually been supposed." Indeed, they are "entitled. . .to be counted among the Founding Fathers." As he observes, moreover, "the Constitution that came out of the deliberations of 1787 and 1788 was not the same Constitution that went in. . . ." To Jack N. Rakove, another scholar with a national reputation, "Foremost" as "the essays of The Federalist" are their "sway over modern scholarship begs explanation in its own right." As for the anti-Federalists, however "extravagant or plausible" they were (and most historians prefer

the former designation), their "fears were part of the original understanding of the Constitution. . . ."[8]

Thus the title above and the need to go beyond the myths indicated and look anew at the creation of the American republic. In retrospect, the anti-Federalists deserve the title of "framers of the Constitution" for they were the ones who demanded amendments resulting in the Bill of Rights including the Tenth one that made our new government neither national (as proposed by Alexander Hamilton and James Madison) nor a "quasi-federal" one (the plan reluctantly accepted on the part of the nationalists who agreed to the Great Compromise of July 16, 1787 that provided for state representation in the Senate). Hence the respective and historically accurate terms of "Federalists" (those who supported the plan of government as reported from Philadelphia in September of 1787) and "anti-Federalists" (those who in increasing numbers opposed the limited federalism of 1787).[9]

The Bill of Rights, it seems to be forgotten, was as much about states' rights as personal liberty and without guarantees for the protection of both, the proposed government of 1787 would not have been adopted. Nor would it have been a federal republic. On this point, the anti-Federalists were not opponents of the Constitution but perfecters of it. Nor were they "men of little faith" since a dark view of human nature was a hall mark of 18th century American thought. At the same time, the views expressed in the Kentucky and Virginia Resolutions and the Virginia Report of 1800 (the latter two authored by Madison) were not altogether new creations beyond the meaning of 1787. To the contrary, they simply expressed the language used, i.e., "union of the states," "compact," "reserved rights," and drawing a "line of partition" between powers delegated and not to prevent a "consolidated" government, can all be found in the debates of 1787-1788. After all, the aim of the framers was to create an effective and a limited government in keeping with their radical Whig-republican principles of 1776.[10]

Since what follows is so contrary to accepted historical orthodoxy about 1787 and 1798-1799, extensive quotes from relevant sources will be presented for documentary purposes. To do otherwise would only raise doubts about the author's interpretations. The evidence speaks for itself as does its impact with respect to the nature of the Union whose meaning was not ambiguous to contemporaries or antebellum Southerners. The government of America was a federal republic and a union of the states not the states united.[11]

While the evidence to be presented is certainly not new, there is a new way of looking at it and this is where republicanism comes into the story. When Bernard Bailyn, Gordon S. Wood, and other scholars recovered our original radical Whig-republican beliefs as a people, they did more than reinterpret early American history and thought. They literally cut through what is termed here a "myth of democracy" or the notion that America was born liberal, democratic, egalitarian, and fully unified as a nation. Although associated with Louis Hartz and the Consensus school of historiography of the 1950s and early 1960s, the "myth of democracy" (and its corollary of a reactionary South) had its origins in the North before the

Civil War as seen in 19th century histories of the Revolution and the Constitution and in the Lincolnian idea of the union as absolute. It is this same "republican synthesis" that provides the missing clue to what happened in 1776 and 1787 and what has been lacking heretofore has been an appreciation of the founding generation's preoccupation with the abuse of political power. It is this context that makes clear the underlying concern for separation of powers, strict construction, federalism, and above all the rights of states. It also reminds us that republican ideology is still relevant despite being declared dead as a meaningful concept.[12]

1787 and the Rights of States

The first debate in the federal convention, and the most important one because it led to the defeat of the highly nationalist Virginia Plan (really Madison's) and made states' rights one of the highest priorities, was that between small and large states from May 30 until the Great Compromise of July 16. If the proposed government was not to be national nor a confederation as of old, how were the states to be incorporated into the structure of the new republic? What rights would they have now that they would no longer be independent and sovereign? Dr. Samuel Johnson summed up the situation very neatly on June 21 (*Notes of Debates*, 163):[13]

> On a comparison of the two plans which had been proposed from Virginia & N[ew] Jersey, it appeared that the peculiarity which characterized the latter was its being calculated to preserve the individuality of the States. The plan from Va. did not profess to destroy this individuality altogether, but was charged with such a tendency. One Gentleman alone (Col. Hamilton) in his animadversions on the plan of N. Jersey, boldly and decisively contended for an abolition of the State Govts. Mr. Wilson & the gentlemen from Virg[ini]a who also were adversaries of the plan of N. Jersey held a different language. They wished to leave the States in possession of a considerable, tho' a subordinate jurisdiction. They had not yet however shewn how this c[oul]d consist with, or be secured ag[ain]st the general sovereignty & jurisdiction, which they proposed to give to the national Government. If this could be shewn in such a manner as to satisfy the patrons of the N. Jersey propositions, that the individuality of the States would not be endangered, many of their objections would no doubt removed. If this could not be shewn their objections would have their full force. He wished it therefore to be well considered whether in case the States, as proposed, sh[oul]d retain some portion of sovereignty at least, this portion could be preserved, without allowing them to participate effectually in the Gen[era]l Govt., without giving them each a distinct and equal vote for the purpose of defending themselves in the general Councils.

No Miracle at Philadelphia

Another myth besides that of Madison being the "father of the Constitution" is that of a "miracle at Philadelphia." Such were the conflicting interests to be

accommodated in 1787, it has been argued, that any agreement at all was quite an achievement. Nothing could be farther from the truth. All agreed that a new government was necessary to preserve liberty in America. All agreed that the federal government needed enlarged powers at least in certain areas. Since a national government was out of the question and the Confederation government was obviously defective, the path to be taken was pretty much pre-determined. Put another way, compromise should have been easier than it was. The essential point was twice made by Charles Pinckney on June 16 and June 25 (*Notes of Debates*, 127, 187):[14]

> The whole comes to this, as he conceived. Give N[ew] Jersey an equal vote, and she will dismiss her scruples, and concur in the Nati[ona]l system. . . . All that we have to do then is to distribute the powers the Govt. in such a manner, and for such limited periods, as while it gives a proper degree of permanency to the Magistrate, will reserve to the people, the right of election they will not or ought not frequently to part with. I am of the opinion that this may be easily done; and that with some amendments the propositions before the Committee the [Virginia and New Jersey plans] will fully answer this end.

Oliver Ellsworth and Benjamin Franklin said very much the same thing five days later using more home-spun and pragmatic language: "We are razing the foundations of the building, when we need only repair the roof." (*Notes of Debates*, June 30, 223). "The diversity of opinions turn on two points. If a proportional representation takes place, the small States contend that their liberties will be in danger. If an equality of votes is to be put in place, the large States say their money will be in danger. When a broad table is to be made, and the edge of the planks do not fit, the artist takes a little from both, and makes a good joint. In like manner here both sides must part with some of their demands, in order that they may join in some accommodating proposition." (*Notes of Debates*, June 30, 227).[15]

Nationalists to Blame

If it was known what had to be done, why did the business of the convention drag on and almost come to a complete stop? To William Paterson and other small-state delegates, the blame lay squarely with the nationalists (James Madison, Alexander Hamilton, James Wilson, and Gouvernor Morris).[16]

> "Mr. Strong . . . It is agreed on all hands that Congress are nearly at an end. If no accommodation takes place, the Union itself must soon be dissolved. . . . He thought the small States had made a considerable concession in the article of [on] money bills; and that they might naturally expect some concessions on the other side." (*Notes of Debates*, July 14, 293).
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> "Mr. Patterson [Paterson], thought with Mr. Randolph that it was high time for the Convention to adjourn that the rule of secrecy ought to be rescinded, and

that our Constituents should be consulted. No conciliation could be admissible [sic] on the part of the smaller States on any other ground than that of an equality of votes in the 2d branch. If Mr. Randolph would reduce to form his motion for an adjournment sine die, he would second it with all his heart." (*Notes of Debates*, July 16, 299-300).

"Mr. Rutledge could see no need of an adjourn[men]t because he could see no chance of a compromise. The little States were fixt. They had repeatedly & solemnly declared themselves to be. All that the larger States then had to do, was to decide whether they would yield or not. . . . Had we not better keep the Govt. up a little longer, hoping that another Convention will supply our omissions, than abandon every thing to hazard. Our Constituents will be very little satisfied if we take the latter course." (*Notes of Debates*, July 16, 300-301).

The New American Idea of Checks and Balances

What the small states wanted, of course, was protection for the rights of states in the form of a negative. Such an idea, it was argued, was consistent with the new American theory of checks and balances. Here's how James Madison explained it, a good summary of which is provided in his discussion of a "Council of Revision" as a possible check on the Executive or President.

Mr. Madison could not discover in the proposed association of the Judges with the Executive in the Revisionary check on the Legislature any violation of the maxim which requires the great departments of power to be kept separate & distinct. On the contrary he thought it an auxiliary precaution in favor of the maxim. If a Constitutional discrimination of the departments on paper were a sufficient security to each ag[ain]st encroachments of the others, all further provision would indeed be superflous. But experience had taught us a distrust of that security; and that it is necessary to introduce such a balance of powers and interests, as will guarantee the provisions on paper. Instead therefore of contenting ourselves with laying down the Theory in the Constitution that each department ought to be separate & distinct, it was proposed to add a defensive power to each which should maintain the theory in practice. [Italics added] In so doing we did not blend the departments together. We erected effectual barriers for keeping them separate. . . . (*Notes of Debates*, July 21, 340-341).

James Madison: "If it be a fundamental principle of free Govt. that the Legislative, Executive, & Judiciary powers should be separately exercised, it is equally so that they be independently exercised." (*Notes of Debates*, July 19, 326).

In the above analysis, Madison underscored one of the lessons learned since 1776. The old idea of separation of powers as propounded by Montesquieu had to be improved. Paper barriers did not prevent the abuse of power be it by rulers or by the people. A positive power of self-defense was essential to preserve the independence of the departments of government.[17]

A State Negative Logical

While scholars have long celebrated our system of checks and balances, and devising the proper ones was what the federal convention was all about, they have failed to appreciate that this great innovation in political science was also meant to apply to the states as well. To illustrate this most crucial insight, I offer the following quotes:[18]

> Doct[o]r Johnson . . . The fact is that the States do exist as political Societies, and a Govt. to be formed for them in their political capacity, as well as for the individuals composing them. Does it not seem to follow, that if the States as such are to exist they must be armed with some power of self-defence. This is the idea of [Col. Mason] who appears to have looked to the bottom of this matter. Besides the Aristocratic and other interests, the States have their interests as such, and are equally entitled to likes [sic] means. . . . (*Notes of Debates*, June 29, 211).
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> Mr. Elseworth [sic; Ellsworth] . . . The power of self-defence was essential to the small States. Nature had given it to the smallest insect of the creation. . . . (*Notes of Debates*, June 29, 218).
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> Mr. Elseworth [sic; Ellsworth] . . . the U. S. are sovereign on their side of the line dividing the jurisdictions—the States on the other—each ought to have power to defend their respective Sovereignties. (*Notes of Debates*, August 20, 493).

Not one of the above framers, it should be noted, was Southern. All represented Northern states and interests. Nor can the concern for states' rights be attributed to the need to protect slavery (as most historians have concluded in order to diminish the validity of what was and is a fundamental principle of limited and balanced government).[19]

Clearly and unambiguously, then, a state negative was contemplated by the framers. The idea was explicit in the debate between the large and small states over the composition of the Senate with the latter insisting that the second branch of the national legislature ought to represent States and that they each, respective of size and wealth, be given an equal vote. The rationale here was made clear by Roger Sherman on July 14 *(Notes of Debates*, 291) when he "urged the equality of votes not so much as a security for the small States; as for the State Govts. which could not be preserved unless they *were represented & had a negative in the Gen[era]l Government*." [Italics added] [20]

> Doct[o]r Johnnson . . . He wished it therefore to be well considered whether in case the States, as was proposed, sh[oul]d retain some portion of their sovereignty at least, this portion could be preserved, without allowing them to participate effectually in the Genl. Govt., without giving them each a distinct and equal vote for the purpose of defending themselves in the general Councils." (*Notes of Debates*, June 21, 163).

The idea of a positive power of self-defense on the part of the states did not end with the Great Compromise of July 16 giving states representation in the Senate and an equal vote (*Notes of Debates*, 297-301). It continued within the convention but became subsumed under another critical albeit neglected debate, that of drawing a line of demarcation between federal and state powers (the terminology here will be important later when the first Nullification movement is discussed). Again, contemporary quotes are presented for purposes of documentation.[21]

> Mr. Sherman who took his seat today [May 30], admitted that the Confederation had not given sufficient power to Cong[res]s and that additional powers were necessary; particularly that of raising money which he said would involve many other powers. *He admitted also that the General & particular jurisdictions ought in no case to be concurrent*. . . . [Italics added] (*Notes of Debates*, May 30, 35).
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> Mr. Dickenson [sic; Dickinson] deemed it impossible to draw a line between the cases proper & improper for the exercise of the [national] negative [proposed by James Madison]. We must take our choice of two things. We must either subject the States to the danger of being injured by that of the Natl. Govt. or the latter to the danger of being injured by that of the States. He thought the danger greater from the States. To leave the power doubtful, would be opening another spring of discord, and he was for shutting as many of them as possible. (*Notes of Debates,* June 8, 91).
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> "Mr. Sherman observed that it would be difficult to draw the line between the powers of the Genl. Legislatures, and those to be left with the States. . . ." (*Notes of Debates*, July 17, 302).

To cut short a long and complicated story, the matter of rights to be reserved to the individual states remained a sticking point. That it would become one of the critical issues during the ratification process was highlighted in the convention's last days by those already expressing objections to the proposed new government for the United States. "Mr. Randolph took this opportunity to state his objections to the System. They turned on [among other things] . . . the want of a more definite boundary between the General & State Legislatures . . . and between the General and State Judiciaries. . . . (*Notes of Debates*, September 10, 614).[22]

From Federalism to Confederalism: The State Ratification Debates and the Drawing of A Line of Demarcation

Just as states' rights (including the idea of a negative or a positive power of self defense) were of central concern within the Federal Convention of 1787, so too did they continue to be an issue in the state conventions called to debate the proposed new government. A sample of quotes follows:[23]

> Are not the terms, common defence and general welfare, indefinite, undefinable terms? *What checks have the state governments against such encroachments*? [Italics added] (Mr. Williams of New York, June 27, 1788, in Elliot, ed., *Debates*, II, 321).

> Congress . . . is to be considered as only a part of a complex system. The state governments are necessary for certain local purposes. The general government for national purposes. The latter ought to rest on the former, not only in its form, but in its operations. *It is therefore of the highest importance that the line of jurisdiction should be accurately drawn*. . . . [Italics added] (Mr. Melancton Smith of New York, June 27, 1788, in Elliot, ed*., Debates*, II, 316).

Despite assurances by nationalists that the rights of states were secured under the proposed government, true federalists and republicans nevertheless insisted on amendments to preserve the states and the all-essential power of self-defense. To Patrick Henry, "The government unaltered may be terrible to America; but it can never be loved, till it be amended." George Mason, his fellow Virginian, agreed as did Mr. Williams of New York. [24]

> We must have amendments as will secure the liberty and happiness of the people on a plain, simple construction, not on doubtful ground. We wish to give the government sufficient energy, on real republican principles, but we wish to withhold such powers as are not absolutely necessary in themselves, but are extremely dangerous. We wish to shut the door against corruption. . . . We ask such amendments as will point out what powers are reserved to the state governments. (George Mason of Virginia in Elliot, ed., *Debates*, III, 263).
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> . . .The constitution should be so formed as not to swallow up the state governments: the general government ought to be confined to certain national objects; and the states should retain such powers, as concern their own internal police. (Mr. Williams of New York, in Elliot, ed., *Debates*, II, 241).
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> [Hamilton] seemed disposed to render the federal government entirely independent, and to prevent the possibility of it ever being influenced by the interests of the several states: and yet he had acknowledged them to be the necessary fundamental parts of the system. *Where then was the check* [Italics added] (Mr. Lansing of New York in Elliot, ed., *Debates*, II, 296).
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> It appears to me that the state governments are not sufficiently secured, and that they may be swallowed up by the great mass of powers given to Congress. (Mr. Spencer of North Carolina, in Elliot, ed., *Debates*, IV, 76).
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> Our rights are not guarded. There is no declaration of rights, to secure every member of the society those unalienable rights which ought not to be given up to any government. *Such a bill of rights would be a check upon men in power.* [Italics added for emphasis.] (Mr. Spencer of North Carolina, in Elliot, ed., *Debates*, IV, 149).
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> There is a decided majority for anterior amendments, that is [among those] who do not think it prudent to mount a high-blooded, fiery steed, without a bridle. The amendments which will be proposed will contain simple propositions, guarding the rights of states from . . . encroachment. . . . (Theodoric Bland to Arthur Lee, June 13, 1788 in Richard Henry Lee, *Life of Arthur Lee, LLD*. (2 vols.; Boston, 1829), II, 337-339).
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> I mean, my friend, to let you know how deeply I am impressed with a sense of the Importance of Amendments. (Samuel Adams to Richard Henry Lee, in Henry A. Cushing, ed., *Writings of Samuel Adams* (4 vols., Boston, 1904-1908), IV, 333-335).

Among the amendments proposed by several states were those that reserved to the states all powers not delegated to Congress. Rhode Island wanted the following: "1st. The United States shall guarantee to each State its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this Constitution expressly delegated to the United States." It also declared in its letter of acceptance "That the powers of government may be reassumed by the People whensoever it shall become necessary to their happiness." Similar language was used by the Virginia convention: that "the powers granted under the Constitution being derived from the people . . . be resumed by them whensoever the same shall be perverted to their injury or oppression; and that every power, not granted thereby remains with them and at their will."[25]

Let Experience Be Our Guide

After all was said and done, the government as amended represented a not so radical departure after all. It was, in effect, only a modification of the old Articles of Confederation (as Madison himself would long insist). To attempt more, as was noted time and again, was to go against the American experience of federalism and republicanism. [26]

> Mr. Butler. The people will not bear such innovations. The States will revolt at such encroachments. . . . We must follow the example of Solon who gave the Athenians not the best Govt. he could devise; but the best they w[oul]d receive. (*Notes of Debates*, June 5, 73).
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> Mr. Patterson considered the proposition for a pro-portional representation as striking at the existence of the lesser States. . . . The Convention he said was formed in pursuance of an Act of Cong[res]s . . . that the amendment of the confederacy was the object of all the laws and commissions on the subject. . . . We ought to keep within its limits, or we should be charged by our Constituents with usurpation. . . . We have no power to go beyond the federal scheme, and if we had the people were not ripe for any other. We must follow the people. . . . A confederacy supposes sovereignty in the members composing it & sovereignty supposes equality. (*Notes of Debates*, June 9, 95).
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> Mr. Lansing . . . was decidedly of opinion that the power of the Convention was restrained to amendments of a federal nature, and having for their basis the Confederacy in being. . . . N. York would never have concurred in sending deputies to the convention, if she had supposed the deliberations were to turn on a consolidation of the States, and a National Government. (*Notes of Debates*, June 16, 122).

Now we can understand John Dickinson's famous phrase, "Experience must be our guide. Reason may mislead us," which accurately expressed the majority viewpoint, especially with respect to the rights of the states. "It was not Reason that discovered the singular & admirable mechanism of the English Constitution" or "trial by Jury," he noted. (*Notes of Debates*, August 13, 447). Experience, he

observed earlier, also proved that the "accidental lucky division of this Country into distinct States" was a good and not a bad thing. (*Notes of Debates*, June 2, 57) and their "preservation . . . in a certain degree of agency [was] indispensable. . . . To attempt to abolish the States altogether, would degrade the Councils of our Country, would be impracticable, would be ruinous." (*Notes of Debates*, June 7, 84). His countrymen agreed.[27]

No to Consolidation and the Madisonian Extended Republic

Besides the lack of a Bill of Rights, the anti-Federalists' next most potent argument against the proposed Constitution centered on the issue of consolidation. While admitting that "Our object has been all along, to reform our federal system, and to strengthen our governments," the "Federal Farmer" nevertheless objected to the proposed new government. "The plan of government . . . is evidently calculated totally to change, in time, our condition as a people. Instead of being thirteen republics, under a a federal head, it is clearly designed to make us one consolidated government." In his fifth essay, "Federal Farmer" admitted "that we want a federal system" but "This subject of consolidating the states is new; and because forty or fifty men have agreed in a system, to suppose the good sense of this country . . . must adopt it without examination, and . . . without endeavouring to amend [it] . . . is truly humiliating." Samuel Adams was equally direct and to the point. "I confess," he wrote to Richard Henry Lee, "as I enter the Building I stumble at the Threshold. I meet with a National Government, instead of a foederal Union of Sovereign States." [28]

Pointing to the development of a new federalism, Adams also had this to say: "But should we continue distinct sovereig[n] States, confederated for the Purposes of mutual Safety and Happiness, each contributing to the federal Head such a Part of its Sovereignty as would render the Government fully adequate to these Purposes and no more, the People would govern themselves more easily, the Laws of each State being well adapted to its own Genius & Circumstance, and the Liberties of the United States would be more secure than they can be . . . under the proposed Constitution." "Brutus" agreed. The best government for America was a confederation of independent states "for the conducting [of] certain general concerns, in which they have a common interest, leaving the management of their internal and local affairs to their separate governments." "How far the powers to be retained by the states shall extend, is the question. . .?" [29] As the anti-Federalists reiterated again and again, a federal government implied the existence of states. To quote Nathaniel Ames from Massachusetts: "The state governments represent the wishes and feelings of the people. They are the safeguards and ornament of our liberties—they will afford a shelter against the abuse of power, and will be the natural avengers of our violated rights." Patrick Henry of Virginia concurred. After calling the new government a consolidated and a dangerous one, he added that "States are the characteristics, and soul of a confederation. If the

states be not the agents of this compact, it must be one great consolidated national government, of the people of all the states." "The distinction between a national government and a confederacy is not sufficiently discerned." The people never sent delegates but the states did. [30]

Agreeing with Montesquieu, that a republican government could only subsist in a small territory, the anti-Federalists came to the obvious conclusion: America would have to be a federal republic and a union of the states (not the states united). As small republics themselves, the states would provide the foundation for republican and limited government in America. Here's what "Centinel" had to say: ". . .from the nature of things, from the opinions of the greatest writers and from the peculiar circumstances of the United States," it is not practical to establish and maintain "one government on the principles of freedom in so extensive a territory. . . ." The only plausible system "by which so extensive a country can be governed consistent with freedom," therefore, is "a confederation of republics, possessing all the powers of internal government, and united in the management of their general and foreign concerns. . . ." Brutus agreed.[31]

> It is admitted, 'that the circumstances of our country are such, as to demand a compound, instead of a simple, a confederate, instead of a sole government'. . . . The government then, being complex in its nature, the end it has in view is so also; and it is necessary, that the state governments should possess the means to attain the ends expected from them. . . . Neither the general government, nor the state governments, ought to be vested with all the powers to be exercised for promoting the ends of government. The powers are divided between them—certain ends are to be attained by the one, and other certain ends by the other; and these, taken together, include all the ends of good government.

To the "Federal Farmer", the United States could exist as one nation only as "Distinct republics connected under a foederal head. In this case the respective state governments must be the principal guardians of the peoples [sic] rights, and exclusively regulate the internal police; in them must rest the balance of government."[32]

The Federalist and the Madisonian Extended Republic Rejected

In rejecting the arguments of the Federalists and *The Federalist*, the anti-Federalists also exploded Madison's much celebrated theory of the extended republic which, by contrast, was basically and boldly nationalist and consolidationist in intent. Based on his failed Virginia plan, representation was to have been proportional in both Houses of Congress so as to cut through the power of the states or state sovereignty (the bane of the Confederation and, to Madison, the greatest threat to the republic). As Forrest McDonald has revealed, in his analysis of "the Madisonian constitution," the frame of government proposed by Madison in 1787, the one we know as the Virginia Plan, had as its purpose the virtual elimination of

the states. Supreme power was to concentrated in a national Congress (bicameral) which he also desired to have a negative over state legislation.[33]

Small wonder, then, that the Madison or Virginia plan was opposed from the beginning and ultimately rejected for being too national and too innovative. It went, in short, beyond the American political experience and the theory of republicanism. His much praised idea of "the extended republic" was in fact not very republican at all. Madison's solution to the problems of faction and majority tyranny or "democratic despotism" (the new issue that arose in the 1780s and which prompted the movement for a new constitution) was based not on states but on individuals who in the aggregate would comprise such a diversity of interests as to inhibit any collusion and the possibility of their gaining control of the government. Should this not work, there was always the power of the national government to be called upon.[34]

Madison's "extended republic" had one major flaw. It assumed a direct relationship between individuals or the people and the national government (via proportional representation). In terms of the radical Whig-republican ideology of the time, however, this type of government was an Asian despotism defined to be one where rulers had direct and unlimited control over their subjects. As opponents within the convention and without stated again and again, a federal government pre-supposed the existence of states. These had to be recognized and somehow incorporated into the structure of the government. Determining their role, in effect, was one of the essential tasks of the federal convention as described above. As the "Federal Farmer" had already observed, "In a federal system we must not only balance the parts of the same government . . . but we must find a balancing influence between the general and local governments—the latter is what men or writers have but very little or imperfectly considered." [35]

Like so much else in the writings of the Federalists (including *The Federalist*), the anti-Federalists believed with Patrick Henry that they "smelled a rat." Indeed, *The Federalist* emphasis upon the limited nature of the proposed government even without a Bill of Rights just did not ring true, a point highlighted by Charles Johnson of North Carolina. Writing to James Iredell of the same state, he agreed that *The Federalist* was "elegantly written. . . . But I am surprised that he should have thought it necessary to take so much pains to establish, what appears at the first glance, at least to me, an incontrovertible truth, which is—that the States, united under one government, properly balanced, will be much more powerful, have fewer causes either of internal or external quarrel, and will be able to procure greater commercial advantages, more respectability and credit, than the States disunited into distinct, independent governments, or separate confederacies." "I shall be particularly desirous to see the numbers [of *The Federalist*] that treat of the additional security which the adoption of the new Constitution will afford to the republican form of government, to liberty and property."[36]

For all of its republican rhetoric, *The Federalist* ironically helped the cause of the anti-Federalists. If what *The Federalist* said was true, then how could its au-

thors and others of like persuasion object to amendments? The idea of *The Federalist* having a "split personality," it would appear, is by no means a new problem. It was there from the beginning and only serves to underscore the purpose of that collection of essays: to prevent amendments altogether and to regain some of the political momentum that its authors had lost during the Federal Convention. [37]

While much ink has been spilled in defining the terms "federalist" and "antifederalist: and their correct spelling, the following is suggested as a corrective. At the beginning of the Federal Convention in 1787, there were the federalists or confederalists (defenders of the Articles of Confederation) and the nationalists (especially James Madison, Alexander Hamilton, James Wilson, and Gouvernor Morris). With the Great Compromise (opposed by the nationalists), most delegates became federalists in a newer sense, i.e., supporting the representation of the states in the Senate. This definition was not sufficient, however, to those who desired more protection for the rights of states and of individuals. Thus the correct term anti-Federalists applied to those who wanted a further division of power between the state and federal governments and beyond just the separation of powers within the national Legislature. Thus, too, the anti-Federalists as the real federalists who led to the creation of our compound confederate government (to use its official designation). As noted, the process of government-making was a fluid one over the period 1787-1791.[38]

In the end, the anti-Federalists rather than the Federalists are entitled to the claim of being the real founding fathers of the Constitution we so revere today. Without them, there would have been no Bill of Rights or a line of partition specifying delegated versus reserved powers. Without them, there would have been no new American science of politics, of modern federalism, divided powers, and a complete system of checks and balances finally applied to the states with the Tenth Amendment and originally meant to include a positive power of self-defense or Nullification. (If that N-word is not there explicitly, the intent most certainly is. To suggest otherwise is to deny at the same time the existence of "federalism," "separation of powers," and "checks and balances" which no where appear in the Constitution).[39]

By no means opposed to granting extraordinary powers to the proposed new government, the anti-Federalists instead of the Federalists or *The Federalist* were the ones who saw the need for new and different safeguards to assure that the rights of individuals and of states were secure. Opposing the highly nationalist Virginia Plan from the beginning, based on radical Whig-republican ideology, the anti-Federalists held out initially for state representation in the Senate as a first step toward a new definition of federalism that went beyond the old idea of a Confederacy but which did not include a consolidated or a national government.[40]

As for the nature of the new government as amended, it was truly a federal republic or union of the states and not the states united. In keeping with radical Whig-republican ideology, not only had the wheels and springs of government been created anew to afford new safeguards against the abuse of power, but in-

corporating the states into the new federal system made republican government possible in such a large territory as America. Hamilton may have described it in *The Federalist* #9 as a "confederate republic" and Madison may have claimed it as "in strictness neither national nor a federal Constitution" (in essay #39), but the anti-Federalists were the ones who made the government federal (by insisting upon a role for the states beyond the Senate because their varied interests could not be adequately protected.[41]

From Principle to Action: James Madison as the Father of Nullification

While Nullification continued to be believed after 1791 and long before 1798 as Forrest McDonald and James M. Banning, Jr. have noted (with little noticeable historiographical impact), and as indicated by Jefferson's 1792 letter to Madison, its espousal in Virginia as a remedy to be "wreaked thro' the forms of the Constitution" is to be attributed to none other than James Madison (and above the claims made for Thomas Jefferson or John Taylor of Caroline). For beginners, there is the direct assertion of Irving Brant made way back in 1950. In his words, "The basic doctrine of state opposition to unconstitutional laws had been suggested by Madison to Jefferson in 1788." As we know, too, the Madison-Jefferson collaboration about resistance to "Hamiltonianism" and "Federalism" continued uninterrupted through 1796 and reached the point that Madison actually loaned his *Notes* for Jefferson to copy in 1796. [42]

Using his *Notes*, moreover, it was Madison who authored the Virginia Resolution of 1798. This document is of particular interest because it contains a clue that links its language to the debates in the federal convention of 1787, knowledge of which only Madison himself possessed. The telling phrase is as follows:

> Encroachments springing from a Government, WHOSE ORGANIZATION CANNOT BE MAINTAINED WITHOUT THE CO-OPERATION OF THE STATES, furnish the strongest excitements upon the State Legislatures to watchfulness, and impose upon them the strongest obligation, TO PRESERVE UNIMPAIRED THE LINE OF PARTITION. (Elliot, ed., *Debates*, IV, 556).

This is precisely the language used in the debates of 1787 as recorded by Madison and which refer to the necessity of drawing a line of demarcation between federal and state powers or those reserved versus those delegated.[43]

In sum, not only was Nullification constitutional (meaning that it was raised within the Federal Convention and later incorporated into the Tenth Amendment), but it was entirely in keeping with the new American science of politics described so well by Gordon S. Wood (who, significantly, used John Taylor of Caroline to illustrate what the framers had accomplished). For Madison and Jefferson, raw politics and party propaganda were certainly motives behind the first Nullification movement in Virginia. So too was the deeply felt and real need to restore the

Whig-republican principles of 1776 and 1787 that were already being forgotten so early in the history of the republic. What they themselves said, it appears, can now be more readily accepted at face value.[44]

While many explanations for the rise of the Republican (Whig) party and the development of the first party system have been advanced, states' rights and Nullification have been largely dismissed. Not without meaning, however, did Jefferson use the term "Whig" to describe the Republican party he and Madison organized. And the designation of "Whig" reminds us that "republicanism" was "anti-Federalism" carried into the 1790s and beyond. In this context, Charles A. Beard was at least half-right about a "counter-revolution" on the part of the Federalists. It came, however, not with the Federal Convention as he supposed but after the new government was organized in 1789. [45]

Unfashionable as Beard may be nowadays, with some scholars suggesting more innocently that "the First Congress was a sort of continuing constitutional convention, and not simply because so many of its members—James Madison, Oliver Ellsworth, Elbridge Gerry, Rufus King, Robert Morris, and William Paterson being only the most conspicuous examples—had helped to compose or to ratify the Constitution itself"[46] or that "policy goals, not fidelity to past position, most often influenced the construction placed on the Constitution in discussions of the scope of federal power or, within the federal government, the scope of executive power,"[47] it is clear that original intentions were already being dismissed as irrelevant with the consequence that the records of the Federal Convention and of the state ratification debates were regarded as unimportant. As Joseph Lynch yet admits, "the Federalists, under Washington's quiet—and Hamilton's outspoken—leadership, disregarded the Federalist thesis that the Article I legislative powers of the federal government were few and defined, and opted instead for a broad formulation of the enigmatically phrased Necessary and Proper Clause and the spending power, so as to authorize Congress to legislate in the general interests of the country." If "Madison and his allies" were not paragons of consistency in invoking original intentions, they more often than not invoked "ratification assurances" or "a framer's recollections." Besides his own flip-flop about the value of the Convention debates, Elbridge Gerry even went as far as to declare that "the records of the state ratifying conventions were no better since they were 'generally partial and mutilated'."[48]

The publication of Jonathan Elliot's *Debates* beginning in 1827 would disprove this statement. Although the sparse journal of the Federal Convention was published in 1819 (at the behest of John Quincy Adams for political reasons it appears) and the notes of Robert Yates followed in 1821, Madison's *Notes* had to await his death before they saw the light of day in 1840. Only in the 20th century would a complete documentary history of the Federal and state ratifying conventions be available to scholars which lacunae to say the least inhibited an understanding of original intentions and who the framers were.[49]

What Happened to Nullification?

With the issues of Nullification's origins and legitimacy clarified, the question of what happened to its constitutionality can now be addressed (which paradigm offers a more fruitful approach rather than the standard assumption of its unconstitutionality and illegitimacy). For the period at hand, several things happened that would impact Nullification negatively. First and most important was the anonymity pursued by Jefferson and Madison during the first Nullification movement in Virginia. Understandable as this was in light of anti-party sentiment of the time and their respective public positions and reputation, without the prestige and weight of their names the principles of 1798 and 1799 became identified for what they are today: as something sectional, sinister, and disunionist (as the replies of states from the northward, controlled by Federalists, so tellingly reveal). And so it has remained ever since despite evidence to the contrary that has always existed but which Madison kept hidden from the public during his lifetime.[50]

The second thing to happen to Nullification and its constitutionality was the triumph of the Republican Party in the election of 1800. With Whig-republican principles of 1776 and 1787 restored albeit briefly (before events between 1803 and 1812), there was no need for Jefferson and Madison to continue their defense of original intentions and constitutional reconstruction. They also hoped that this first crisis of the union would be the last one. It was not as events soon proved.[49]

The third thing to happen to Nullification was its re-emergence in New England as a legitimate means to protest the policies of Jefferson and Madison leading to the War of 1812 and the liberalization of the Republican party (like the Louisiana Purchase of 1803). The "Remonstrance of Massachusetts" of June, 1813, underscores the beliefs of Yankees no less in Nullification and secession as original intentions. Unfortunately, the disastrous Hartford Convention at war's end in 1814-1815, and the negative reaction it engendered (mostly from the South), overshadowed what had been considered to be a principled opposition thus further "nullifiying" Nullification and reinforcing its sectional and divisive nature. In addition to fomenting political and constitutional dissent in New England, the near disastrous War of 1812 also revived liberalism defined here as neo-Hamiltonianism as an antidote to old-fashioned republicanism that seemed more and more irrelevant to the needs of the young republic.[52]

The fourth thing to happen to Nullification was the continued silence of Jefferson and Madison about their roles in 1798-1799. "For fifty-three years after the Constitution . . . only two men had in their possession a firsthand, daily account of virtually everything that had taken place. . . . One was James Madison . . . The other was . . . Thomas Jefferson, to whom Madison later entrusted his original notes so that a copy might be made for safekeeping." No doubt mixed motives were at work here. With the South united against New England, there was no need to go public in defense of a lost cause. On the other hand, without Madison's *Notes*, Nullification could not be linked to the debates of 1787-1788 and with-

out a history before 1798-1800 this theory was considered as being beyond the Constitution. Thus the strange phenomenon of states' rights without Nullification with the rise of the Old Republicans in the renewed struggle between liberalism and republicanism (a la the 1790s all over again). For this same reason, the earliest histories of the Constitution were quiet on the subject as well although they accurately described the federal rather than the national nature of the American republic.[53]

In the longer run, and following the transformation of the republic between 1815 and 1860, early American and Southern history were re-written from a 19th century and more liberal-democratic-nationalistic perspective giving us the myths of democracy (American was born modern and liberal) and a reactionary South (as a slaveocracy and a Slave Power which abandoned the principles of 1776 and 1787) that persist today. Agreeing with the author about the 19th century origins of the liberal myth of democracy is no less an authority than Joyce Appleby. "For a long time," she reminds us, "American historical writing simply explained how the United States became the territorial embodiment of liberal truths" which she identifies as the extension of suffrage, representation, the perfection of the two-party system, capitalism, and democracy. Originating in the "English philosophical tradition of Bacon, Locke, and Newton," liberalism then passed on to America. "Thus, the authors of the *Federalist Papers* became the true heirs of Locke, and America's democratic statesmen the practical interpreters of Adam Smith."[54]

Referring to the Antifederalists, Appleby concludes correctly that "Their views have not, like those of the Federalists, lived on to be incorporated within the history of a success. . . . [T]heir writings are reminders that other constitutions could have been written. Like the history of science, the history of the United States Constitution has been largely written as the history of its progress." "With the rejection after the Civil War of the concept of the Constitution as a compact of states," moreover, "constitutionalism merged with historicism to form the American variant of immanent values unfolding in space and time. Here again the haze of veneration that obscures the original reception of the Constitution hides as well the conceptual problems involved in integrating the Constitution into the didactic traditions of eighteenth-century America."[55]

Anne Norton, another respectable scholar with a national reputation, goes a step further by linking the myth of democracy with the notion of a reactionary South. As she notes, there was a liberal myth before Louis Hartz (*The Liberal Tradition in America* [New York, 1955])and invariably it excluded the South. "For Hartz the South was the 'alien child in the liberal family'. . . ." To Prof. Norton, moreover, the liberal myth of democracy was of Northern and Puritan origin. "The mythic history of this America begins in Scripture and, through the Puritans, leads inexorably to industrial capitalism."[56]

Writing in 1890, G. W. Hazleton commented that "It must be assumed that the statesmen who grasped the great problem which confronted them in 1789 clearly saw the necessity of a national organization. . . ." A reviewer of George Bancroft's

History of the Formation of the Constitution had this intriguing thought: "Many of the ideas set forth in the convention . . . appear sufficiently curious in our own day, and show the jargon out of which that instrument sprang into being." That "jargon," of course, is republican ideology as we now know it. Da Costa also accused "Calhoun and his co-laborers" of playing "fast and loose with the Constitution. . . ."[57]

By the time of the Civil War, then, Nullification and secessionism were inextricably linked together as twin doctrines of a perverse Southern constitutionalism that had threatened the union since at least the Nullification controversy in South Carolina from 1818-1833. This was the view of Robert Settle, a converted Republican from North Carolina. As far as he was concerned, "The war was commenced to perpetuate slavery" and the events of 1860-1861 he described as "the movements of the secessionist[s] & nullifiers. . . ." This new consensus against Nullification and rejecting its unconstitutionality became entrenched nationally following the Northern victory in the Civil War. After noting that "Particularism had become to such an extent part of the flesh and blood of the native born colonists," and that Calhoun's doctrines were popularly received because "they advanced no new principles," Hermann von Holst in his *Constitutional History of the United States* nevertheless concluded that "The slavery question drove him into the path, and with the increasing development of the slaveholding interest he followed it on to the furthest consequences." The publication of Caleb William Loring*, Nullification, Secession Webster's Argument and the Kentucky and Virginia Resolutions Considered in Reference to the Constitution and Historically* (New York: G. P. Putnam's Sons, 1893) completed the first cycle of anti-Nullification historiography.[58]

Contributing to the "nullification" of Nullification was none other than James Madison himself who became the leading anti-Nullifier of 1828-1833. Keeping his *Notes* to himself, however, Madison reverted to Publius of old by trying to steer a middle way between the extreme nationalism of Andrew Jackson and the extreme states' rights views of John C. Calhoun. He did so by reiterating the failed arguments of *The Federalist* that the proposed government of 1787 was conformable to republicanism and federalism. The government, he intoned, was both federal and national although the states' rights aspects of his federalism were never made clear either at this time or earlier. At the same time, the situation in South Carolina was different from that of Virginia (the old civil liberty defense) and no single state action was ever intended. Additionally, Madison charged the South Carolina Nullfiers with attempting to revive the old Articles of Confederation not unlike the Federalists did in their debate with the anti-Federalists of 1787-1788. [59]

Now we know why Madison never published his *Notes* during his lifetime. To have done so early on would have revealed him as the extreme nationalist ("consolidationist") he was (besides his Virginia Plan there was his continued support of a national negative over the states). To have done so later on would have provided support for the constitutionality of Nullification as claimed by John C. Calhoun.