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Madison and the Powers Reserved to the States

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MADISON AND THE POWERS RESERVED TO THE STATES

by

Robert E. Larkin, S.J.

A Thesis Submitted to the Faculty of the Graduate School
of Loyola University in Partial Fulfillment of
the Requirements for the Degree of
Master of Arts

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Robert E. Larkin was born July 24, 1934, in Chicago, Illinois. He began school in LaSalle, Illinois; but in 1942 the family returned to Chicago where he finished grammar school and high school. After graduating from Loyola Academy in June, 1952, he entered the Jesuit Order the same summer. During his first few years as a Jesuit he was enrolled at Xavier University, Cincinnati, but transferred to Loyola of Chicago when he moved to West Baden College in Indiana. In 1957 he received his Bachelor of Arts degree, in 1959 his licentiate in philosophy. Thereupon he began teaching at the University of Detroit High School where he stayed until June, 1962.

Mr. Larkin, S. J., has now returned to West Baden College to finish his theological studies before his ordination to the priesthood.
The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

--Tenth Amendment,
U.S. Constitution
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CHAPTER I

INTRODUCTION

The problem of the powers reserved by the States has been perennial in American history. Seven generations of Americans have wrestled with the problem of reconciling the expansion of federal power with the powers proper to the States. As one of the first statesmen to meet the difficulty, James Madison saw it developing even before his country was permanently established. He was the Congressman, moreover, who presented the formula which enshrined the principle of reserved power in the Constitution and it was he who found the most comprehensive answer to what that principle meant. The search for that answer consumed most of Madison's life.

At the beginning of his political career, Madison was a dedicated nationalist, a patriot devoted to securing a free and independent American nation. By 1800 the situation had radically changed. The American nation had not only been secured, but had grown so powerful that Madison believed it threatened the safety of the States. Consequently he left the ranks of the Federalists and took up the standard of states' rights. The third period of Madison's development in regard to the federal-state conflict came near the close of his life. As the dangers of nullification and secession arose during the 1830's, Madison directed his waning powers to defend that Constitution which recognized both the powers of the central government and of the States. Thus beginning as a nationalist, Madison
then saw himself as a citizen of Virginia, and finally as a constitution-
alist.

Born at Port Conway in Virginia on March 16, 1751, Madison entered
the College of New Jersey (later Princeton University) in 1769. After
graduating he considered joining the ministry as his life's work; but,
drawn into the political vortex of that decade, he took instead a seat in
the Virginia Convention of 1776. At that time he was but twenty-five
years old and from that day forward he was to hold high office in his
country for forty years culminating in the Presidency of the United States.
Even after his Presidency, he lived another twenty years until his death
in 1836.

In 1780 during the height of the Revolutionary War, he went as a del-
egate to the Continental Congress which was at that time awaiting the
final ratifications by the States of the Articles of Confederation. The
ratification by Maryland in the following year put the Articles into
effect. The second of these articles expressed the principle of reserved
powers in the first form that applied to the nation as a whole—later the
Federal Constitution would have its own formula, somewhat different. The
article reads: "Each State retains its sovereignty, freedom, and inde-
pendence, and every power, jurisdiction, and right, which is not by this
confederation expressly delegated to the United States, in Congress
assembled."¹

¹Select Documents Illustrative of the History of the United States,
There were already precedents in American government for such a declaration. In 1776 Madison had been present when his fellow-Virginian George Mason drew up the Declaration of Rights which declared "that all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants."\(^2\) The Constitution of Massachusetts in 1780 included a principle that followed the second of the Articles of Confederation ever more closely: "The people of this commonwealth have the sole and exclusive right of governing themselves, as a free, sovereign, and independent state; and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, right, which is not, or may not hereafter be, by them expressly delegated to the United States of America, in Congress assembled."\(^3\) Notice should be taken of the word "expressly" which appears in both the Massachusetts constitution and the article of Confederation. Bitter fights would later be fought—and lost—over that word.

But behind this American background of the question lies a tradition of British and French political thought. Indeed the different European formulations of the problem of reserved power each found a champion among the American leaders.

Basically only three positions are possible for one wishing a popular


\(^3\)Ibid., III, 1890.
government. Either he stands with Blackstone—and later with Hamilton—on the side of parliamentary despotism; or with Rousseau and Jefferson on the side of democratic despotism; or somewhere in the middle with Locke and Madison on the narrow ledge of divided sovereignty. The notion of sovereignty is itself subject to ambiguities (as will be pointed out more fully in Chapter IV); for the present, it may be said that the three groups all admit the sovereignty of the people. They would agree, moreover, that all just governments must be based on the will of the people. The issue that divided them is more subtle. Suppose that a free people have erected a popular government to rule their communal lives. That government, if it is to be competent, must have the power to enforce its determinations on the body politic. But if this government abuses its power in particular instances, is there any legal way for the citizens to resist? The important word is legal. Against tyranny a morally legitimate way is always open to the people—that is to say, some revolutions are just. Yet a revolution is by its nature extra-legal.

Can the citizens, therefore, resist governmental tyranny in some fashion which will be within their existing legal framework? To wait for the next elections and vote for somebody else would be sound advice in most cases, but what of those instances when nothing worth saving will be left by the next elections? Is any power, both legal and coercive, left with the people?

William Blackstone says no. Parliament can, according to Blackstone, "do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold the omnipotence of parliament. True it is, that what the parliament doth, no
authority upon earth can undo."4 "It hath sovereign and uncontrollable
authority in the making, confirming, enlarging, restraining, abrogating,
repealing, reviving, and expounding of laws, concerning matters of all
possible denominations, ecclesiastical or temporal, civil, military, mar-
time, or criminal; this being the place where that absolute despotic pow-
er which must in all governments reside somewhere, is entrusted."5 (The
italics are our own.) In such a system it is a prime importance that only
worthy men be elected to the dread body of parliament. But is not Black-
stone, by his stressing this point, only leaving us with a counsel of de-
spair? Cannot the mind of man devise some measure of protection from his
own creations?

Jean Jacques Rousseau would say yes, but his approach to the problem
is somewhat different from Blackstone's. Rousseau's political philosophy
is best expressed in his Social Contract. Not to accuse Rousseau of sus-
tained consistency, we may still look for his recurrent thoughts "as far
as it is possible to discover what his opinions were amid the numerous
contradictions, intentional and unintentional, of his writings."6

In the fifth chapter of the Social Contract, Rousseau presents the
following mysterious riddle: "To find a form of association which shall
defend and protect with the public force the person and property of each
associate, and by means of which each, uniting with all, shall obey

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by James Dewitt Andrews (Chicago, 1899), I, 1616.
5 Ibid.
6 The Social Contract (New York, 1893); from the Introduction by
Edward L. Walter.
however only himself and remain as free as before." This is pure mystical nonsense, yet Rousseau regards it as the goal of all society. That it might appear attainable, Rousseau explains this social compact in terms of his celebrated general will. "If, then, we remove from the social contract all that is not of its essence, it will be reduced to the following terms: 'Each of us gives in common his person and all his force under the supreme direction of the general will; and we receive each member as an indivisible part of the whole.'" If the citizen, however, is indivisible from the whole, then we have the basis for that democratic despotism of the fascist sort which is so easily read into the works of Rousseau.

Nor does his notion of sovereignty help matters; for this also, he believes, is inalienable and indivisible. "The first and most important consequence of the principles just established is, that only the general will can direct the forces of the state . . . . I say then the sovereignty being only the exercise of the general will, can never alienate itself." What is this general will upon which all else depends? If it is more than a mere majority opinion, then mass rule might be avoided. At one point Rousseau supports such a hope when he states that there is "a great difference between the will of all and the general will." This hope is soon dashed, for he explains that by "the will of all" he means the undifferentiated will before the opposing views are cancelled off. "Take from

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these same wills the plus and the minus, which destroy each other, and there will remain for the sum of the difference the general will." In other words we are back where we started, mass rule.

The general will is, furthermore, not only incapable of doing wrong to anyone, but is the only legitimate voice of the people. Rousseau disapproves of all political parties and clubs and even discourages any sort of public associations because such bodies would necessarily have voices of their own which would distract the citizen from the siren voice of the general will. Rousseau thereby rejects that political pluralism which Madison would later regard so highly.

Where Rousseau laid down general principles, Thomas Jefferson was able to follow with some of his own. "After all, it is my principle that the will of the majority should always prevail." He tended to think that a primitive society without any government was the best for man; and should any governments exist, "I hold it that a little rebellion now and then is a good thing." It is to Jefferson's credit that his actions were often more prudent than his words. He became a great American by what he did for his country rather than by what he said about it. Regarding the reserved powers, Jefferson's policy was simple: since any action

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9 Ibid., 41.


of government which was opposed to the people's desires was invalid, the only matter open to discussion was how the people were to redress the wrong.

Madison tried to find a middle ground between the extremes of a government responsible but omnipotent, and of a popular but despotic one. John Locke had sought the same sort of ground but with less success—partly because he dealt with the unwritten English constitution while Madison had the American document. In his Treatise of Civil Government, Ch. XIII, Locke insisted that some power must remain in the hands of the people. "There remains still in the people a supreme power to remove or alter the legislative when they find the legislative act contrary to the trust reposed in them. For all power given with trust for the attaining an end being limited by that end, whenever that end is manifestly neglected or opposed, the trust must necessarily be forfeited, and the power devolve into the hands of those that gave it."12 Yet, despite this assertion which seems so opposed to the absolutism of Blackstone's parliament, Locke is forced to admit that the actual possibility of such a devolution of power is practically nil, for "this power of the people can never take place till the government be dissolved."13 Blackstone took notice of the difficulty Locke had encountered. After explaining the latter's theory


13 Ibid., 101.
of devolution, Blackstone says, "But, however just this conclusion may be in theory, we cannot practically adopt it, nor take any legal steps for carrying it into execution." That was true of the England of Blackstone's day and of England today; but could a nation that was federal in character so arrange the distribution of power within it, that particular powers might devolve while the government be not dissolved. That was the question Madison set out to answer. Even at the beginning of his career when he was most concerned about the establishment of a new national government, Madison was aware of the contest of powers which such a government would generate.

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14 Blackstone, p. 162. The italics are Blackstone's. Any italics appearing in a quoted source may hereafter be understood as in the original unless stated otherwise.
CHAPTER II
MADISON THE NATIONALIST

Like many American leaders after the War of Independence, Madison was dissatisfied with the government provided by the Articles of Confederation. Realizing the need of a strong national government, he also understood that complete centralization was out of the question. As his letter to Washington on April 16, 1787 indicates: "conceiving that an individual independence of the States is utterly irreconcilable with their aggregate sovereignty, and that a consolidation of the whole into one single republic would be as inexpedient as it is unattainable, I have sought for a middle ground, which may at once support a due supremacy of the national authority and not exclude the local authorities whenever they can be subordinately useful."¹ (The italics are ours.) Madison here envisioned the States in a much humbler role than they actually play. Madison's position here is nationalistic, but mixed with good political sense in that he appreciated the need of some compromise.

During the same month of April, Madison penned an essay entitled "Vices of the Political System of the United States" wherein he deplored the feebleness of the then-obtaining system. Aware that many of his fellow-citizens had a deep-set fear of bureaucratic government, he proceeded cautiously. "The great desideratum in Government is such a modification

¹The Writings of James Madison, ed. Jaillard Hunt (New York, 1903), I, 287. (Hereafter, this will be referred to simply as Hunt.)
of the sovereignty as will render it sufficiently neutral between the different interests and factions to control one part of the society from invading the rights of another, and, at the same time, sufficiently controlled itself from setting up an interest adverse to that of the whole society."^2 This wholesome fear of bureaucracy will reappear in Madison time and again over the years.

Rumor of a convention to draft a new federal Constitution was in the air that spring. Washington saw the need but doubted whether the men of the different States would cooperate sufficiently in any joint remedy. He also had fears that the executive authority of the government would not be made sufficiently strong. "I have doubts whether any system without the means of coercion in the Sovereign will enforce Obedience to the Government; without which everything else fails."^3

Despite such doubts the Constitutional Convention did meet in Philadelphia at the end of May, 1787. Washington was appointed President of the Convention while Madison acted as one of the several delegates from the State of Virginia. During the course of the debates the matter of reserved powers was scarcely brought up. A few times the possibility of a bill of rights including a definition of reserved power was mentioned, but was "regarded as nugatory"^4 since the delegates of the convention

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^2 Ibid., 327.


^4 Washington to Lafayette (April 28, 1788), Ibid., XXIX, 478.
considered the form and substance of the Constitution to be a virtual bill of rights itself.

Madison's voluminous notes, known as Debates in the Federal Convention, provide the most complete account of the transactions. On June 29 the notes record the following: "Mr. Madison agreed with Doc. Johnson, that the mixed nature of the Gov't ought to be kept in view; but thought too much stress was laid on the rank of the States as political societies. There was a gradation, he observed, from the smallest corporation, with the most limited powers, to the largest empire with the most perfect sovereignty. He pointed out the limitation in the sovereignty of the States. Under the proposed Gov't the powers of the States will be much further reduced." This is certainly a nationalist attitude.

The same discussion was recorded by another of the delegates, Robert Yates of New York. His account of Madison's remarks are at variance with the Virginian's in several respects. According to Yates's journal: "Mr. Madison: Some contend that the States are sovereign when, in fact, they are only political societies. There is a gradation of power in all societies from the lowest corporation to the highest sovereign. The States never possessed the essential rights of sovereignty." Yates's final statement is confounding--if Madison regarded the States as never having sovereignty, how could he permit them to ratify? Furthermore, such a denial would have earned his anathema a few years thereafter. It is far

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6 Ibid., 823-824.
more likely, therefore, that Yates over-simplified the Virginian's remarks which themselves left little enough to the States.

Since Hamilton and Madison worked closely together after the Convention, it is helpful to understand Hamilton's views during the Convention. Hamilton needed the political maneuvering of his friends even to be appointed as a delegate; but his hands were tied because the other two New York delegates represented the party of Governor George Clinton, Hamilton's opponent. Outvoted on all the major issues by the other two delegates, Hamilton decided to divide his time between Philadelphia and New York.

During the first month of the convention when he was in unbroken attendance, the junior delegate from New York said little, permitting older and wiser statesmen to voice their sentiments. These sentiments ran in two opposite currents: the first was the Virginia plan of Edmund Randolph which went beyond the purpose of merely revising the Articles of Confederation and envisioned the creation of a true national government; the second was the New Jersey plan of William Paterson which aimed at a moderate strengthening of the Articles. To the observant Hamilton, the Virginia plan seemed by far the sounder, yet he was far from satisfied with it. Consequently, on June 18 Hamilton took the floor—and held it the rest of

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the day according to the notes of Madison. 8

He began by enumerating what people expect and need from their government and then strove to show that neither the Virginia nor the New Jersey plan fulfilled the requirements. Next he launched into his constitution complete with articles and sections. He explained he was not submitting the constitution to the delegates for their formal consideration, but rather as a sketch of what he considered must appear in the final draft. Among other innovations he would have the President and all the senators hold office indefinitely "in good behavior." His tenth article startled the majority of the delegates. "All the laws of the particular States contrary to the Convention or laws of the United States to be utterly void. And the better to prevent such laws being passed the Governor or President of each State shall be appointed by the General Government." 9 The provision about the government appointing state governors sounds radical even today; in 1787, it struck some as fantastic. It is small wonder that the Convention promptly set aside Hamilton's explosive notions.

8 Although the authenticity of Madison's notes on the whole has never been seriously questioned, certain parts puzzled not a few historians because of similarities to other notes taken at the Convention. After a scientific study of manuscripts by two modern historians, it seems that Madison copied out, during September and October of 1789, the Journal of William Jackson who had served as the secretary of the Convention, and used this journal to make additions and corrections in his own notes. Cf. Charles Keller and George Pierson, "A New Madison Manuscript Relating to the Federal Convention, 1787," American Historical Review, XXXVI (Oct., 1930), 17-30.

9 Tansill, p. 225. (From the notes of Madison.)
The Convention turned instead back to the Virginia plan and, after many a compromise, came up with a much-amended form of the original Virginia plan of Randolph; so amended that Randolph himself would not sign. Madison was favorably disposed toward the measure and was willing to sign. Hamilton, although very critical of some of the provisions, was always a realist. He knew that something was better than nothing and that the American people were at a crisis. Some organ of government had to be agreed upon and put into operation. Hamilton was eager to have the delegates sign unanimously, but he failed not only with Randolph but with Mason. This was a serious blow because George Mason had made some of the most important decisions of the Convention. He was a clear thinker and contributed frequently during the debates. When the provisional draft was being drawn up, Mason made an observation of cardinal importance. Again from Madison's notes: "On the resolution 'referring the new Constitution to Assemblies to be chosen by the people for the express purpose of ratifying it,' Col. George Mason considered a reference of the plan to the authority of the people as one of the most important and essential of the Resolutions. The Legislatures have no power to ratify it. They are the mere creatures of the State Constitutions, and can not be greater than their creators... Whither then must we resort? To the people with whom all power remains that has not been given up in the Constitutions derived from them." Years later Madison would insist upon this clarification made by Mason.

10 Ibid., p. 434.
All in all, thirty-nine of the fifty-five delegates who had attended the convention agreed to sign. Along with the proposed Constitution, George Washington sent to the President of Congress in New York his own letter of introduction as President of the Convention. Washington's letter breathes of the tranquility which comes only after a storm. He writes as a man who has seen his duty through to the end and seen history made in the process. We confine ourselves to that part of it which deals with the federal-state conflict.

It is obviously impracticable in the federal government of these states to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all: Individuals entering into society, must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on the situation and circumstance as on the object to be obtained. It is at all times difficult to draw with precision the line between those rights which may be surrendered and those which may be reserved; and on the present occasion this difficulty was increased [sic] by a difference among the several states as to their situation, extent, habits, and particular interests.

In all our deliberations on this subject we kept steadily in view, that which appears to us the greatest interest of every true American, the consolidation of our Union, in which is involved our prosperity, felicity, safety, perhaps our national existence.11

However noble the letter, a fight was still in store before the Constitution it accompanied was accepted. A large share of the fight was waged by the remarkable "Publius." Publius was not one man, but three: Alexander Hamilton, James Madison, and John Jay. Of the eighty-five essays which appeared in various New York newspapers under the name of

11Ibid., 1003.
Publius, Madison was probably the author of twenty-nine—that is, just over a third of the entire work.\textsuperscript{12} The problem of the essays claimed by both Hamilton and Madison will never be conclusively resolved, as a century of controversy will testify. For most of the disputed numbers, however, strong reasons exist which favor Madison. Jacob E. Cooke accepts the Madison claims in his recent edition of \textit{The Federalist} which is truly a work of exegesis,\textsuperscript{13} and we would do well to accept the same.

The purpose of the Federalist Papers was to convince the people of the United States that the Constitution was necessary and proper for their safety and prosperity. The Papers are a work of advocacy, not a flight of speculation. The writers were selling a product and like all salesmen they occasionally said things their better judgment told them were just not so. This was all the more unavoidable since Hamilton and Madison undertook an \textit{ad litteram} defense of the Constitutional text. Thus, when backed into a phrase or clause bound to cause trepidation among their critics, they tried to solve the difficulty whatever way they could.

Not all of Madison's statements should be given the same credit. We must remember that the Devil can quote Scripture to his purpose. To take, for example, the passage where Madison says that the powers of the new government "are few and defined,"\textsuperscript{14} and regard it as representative thought.

\textsuperscript{12}Cf. Douglass Adair, "The Authorship of the Disputed Federalist Papers," \textit{William and Mary Quarterly}, 3d series, Part I (April, 1944); Part II (July, 1944).

\textsuperscript{13}\textit{The Federalist}, ed. Jacob Cooke (Middletown, Conn., 1961).

\textsuperscript{14}Ibid., 313.
would be to take the exception for the rule, as can be seen by comparing it to the whole body of his work in the *Federalist*.

In his opening essay, No. 10, he clarifies some preliminary notions. He points out what he understands by democracy and by republic; he explains the advantages accruing to the United States as a federal republic. He then faces his chief task, a defense of the grants of power made to the central authority. As a palliative to those anxious about the States' prerogatives he adds various reasons why, the States would, in any contest of power have the advantage over the Federal authorities.

Madison's definitions for pure democracy and for a republic are close to today's accepted usage. (This was a remarkable achievement considering the confusion with which the terms were used in his day.) First he explains "a pure Democracy, by which I mean, a Society, consisting of a small number of citizens, who assemble and administer the Government in person." Such governments have no cure for "the mischiefs of faction." "Hence it is, that such Democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have in general been as short in their lives, as they have been violent in their deaths." Madison criticizes "theoretic politicians, who have patronized this species of Government," among whom he would have to number his friend Thomas Jefferson. (Jefferson at

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this time was still in Paris serving as the American envoy and knew nothing about the work Madison was doing in the Federalist Papers.)

But an alternate form of popular government is at hand: "A Republic, by which I mean a Government in which the scheme of representation takes place, opens a different prospect." The two features which distinguish the republic from pure democracy are the use of representation and the larger territory it can administer efficiently. In both these features Madison finds protection from the evils of faction and irresponsible rule.

The ability of a republic to administer a vast area brings Madison to his pre-ordained conclusion: "Hence it clearly appears, that the same advantage which a Republic has over a Democracy, in controlling effects of faction, is enjoyed by a large over a small Republic--is enjoyed by the Union over the States composing it."

Referring to this essay, Douglass Adair has said, "Madison was one of the pioneers of 'pluralism' in political thought. Where Hamilton saw the corporate spirit of the several states as poisonous to the union, Madison was aware that the preservation of the state governments could serve the cause of both liberty and union."  

Evidence of Madison's pluralism is seen in No. 51 as well. "Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will

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17Ibid., 62.

18Ibid., 64.

be insecure. There are but two methods of providing against this evil: The one by creating a will in the community independent of the majority, that is, of the society itself; the other by comprehending in the society so many separate descriptions of citizens, as will render an unjust combination of a majority of the whole, very improbable." By the first method Madison meant monarchy, which he finds unsatisfactory for other reasons. "The second method will be exemplified in the federal republic of the United States." The Madison credo is simple: in numbers lies our salvation. His divergence from Rousseau is here made clear. The Frenchman, by use of plus and minus, would never be able to find "an unjust combination of a majority," which Madison recognized as a real danger. Furthermore, the Frenchman was in favor of preventing local interests and parties from springing up while Madison placed security in their very cultivation. "The larger the society, provided it lie within a practicable sphere, the more duly capable it will be of self government. And happily for the republican cause, the practicable sphere may be carried to a very great extent, by a judicious modification and mixture of the federal principle."  

Having explained the nature of a republic and the blessings of a federal one, Madison faces the knottier problem of justifying the powers which are to be given the Federal Government. In No. 44 of the essays he defends Article I, Section 8, Clause 18—known today as the Elastic Clause.

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It reads: "The Congress shall have Power * * * To make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof." Madison admits: "Few parts of the Constitution have been assailed with more intemperance than this; yet on a fair investigation of it, no part can appear more completely invulnerable. Without the substance of this power, the whole Constitution would be a dead letter." It must be assumed therefore that the opposition is centered against the form of the grant of power. Madison then suggests four alternatives the men at the Convention might have followed, but he then rejects each for particular reasons. One alternative would have been for the framers to be entirely silent on the subject. This would have been hazardous, leaving the document entirely open "to construction and inference."

The other three suggestions are of more importance. The first would be to copy out in the new Constitution the second of the Articles of Confederation. This article prohibited, as was seen, the use of any power "not expressly delegated." Madison rejects this, for Congress would be in the dilemma of either "construing the term 'expressly' with so much rigour as to disarm the government of all real authority whatever, or with so much latitude as to destroy altogether the force of the restriction."

The second suggestion would be to replace the Elastic Clause with a positive enumeration of the powers given Congress. Madison's dismissal

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of this reveals how little of his heart was in the statement that the powers of the Government were "few and defined." An attempt, he states, for a positive enumeration is doomed to futility for it "would have involved a complete digest of laws on every subject to which the Constitution relates; accommodated too not only to the existing state of things, but to all the possible changes which futurity may produce: For in every new application of a general power, the particular powers, which are the means of attaining the object of the general power, must always necessarily vary with that object." 23

He next dismisses a negative enumeration of powers Congress may not exercise. Pursuing the impracticality of such a course with the thoroughness of those who beat dead horses, Madison stumbles at the end into a serious over-statement: "No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorised; wherever a general power to do a thing is given, every particular power necessary for doing it, is included."24 This is not only poor politics; it is bad ethics. Worthy ends cannot justify immoral means even when the latter are the most expeditious way to the ends in view. John Marshall's famous canon in the M'Culloch v. Maryland case is more circumspect: "Let the end be legitimate, let it be within the scope of the Constitution, [then] all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit

23 The Federalist, pp. 303-304.

24 Ibid., pp. 304-305.
of the Constitution, are constitutional." Marshall agrees with Madison on the need for expansion in the government's duties, but he makes it clear—which Madison did not—that efficacy is not the only criterion.

The Elastic Clause occupied Madison in No. 44 of the Federalist. The following two essays continue his defense of federal power. Number 45 opens, "Having shewn that no one of the powers transferred to the federal Government is unnecessary or improper, the next question to be considered is whether the whole mass of them will be dangerous to the portion of authority left in the several States;" and Number 46 begins, "Resuming the subject of the last paper, I proceed to enquire whether the Federal Government or the State Governments will have the advantage with regard to the predilection and support of the people." Several of the arguments of these two numbers deserve closer examination.

In a passage at the beginning of No. 45, Madison reaches his rhetorical summit in his defense of the federal government.

Was then the American revolution effected, was the American confederacy formed, was the precious blood of thousands spilt, and the hard earned substance of millions lavished, not that the people of America should enjoy peace, liberty and safety; but that the Governments of the individual States, that particular municipal establishments, might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty? We have heard of the impious doctrine in the old world that the people were made for kings, not kings for the people. Is the same doctrine to be revived in the new in another shape, that the solid happiness of the people is to be sacrificed to the views of political institutions of a different form? . . . Were the plan of the Convention adverse to the public happiness, my voice would be, reject the plan. Were the Union itself inconsistent with the public happiness, it would be, abolish the Union. In like manner

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as far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every citizen must be, let the former be sacrificed to the latter. How far the sacrifice is necessary, has been shown.\(^{26}\)

On the contrary, Mr. Madison, how far has never been shown. At least, not to everyone's satisfaction, and the battle still goes on.

But if Madison could not read the future in No. 45, he did play the prophet in No. 46. "If an act of a particular State, though unfriendly to the national government, be generally popular in that State, ... it is executed immediately and of course, by means on the spot, and depending on the State alone [Read Little Rock, 1957]. The opposition of the Federal Government [Read the District Court], or the interposition of Federal officers, would but inflame the zeal of all parties on the side of the State, and the evil could not be prevented or repaired, if at all, without the employment of means which must always be resorted to with reluctance and difficulty [Read U. S. troops]."\(^{27}\)

In this passage Madison has used the word *interposition* for a federal measure against the State. Ten years later he will canonize the word as a State measure against federal authority.

Continuing his prophecy of twentieth-century tactics, Madison mentions the weapons at the State's disposal. "The disquietude of the people, their repugnance and perhaps refusal to cooperate with the officers of the Union, the frowns of the executive magistracy of the State [Governor Faubus?], the embarrassments created by legislative devices, which would often be added

\(^{26}\) *The Federalist*, p. 309.

on such occasions, would oppose in any State difficulties not to be de-
spised. 28 Quite true--our national authorities have never de pised the
forces in the States, nor have they been deterred by such forces. The con-
flict between State and Nation has never been wholly resolved in any bat-
tle. Rather it is a political reality with which we all must live.

A summary of Madison's views of the Federal-State relationship at the
time of the Federalist would be: Give to the national government adequate
powers to deal with present and future problems and let the States--which
will always have the close support of the people--take care of themselves.

When we consider the purpose of the essays, such reasoning is not surpris-
ing.

Indeed such an attitude was shared by the other prominent contrib-
utor--Hamilton. Hamilton, like Madison, wanted a strong central govern-
ment with wide powers in various fields. Certain differences exist, how-
ever, between the two men. Madison had a salutary fear of 'big government'
which Hamilton never seems to have shared. Madison had written against
"setting up an interest adverse to that of the whole society," 29 and in
one of the last of his Federalist essays he returns to this theme: "If
men were angels, no government would be necessary. If angels were to gov-
ern men, neither external nor internal controls on government would be
necessary. In framing a government which is to be administered by men
over men, the great difficulty lies in this: You must first enable the

28 Ibid.

29 Cf. page 9.
government to control the governed; and in the next place, oblige it to control itself."\textsuperscript{30} Hamilton was not concerned with the latter believing that election and the possibility of impeachment were sufficient guarantees.

Regarding the people at large, Hamilton had but little trust in their political competence. "The voice of the people has been said to be the voice of God; and however ... quoted and believed, it is not true in fact. The people are turbulent and changing; they seldom judge or determine right."\textsuperscript{31} A cynical stand, but one possessing its share of practical wisdom. Madison's friend Thomas Jefferson had entirely different sentiments. "After all, it is my principle that the will of the majority should always prevail."\textsuperscript{32} Between these two extremes Madison hoped to strike a happy medium whereby the reasoned will of the majority would be respected, for in the long run the people must know what they want and where to find it. If not, all civilization as well as all government is useless. But Madison admits that in the short perspective of immediate problems the people can judge amiss, and consequently he can speak of "an unjust combination of the majority," a situation which Jefferson would regard as contradictory. Madison believed one of the purposes of the United States Senate was to protect the nation from such unstable combinations. In his last essay in the Federalist papers (No. 63), Madison says, "there are particular moments

\textsuperscript{30}The Federalist (No. 51), p. 349.


\textsuperscript{32}Ford, IV, 479-480.
in public affairs, when the people stimulated by some irregular passion... may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow meditated by the people against themselves." Madison accepts this sort of temporary check on the people, yet he hopes they will continue to voice their views both singly and through clubs, associations, and other groups. In such a chorus Hamilton hears only cacophony; Jefferson a voice divine; but Madison a coincidentia oppositorum, a stability gained by the broad basis of the opinions expressed.

Nine States were needed to ratify the Constitution and put it into effect. New Hampshire became the ninth on June 21, 1788, but New York and Virginia were still outside the Union. In the latter State, it was only by overcoming the opposition of such men as Patrick Henry and George Mason, that Madison and his fellow Federalists were able to secure the Virginia ratification. A month later New York threw in her lot with the Union thereby putting the American ship of state out to sea.

The voyage became rough before the harbor was left and James Madison, for one, was nearly washed overboard before getting his sea-legs. The anti-federalist forces profited by a reaction that swept Virginia after the ratification. Once in charge, the party of Henry and Mason tried to send so many anti-federalists to the new Congress that the government

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33 The Federalist, p. 425.
might be thrown into stalemate. Madison was defeated in his attempt for the United States Senate, and it was only by vigorous campaigning that he won a seat in the first House of Representatives.

During the nine months between Virginia's ratification and the inauguration of George Washington in March of 1789, Madison had opportunity to write many letters to Thomas Jefferson who was still serving as the American minister in Paris. But it was only in the summer of 1788--several months after the last of the Federalist Papers had been published--that Madison got around to tell his friend about his work on the series. As it was, he was forced into the admission since a third party had been so kind as to send Jefferson a copy. "Col. Carrington tells me he has sent you the first volume of the federalist, and adds the 2d by this conveyance. I believe I never have yet mentioned to you that publication. It was undertaken last fall by Jay, Hamilton, and myself. The proposal came from the two former. The execution was thrown, by the sickness of Jay, most on the two others."34 In an age when personal correspondence was known for its formalism, Madison's stiffness may not have been as strange as it seems today; yet never in his personal letters, no matter how close the recipient or how urgent the matter, does Madison let himself go. In the present case, of course, his formalism helps to shield his embarrassment over delaying so long to tell Jefferson about his work as "Publius." Jefferson actually remarked later that he was pleased with the ideas expressed in the Federalist--which may indicate he did not read it closely.

34 Hunt, V, 246.
During the months before the actual inception of the new government, the attitude of Madison and Hamilton changed in regard to a possible bill of rights. Writing to Jefferson on October 17, 1788, Madison states: "My own opinion has always been in favor of a bill of rights...at the same time I have never thought the omission a material defect, nor been anxious to supply it even by subsequent amendment...I have favored it because I supposed it might be of use."  

35 Of use, indeed, for saving his political skin. Jefferson can be given credit for being able to read between the lines. Continuing in the same letter, Madison says:

The difference [between monarchies and republics] so far as it relates to the point in question—the efficacy of a bill of rights in controlling abuses of power—lies in this: That in a monarchy the latent force of the nation is superior to the Sovereign, and a solemn charter of popular rights must have a great effect as a standard for trying the validity of public acts, and a signal for rousing and uniting the superior force of the community; whereas, in a popular Government, the political and physical power may be considered as vested in the same hands, that is, in a majority of the people, and consequently the tyrannical will of the Sovereign is not to be controlled by the dread of an appeal to any other force within the community.  

36 The reasoning of Madison appears sound; but, on close examination, ambiguities arise. What does he mean when he says that in a popular government the political and physical power are vested in the same hands? Certainly the people have the physical power of the community and also the radical political power, that is, the power to institute and abolish

35 Ibid., 271.  
36 Ibid., 273.
governments. But that radical power is not what is being discussed. Bills of rights are protections against the day-to-day abuse of political power in the government. It is the government of a nation—no matter what its form—that possesses the immediate political power. Even in a republic, citizens make a real, though not total, alienation of power. Therefore in popular governments bills of rights still have a place although not as essential as in royal government nor fulfilling quite the same function. For Madison is right in saying that in a popular government "the tyrannical will of the Sovereign is not to be controlled." This is the function of a bill of rights in a royal government. In a republic the sovereign is the people and against their tyrannical will no force will avail. Rather against an arbitrary and harmful course taken by the officers of government is a popular bill of rights instituted. Since the officers of a republic are elected and answerable to the people, the likelihood of their taking oppressive measures is very small; yet such eventualities can occur and then will a bill of rights prove helpful.

But not too helpful as Madison says in the same letter. "Experience proves," he writes, "the inefficacy of a bill of rights on those occasions when its control is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State. In Virginia I have seen the bill of rights violated in every instance where it has been opposed to a popular current."37 When pressed, Madison could be as realistic as the next man.

37 Ibid., 272.
Another letter from the same interregnum period is enlightening. To
George Eve on January 2, 1789: "Circumstances are now changed. The Con-
stitution is established on the ratification of eleven States and a very

great majority of the people of America; and amendments, if pursued in a
proper moderation and in a proper mode, will be not only safe, but may
serve the double purpose of satisfying the minds of the well-meaning oppo-
nents, and providing additional guards in favour of liberty."38

Hamilton joined the bandwagon. "That there will be a reconsideration
of the parts of the system, and that certain amendments will be made, I
devoutly wish and confidently expect."39 This may be with tongue in cheek;
a devout Hamilton is an image difficult to conjure. Hope for amendments
indeed he did, but not for the sort that were likely to be accepted. Wash-
ington regarded amendments in the same light. In a proposed address to
Congress which he drew up in April, 1789, he acknowledged that the States
had demanded "amendments on some of the articles of the Constitution, with
the obvious intention of quieting the minds of the good people of these
United States."40 To the Marquis de Lafayette he had explained that at
the Convention a bill of rights "was considered nugatory."41 But nugatory
or not, they were what the people wanted; so they were what the people got.

38. The Letters and Other Writings of James Madison, published by Order
of Congress (New York, 1884), I, 447. Hereafter this work will be re-
ferred to as Congress Ed.


40. Writings of Washington, XXX, 303.

41. Ibid., XXIX, 478.
On June 8, 1789, James Madison arose in the House of Representatives and proposed that a select committee be formed to consider amendments to the Constitution. At the same time he presented a scheme of those matters which he believed should form the amendments. What the committee brought back after a few weeks was very similar to the suggestions (shall we say demands?) which the various States had made of Congress. The whole of the proceedings went tamely and none could say there were any surprises.

After making his recommendations, Madison said to his fellow Congressmen, "I find from looking into the amendments proposed by the State conventions, that several are particularly anxious that it should be declared in the Constitution, that the powers not therein delegated should be reserved to the several States. Perhaps other words may define this more precisely than the whole of the instrument now does. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration, if the gentlemen will allow that the fact is as stated. I am sure I understand it so."42 To insist that the States have retained what they do not surrender and that the people retain what they surrender to neither government seems to Madison to be such a truism that he can not offer arguments in its behalf.

One might pause to study the young Madison as he stood in Congress where he was destined to speak so often on issues of great moment. At thirty-eight, he was still regarded as young although known to be vastly experienced. He was small in stature and always impeccably dressed, usually in black. Nathan Schachner has caught the genius of the man as well.

42Hunt, V, 387-388.
as any of Madison's contemporaries.

Underneath his dry exterior, Madison was a complex individual. A profound student of ideas, he was capable of translating them into action. A bold and original thinker, he proceeded with deliberation and caution. Though able on occasion to restrain his friends from rushing to political destruction, he could not prevent the lightnings of hatred from descending on his own political head. Apparently timid and retiring though he was, his industry made him the terror of the opposition. Happiest with pen and paper, he spoke incessantly on the floor of Congress. His command of facts was impressive, and his logic pure; yet he convinced no one but those who already were convinced.  

This was the Congressman who waited for the amendments to come back from committee. There were delays, but finally a list following his own suggestions was submitted to the Senate where it again underwent scrutiny. The list was then submitted to the States for ratification, the expression of reserved powers appearing as the twelfth and last amendment. The first two articles were never accepted by a sufficient number of States. Therefore reserved powers moved up to become the Tenth Amendment, the closing statement to our Bill of Rights.

The preceding article, the Ninth, is similar to it: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the People." The Tenth reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."  


44 Constitution, Analysis and Interpretation, p. 41.
What are we to make of these two articles? Are they a pillar of cloud by day and a pillar of fire by night that will lead the elect into the Promised Land; or are they merely the sounding of brass and the tinkling of cymbal? The truth is they are like a voice crying out in the wilderness, "Make straight the way of government." Of the two voices, that heard in the Tenth Amendment has more substance in its message; for the Ninth speaks of rights—which are moral endowments—while the Tenth Amendment speaks of powers—which are political realities. No doubt rights are real enough in their own order; but against a competing power, power is the only answer. Furthermore court action is difficult when based on an undefined mass of retained rights. The only case which based its appeal on the Ninth Amendment saw that appeal summarily rejected by the Supreme Court. 45 Not so with the Tenth Amendment. In Collector v. Day (1871), the principle was drawn from the Tenth Amendment that the reserved powers of the States comprise an independent qualification of otherwise constitutional acts of the Federal Government and this conclusion was applied to nullify, in part, an act of Congress. 46 A similar conclusion was drawn in Hammer v. Dagenhart (1918) and in Schechter Poultry Corporation v. United States (1935) in which Chief Justice Hughes cited the Tenth Amendment against what he regarded the exercise of "extra-constitutional authority." 47

45 Ibid. (The case was Tennessee Electric Power Co. v. TVA, 1939.) 909.
46 Ibid., 916.
47 Ibid., 917-918.
The foregoing have been cited to show that there is enough substance in the Tenth Amendment to base decisions upon it; the cases are not cited as necessarily correct decisions. In fact, Collector v. Day and Hammer v. Dagenhart were expressly overruled by later decisions. Madison of 1789 would have wholeheartedly concurred in these overrulings and have supported Chief Justice Stone who in 1941 on behalf of a unanimous Court wrote: "The power of Congress over interstate commerce 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.' * * * That power can neither be enlarged nor diminished by the exercise or non-exercise of state power. * * * Our conclusion is unaffected by the Tenth Amendment which * * * states but a truism that all is retained which has not been surrendered." 48

Madison voiced the same opinion two years after Congress approved the amendment during the debate over the Bank of the United States in 1791. "Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitutions of the States." 49 The irony of this defense of federal power is that it appears in Madison's speech against the Bank, not for it. By 1791 he had switched to strict

48 Ibid., 918. Stone was delivering the decision in United States v. Darby (1941).

interpretation and narrow federal activity, the very things he had criticized in the Federalist. Such are the humiliations time foists upon men. Eating one's words is a skill all eventually acquire.

The Bank bill was not the first instance of Madison's opposition to Federalist programs. His first open break had occurred over Hamilton's plan for funding the national debt and the sister plan for the national government to assume payment on the state debts. This first battle was joined in January of 1790 when Hamilton, then Secretary of Treasury, submitted his plans in person to the Congress. Among Southerners in particular Hamilton's program met a strong opposition. Madison then proposed a compromise bill, but it was rejected by both Hamiltonians and their opponents. Eventually funding and assumption were both adopted much as the Secretary had proposed—marking a decisive victory for Hamilton and an equally significant defeat for Madison.

It is difficult to assign the principal reason which led Madison away from Washington and Hamilton and into the arms of Jefferson. Was it his personal esteem for the Sage of Monticello? Or did Madison's political horse-sense tell him that he could travel further in the Virginia climate on a Republican mount rather than a Federalist? Was he jealous of Hamilton—or fearful? Whatever his reasons, the results of his shift to Republicanism were momentous.

Having adopted the creed of strict interpretation, Madison was obliged to resist any bill establishing a national bank. Yet clear in his

50 Schachner, p. 105.
understanding of the Constitution, he realized that "interference with the power of the States" was no measure of the constitutionality of a federal bill. A federal bill is unconstitutional, not when it embarrasses or frustrates a law of the States, but only when it goes beyond the powers given to the national government in the Constitution. This was the brunt of Madison's opening statements while the rest of his long address was devoted to a detailed proof that the power of incorporating a national bank could not be found even implicitly in the powers of Congress as delineated in the Constitution. His listeners were evidently more impressed by his introduction than by the body of his argument, for the Bank bill did pass in both houses. Madison expressed his disappointment in a letter to Edmund Pendleton: "The subject of the Bank has been decided contrary to your opinion, as well as my own, by large majorities in both Houses, and is now before the President. The power of incorporating cannot, by any process of safe reasoning, be drawn within the meaning of the Constitution as an appurtenance of any express power. The arguments in favor of the measure... strike at the very essence of the Government, as composed of limited and enumerated powers."\(^{51}\)

At the close of 1791 Madison wrote several articles for the National Gazette in which he tried to explain—to himself as well as to others—the change he had made. In the article entitled "Consolidation," Madison begins on a conciliatory note as though he were an umpire rather than a

\(^{51}\)Congress Ed., I, 528.
contestant. "Here then is a proper object presented, both to those who are most jealously attached to the separate authority reserved in the states, and to those who may be more inclined to contemplate the people of America in the light of one nation. Let the former continue to watch over every encroachment, which might lead to a gradual consolidation of the states into one government. Let the latter employ their utmost zeal to consolidate the affairs of the states into one harmonious interest; and let it be the patriotic study of all, to maintain the various authorities established by our complicated system, each in its respective constitutional sphere."52

This was making things sound easier than they are, but who will begrudge a man spreading oil on troubled waters? In his article "Public Opinion," Madison observes that "a Constitutional Declaration of Right has an influence on government, by becoming a part of public opinion." Thus a declaration of rights will be both an effect and a cause of public opinion.53 This is a pleasant reflection, which neither raises nor resolves any problems. But Madison can be indignant: "What a perversion of the natural order of things! to make power the primary and central object of the social system, and Liberty but its satellite." And he can be clever: "In Europe, charters of liberty have been granted by power. America has set the example... of charters of power granted by liberty."54 If

52 Hunt, V, 68-69.

53 Ibid., 70.

54 Ibid., 122, 83.
Madison was fond of such antithesis, he might have observed that while some men destroy what they love he had created what he now hated.

The articles by Madison in the National Gazette represent the mind of a man passing through a political limbo searching after a new home for his political convictions. Such a state of suspended allegiance could not long last and daily Madison grew more opposed to powers accommodated "to all possible changes which futurity may produce." Futurity had produced some unforeseen changes in his own attitudes as well as in his government.
By the summer of 1798 America had fallen upon evil days as both Federalists and Republicans would testify. Their reasons differed, but the level of their alarm was about the same. The Republicans berated Federalist President John Adams for being bull-headed—which he was—and disloyal—which he was not. The Federalists excoriated Jefferson and Madison as anarchists and atheists. Once the disgrace of the XYZ Affair became known in America, the Federalists had additional ammunition to fire at the Republicans whom they already had labelled Francophiles. American relations with France collapsed and the nation readied itself for war with the French Directory. General Washington came out of retirement to accept the command of the United States Army and Hamilton, raised to the rank of major general, was put in charge of activating the troops. Merchant ships were being armed while riots between French and American sailors became chronic in New York City. Yet all the while the Republican press continued its flood of coarse and reckless accusation against their own government. The Federalists cried treason and their concern was sincere.

Congress acted by passing two bills, one of them designed to protect the United States from undesirable foreign agents and refugees, the second designed to curb the reckless abuse of the public press. The first was called the Alien Act, the second the Sedition Act.
Thomas Jefferson, as Vice President under Adams, had the embarrassing duty of presiding over the Senate while it deliberated over the Alien and Sedition Acts. Although opposed to the bills with all his soul, he felt certain that the Federalist-controlled Senate would pass them. Despairing of anything to be gained from the president's chair in the Senate chamber, Jefferson laid down his gavel and withdrew to Monticello to devise a comprehensive strategy. Madison, at this time, was living in retirement.

Although the two acts were lumped together by friend and foe alike, they differed in purpose and in their constitutional merits. For all its lack of prudence and display of rigor, the Alien Act was surely constitutional. The act, as finally passed on June 25, 1798, empowered the President to order "such aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the Government thereof" out of the country.\(^1\) Given a fair construction, this law provides nothing more than that surveillance every nation must have over the foreigners it admits. The law could be abused and it was, but many just laws have been abused. Furthermore, the Alien Act went no further than similar enactments which led to the internment of German and Japanese aliens at the beginning of the Second World War, and no one was hustled about in 1798 as shamefully as were the Nisei-Americans in 1942.

The Sedition Act was directed at domestic, not foreign, disturbers.

Where the Alien Act had been definite, the Sedition Act was vague. While the first was impartial in tone, the second was in the form of a testy complaint. The first section of the Sedition Act dealt with treason and insurrection and did not go beyond just bounds. The excess and the vagueness crop up in the second section.

If any person shall write, print, utter, or publish, or shall cause or procure to be written, printed, uttered or published...any false, scandalous, and malicious writing or writings against the government of the United States or either house of the Congress of the United States, or the President of the United States with intent to defame the said government... or to excite against them, or either or any of them, the hatred of the good people of the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States... or to resist, oppose, or defeat any such law or act...then such person...shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.2

Was every Republican club or French-speaking society an "unlawful combination"? Was the opposition party to be entirely silent since its normal function was "to resist any law" which it regarded harmful? John Taylor of Caroline may have been correct in saying, "government is getting into the habit of peeping into private letters, and is manufacturing a law, which may even make it criminal to pray to God for better times."3

Jefferson did not intend to pray to God for the remedy. What he

2Ibid., pp.177-178.

thought of God is difficult to say, but what he believed about government was plain to all. Years before, he had told Madison that it was "not clear in my mind" whether the life of savages without any government (which he erroneously supposed was the life of the American Indian) was not the best form of society after all. "I hold it that a little rebellion now and then is a good thing." This cheery idea is followed by the ingenious notion that, if rebellions prove unsuccessful, the ruler should not be too severe on the leaders. If he were, he might discourage subsequent outbreaks.  

This was the Jefferson who now mediated his own sort of rebellion against the Alien and Sedition Act. The government had gone too far and Jefferson was the man to right the damage. In fact, the government had been going too far for the last ten years and he was the man to recall all Americans to what their Union really meant. In the quiet of Monticello, he drew up a list of resolutions, a sort of new Declaration of Independence.

Once he had the resolves on paper, Jefferson looked about for a suitable man to present them. Being Vice President of the government which his scheme would cripple, he was hardly the man for the job. At first he thought of having the resolves made by the legislature of North Carolina and approached Wilson Cary Nicholas to deliver them. But Nicholas, after

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drawing up a transcript of his own which incorporated several minor but significant changes from Jefferson's original, declined the task. Instead Nicholas suggested that Jefferson ask John Breckinridge of Kentucky who was staying with Nicholas at the time. Breckinridge was willing to assist and was in a key position as the Speaker of the House in the Kentucky Assembly. The Kentuckian had the benefit of both Jefferson's and Nicholas's notes—whether Jefferson ever saw Nicholas's transcript is one of the many mysteries still surrounding these clandestine proceedings. Breckinridge, lacking neither imagination nor a fund of political prudence superior to his master Monticello, proceeded to make several changes in the first seven resolves of Jefferson and turned the eighth into two separate resolves.

For the preceding information we are indebted not only to the correspondence of Jefferson and Breckinridge but especially to a letter of Jefferson's grandson, Thomas Jefferson Randolph. This letter, along with other documents cited below, is found in the 1832 edition by Jonathan Elliot of The Virginia and Kentucky Resolutions. This remarkable booklet was more than a piece of good scholarship; it was a handbook of war, for in 1832 the conflict of State versus national authority was raging at a pitch

5 For an authentic copy of Jefferson's own draft, see the invaluable edition of Jonathan Elliot's The Virginia and Kentucky Resolutions of 1798 & '99. (Washington, 1832). A copy of this indispensable source is in the Rare Book Room of University of Chicago.

6 Ibid., p. 61. From the letter of T. J. Randolph referred to later in the text.
higher than ever before. Madison, by virtue of his extraordinary longevity, was still alive and still writing during the 1832 clash. What he maintained at that time will be examined later in this study; the point here is that it was not until 1832 that Americans knew for certain the roles of Nicholas in the Kentucky Resolutions and the role of Taylor in the Virginia Resolutions. Years after the resolves appeared, great confusion reigned as to who the real authors were. Gradually it became clear that Jefferson had written the Kentucky Resolutions and Madison those of Virginia. But whether and how greatly their drafts were changed before being adopted was still debated until the letter of young Randolph quieted most of the doubts.

Randolph's letter is addressed to Hon. Warren R. Davis and is dated March 8, 1832. (This was only two months before Elliot put his edition on the presses—he was working rapidly and brilliantly!) "I have examined," Randolph writes, "and compared the MSS. in my possession with both resolutions offered by Nicholas and Breckinridge: the first I find almost verbatim, as far as they go; the second, in part the ideas, but not the language. The MS contains nine resolutions. Nicholas adopted seven entire, a part of the eighth. Breckinridge took the ideas in part of the omitted resolutions." Young Randolph diligently transcribed the whole of the original draft written in his grandfather's hand. This took several days and we can be sure he was accurate, for in the postscript (dated several days after the first page) he attests that his work is faithful to the original.
Why this solicitude over the original? Because it contained nullification; and no matter how one cuts the Jefferson cake, it comes out Calhoun pure and simple, and thirty years before its time. Nullification speaks from the pages of Jefferson; it whispers from the pages of Nicholas and Breckinridge; but in each instance it is heard.

The first of the Kentucky resolves reads the same in each version. In it we find the following declaration:

That to this compact [the Federal Constitution] each State acceded as a State, and is an integral part, its co-States forming, as to itself, the other party; That the government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself; since that would have made its discretion, and not the Constitution, the measure of its powers; but that as in all other cases of compact among parties having no common Judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress.

Only the gullible or biased could be convinced by such a foggy argument. The judge of the acts of the national government is the Federal Judiciary with the Supreme Court as the final appeal. The courts decide cases involving the Constitution—something which Jefferson skips over. He tries to give the impression that Congress has attempted to be the final judge of its own acts, but he does not say so clearly because all would know that was not the truth. His program for letting each party to the federal compact judge for itself would bring such total confusion that by comparison a little rebellion would indeed be "a good thing."

7 For a copy of the Kentucky Resolutions as delivered, see Commager, pp. 178-182.
In his second resolution, after citing the Tenth Amendment, Jefferson declares the Sedition Act and a law concerning the United States Bank: "altogether void and of no force." The subsequent resolves are spent declaring that the Alien Act with its bed-fellow the Sedition Act "is not law, but is altogether void and of no force." Has Jefferson adopted that principle—taken from psychology rather than political science—that anything said often enough will be believed?

Important differences in the three versions of the Kentucky Resolutions begin with what had been Jefferson's eighth resolve. He wished "a committee of conference and correspondence be appointed who shall have in charge to communicate the preceding resolutions to the Legislatures of the several States." Nicholas and Breckinridge both dropped this impracticable measure which looked back to the venerable Committees of Correspondence preceding the Revolution. The bombshell of Jefferson's draft comes shortly thereafter. He begins by making a false, but specious distinction between abuse of power and assumption of power. "In case of an abuse of delegated powers, the members of the General Government, being chosen by the people, a change by the people would be the constitutional remedy; but where powers are assumed which have not been delegated, a nullification of the act is the rightful remedy; that every State has a natural right in cases not within the compact (casus non foederis), to nullify of their own authority all assumptions of power by others." Jefferson begins by

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8 From the copy of Randolph in Elliot, p. 63.

9 Ibid., 64.
playing with words and closes playing with destruction. Is not the most common abuse of a governmental power the assumption to use it to a degree not delegated? Are not assumptions abuses? Then what does Jefferson mean by his speciously profound distinction? Does he hope to benumb his listeners' minds so that more pernicious theories may slip in unrecognized? Jefferson's closing words are clear as they are deadly: every State has a right to nullify what it judges to be an assumption of undelegated power. His resolves were not a call to parliamentary action so much as a call to arms. He declares that such laws as the Alien and Sedition Acts will "unless arrested at the threshold, necessarily drive these States into revolution and blood, and will furnish new calumnies against republican government."

New calumnies are scarcely necessary: if Jefferson's directives had been put into effect, the government of the United States would have been an object of ridicule even to those who had loved her. Breckinridge and Nicholas saw that as well as anyone. They both struck the above passages entirely from the record. In the formula that Breckinridge submitted in Kentucky, the eighth resolve now became his ninth, Breckinridge's eighth being an entire face-lifting of the last short resolve of Jefferson which had concerned his dear and quite abortive committees. Breckinridge states "that this Commonwealth considers Union for specified National purposes, and particularly for those specified in their late Federal Compact, to be friendly to the peace, happiness, and prosperity of all the States."¹⁰

Surely this is damning with faint praise. Why the late Federal Compact?

¹⁰ Commager, p. 180.
Is it already defunct? A play on words, no doubt, by Breckinridge. He is satisfied to tease the Union, Jefferson would pull it apart. The younger man uses the rapier, the older an axe.

When the Kentucky Resolutions were passed on November 16, 1798 by the Legislature, copies were sent to the Legislatures and Executives of other States. Jefferson then turned his attention to Madison whom he was expecting to write an equally provocative challenge which Virginia might endorse and send out to the nation. Madison already knew about the Kentucky Resolutions but it is not clear whether he had any hand in composing them. In view of the different emphasis in his resolves, it may be unlikely.

The Virginia Resolutions were delivered by John Taylor in the Virginia House of Delegates December 10, 1798. Nearly as much confusion surrounds the drafts of the Virginia Resolutions as those of Kentucky; but just as a letter of Thomas J. Randolph helped clear the doubts with the latter, so a letter of Thomas Jefferson himself has helped reconstruct the events preceding the Virginia Resolutions. Madison accepted the task suggested by Jefferson and drew up a list of resolutions which later became lost and was not at hand when he compiled his papers and letters near the end of his career. However, his list, or a copy of it, was sent to Jefferson for his perusal. In a letter to Wilson Nicholas on November 29, 1798, Jefferson refers to this copy of Madison's resolutions. From the letter it appears that Nicholas had acted as the go-between and courier. "The more I have reflected on the phrase in the paper you shewed me," Jefferson wrote, "the more strongly I think it should be altered. Suppose
you were, instead of the invitation to cooperate in the annulment of the acts, to make it an invitation to concur with this commonwealth in declaring, as it does hereby declare, that the said acts are, and were ab initio, null, void, and of no force, or effect.\(^{11}\) Nicholas evidently related this suggestion to Madison, for when the Virginia Resolves were first presented in the Legislature, Jefferson's words had been added to the sixth resolve. However, most of Jefferson's addition was stricken from the record on a motion by John Taylor himself just before the vote on December 21, 1798. The Resolutions therefore were passed in approximately the same form as drawn up by Madison. It is a document which, endeavoring to stay clear of nullification, involved itself in several ambiguities.

Madison begins with an affirmation of Virginia's attachment to the Union. "Resolved. . . That this Assembly most solemnly declares a warm attachment to the Union of the States, to maintain which it pledges all its powers."\(^{12}\) In the next paragraph, Madison introduces his theory of interposition.

Resolved. . . That this Assembly. . . 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 further valid than they are authorized by the grants enumerated in that compact; and that, in case of a deliberate, palpable,


\(^{12}\) Elliot, pp. 1-2; also Hunt, VI, 326.
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 progress of the evil, and for maintain­
ing within their respective limits the authorities,
rights, and liberties appertaining to them.13

As outlined here, interposition is vague: it could amount to practically
the same thing as nullification; it could mean something far less drastic
which is the way Madison explained it a year later. Even here Madison
speaks of the States while Jefferson had said every State: a very sig­

Most of the resolves are devoted to criticisms of the Alien and Sedi-
tion Acts. In his seventh paragraph Madison re-enters the arena of poli-
tical theory: "...the General Assembly doth solemnly appeal to...the
other States, in confidence that they will concur with this Commonwealth
in declaring, as it does hereby declare, that the acts aforesaid are un­
constitutional; and that the necessary and proper measures will be taken
by each for co-operating with this State."14

It was here that Jefferson had wanted to add "null, void, and of no
force or effect" to the word "unconstitutional." Had such terms been used,
Madison's interposition would equal nullification. As it stood, however,
it might mean that a State which was convinced a federal act was unconstitu­
tional could denounce it as such and invite other States to do the same;
but, until a sufficient number of States took action, the first State

13Elliot, p. 2; Hunt, VI, 326.

14Hunt, VI, 327-328.
could not regard the federal act as void. That was the one safe way to understand the resolves; other interpretations were possible.

General Hamilton regarded the resolutions as bordering on treason and was ready to bring the United States troops into Virginia to show the planters what federal power really was. President Adams regarded them with scorn, and Madison himself became uneasy in his own mind. Less than a week after the Resolutions left Virginia, he wrote to Jefferson: "Have you ever considered thoroughly the distinction between the power of the State & that of the Legislature, on question relating to the federal pact [no question mark]. 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." No reply came from Jefferson but none was needed, for Madison had hit the nail squarely on the head. The legislatures of the States had no power, either singly or jointly, to adjudge the constitutionality of a federal act since it was not those legislatures who had adopted the Constitution, but rather the people of the respective States acting in special convention. But this decisive distinction had not been made by Madison soon enough, for it does not appear in the Resolutions themselves. Consequently Madison found himself in the humiliating position of hearing his own Resolutions attacked on this charge of intrusion

15 Miller, pp. 490-491.

16 Hunt, VI, 328-329, n.
by a legislature into federal matters.

The first State to reply to the Virginia Resolution was Delaware. She declared the Resolutions "a very unjustifiable interference with the general government and constituted authorities of the United States, and of dangerous tendencies, and therefore not a fit subject for the further consideration of the General Assembly."\(^{17}\) From Federalist Delaware, this reply was hardly a shock to the Virginians; nor was the answer from Rhode Island worse than was expected. It stated that the Constitution "vests in the Federal Courts, exclusively, and in the Supreme Court of the United States, ultimately, the authority of deciding on the constitutionality of any act or law of the Congress of the United States!" and "for any state legislature to assume that authority would be...an infraction of the Constitution."\(^{18}\)

Especially interesting is the reply from Massachusetts. Its legislature was also heavily Federalist in complexion, so the Virginians were braced for a strong rebuff. What they received was a calm, well-balanced argument.

This legislature are persuaded, that the decision of all cases in law and equity, arising under the Constitution of the United States, and the construction of all laws made in pursuance thereof, are exclusively vested by the people in the judicial courts of the United States.

\(^{17}\)Cited in Schachner, p. 500.

\(^{18}\)Commager. p. 184.
But, should the respectable state of Virginia persist in the assumption of the right to declare the acts of the National Government unconstitutional, and should she oppose successfully her force and will to those of the nation, the Constitution would be reduced to a mere cypher, to the form and pageantry of authority, without the energy of power. Every act of the Federal Government which thwarted the views or checked the ambitious projects of a particular state, or of its leading and influential members, would be the object of opposition and of remonstrance; while the people, convulsed and confused by the conflict between two hostile jurisdictions, enjoying the protection of neither, would be wearied into a submission to some bold leader, who would establish himself on the ruins of both. 19

Here the analysis of public psychology is as clear as the political argumentation. What makes these words of the Massachusetts Assembly doubly interesting is that within fifteen years the Bay State would be advocating measures she now condemned in the Old Dominion of Virginia. What whole legislatures can master eating their words as well as can a single man. The trick is in the appetite.

The hopes of Jefferson and Madison rested upon the replies from the middle and southern States. The Senate of the State of New York dealt a shattering blow on March 5, 1799. "Whereas the judicial powers extend expressly to all cases of law and equity arising under the Constitution and laws of the United States. . . . the interference of the legislatures of the particular states in those cases is manifestly excluded." Furthermore the Senate "cannot forebear to express the anxiety and regret with which they observe the inflammatory and pernicious sentiments and doctrines which are contained in the resolutions of the legislatures of Virginia and Kentucky."

19 Elliot, p. 10.
20 Ibid., 11.
With New York gone, they knew the game was lost. It was lost, totally lost. Not one favorable reply was made; the States to the south of Virginia did not reply at all wishing neither to hurt nor to support the Old Dominion.

The two champions of the Republican party took the rebuff in contrasting manners. Madison scrutinized his stand in the Resolutions looking for statements to which the good and the wise might take offense; Jefferson reasoning that the best defense was a good offense readied new resolutions of a higher calibre and a longer range. The cannon again would be mounted in Kentucky; and the shot, he hoped, would be heard around the world. In an extraordinary letter to Madison written August 23, 1799, Jefferson outlines his plan of attack. He wanted Virginia and Kentucky to work jointly as before, each preparing re-affirmations and confirmations of their previous statements. The two commonwealths, Jefferson decreed, must be "confident that the good sense of the American people and their attachment to those very rights which we are now vindicating will, before it shall be too late, rally with us round the true principles of our federal compact, yet we must be "determined, were we to be disappointed in this, to sever ourselves from that union we so much value." 21

Two weeks later Jefferson writes to Wilson Nicholas with another sketch of what he wants in the Second Kentucky Resolutions. This sketch follows what he had written to Madison except that the statement "determined...to sever ourselves from that union we so much value" is now

21 Cited in Koch and Ammon, p. 166.
missing. Missing also is the statement that the Alien and Sedition Acts were "palpable violations of the constitutional compact," which had been made in the Madison letter. 22

Since we know that Madison visited Jefferson during the interval between the two letters, most likely he prevailed on Jefferson to drop the threat of secession. Even then, the resolutions proclaimed nullification, and openly since this time neither a Nicholas nor a Breckinridge was able to deter Jefferson. The Kentucky legislature passed the resolves as they were expected on February 22, 1799. Among the heaviest shots fired in the document were:

Resolved. . . That the principle and construction contended for by sundry of the state legislatures, that the general government is the exclusive judge of the powers delegated to it, stop not short of despotism—since the discretion of those who administer the government, and not the Constitution, would be the measure of their powers: That the several states who formed that instrument being sovereign and independent, have the unquestionable right to judge of the infraction; and, That a nullification of those sovereignties of all unauthorized acts done under color of that instrument is the rightful remedy. 23

When the resolves went to the Kentucky Senate, they were debated bitterly; but eventually they were passed and signed by the Governor.

In Virginia things proceeded differently since the original resolves had met considerable opposition the year before. Fortunately for Republican tactics, Madison had returned to public office and now had a seat in

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23 Commager, p. 184.
the House of Delegates from which he could direct the proceedings.

As chairman of the committee which reviewed the Resolutions, he was able to compose a lengthy report which he intended to be his last word on the subject. The Report takes each of the sentences of his resolutions in order, quotes the passages, explains their meaning, and answers the objections which the other States had made. The Report is unquestionably thorough, being twenty times longer than the original Resolutions.  

Essential to Madison's theory of the sovereignty retained by the States even within the Union is the notion of compact which had been mentioned in the third of the Resolutions: "...the powers of the Federal Government result from the compact to which the States are parties." In the Report of 1799 he admitted that the word States is open to several interpretations. "Thus, it sometimes means the separate sections of territory occupied by the political societies within each; sometimes the particular governments established by those societies; sometimes those societies as organized into those particular governments; and, lastly, it means the people composing those political societies, in their highest sovereign capacity." The second and third meanings are difficult to distinguish for one reading Madison. Actually, he is interested chiefly in the fourth: "All will at least concur in that last mentioned; because in that sense the Constitution was submitted to the 'States'; in that sense the 'States' ratified it; and in that sense of the term 'States' they are

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24 Hunt, VI, 341-406.
consequently parties to the compact from which the powers of the Federal
Government result." 25

Madison believed that it is "essential to the nature of compacts,
that where resort can be had to no tribunal superior to the authority of
the parties, the parties themselves must be the rightful judges, in the
last resort, whether the bargain made has been pursued or violated;" and
that the Federal Constitution was such a compact. Such notions are highly
ambiguous: a compact having no tribunal superior to its members is scarecely a compact. It would have no cohesion, no durability. Furthermore,
the Federal Constitution does provide a superior tribunal, namely, the
federal judiciary with the Supreme Court at its head. Article III, Section 2, Clause 1: "The judicial Power shall extend to all Cases, in Law
and Equity, arising under this Constitution, " to Controversies between
two or more States;" Between Citizens of different States." 26

The Constitution does not, however, provide for the judicial review
of acts either of Congress or of the State governments. This power, the
very heart of the courts' contribution to government, was provided in the
Judiciary Act of 1789. 27

Madison had not liked the Judiciary Act when it was passed; 28 but
even so, he should not have acted in 1799 as though the bill had never

25 Ibid., 348.

26 Constitution, Analysis and Interpretation, p. 538.

27 Ibid., 554.

28 Hunt, V, 420, n.
been passed. During the first two years of the new government, his mind was unable to come to any decision over the role of the courts. In No. 39 of the Federalist, he was very positive, "... in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general Government... The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword, and a dissolution of the compact."29 This was a reasonable explanation, but a few months later Madison abandoned it. "In the State Constitutions & indeed in the Fed one also, no provision is made for the case of a disagreement in expounding a law."30 But when the time came for the Bill of Rights in the First Congress, he again reversed himself. "If they the amendments are incorporated into the Constitution, independent tribunals of justice will consider themselves in a particular manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive."31 Since he referred to assumptions by the Legislative, Madison evidently countenanced judicial review of the acts of Congress by the federal courts. Consequently, when it came time for his Report of 1799, his line of attack should have been, not the ignoring of the Judiciary Act and with it the

29The Federalist, p. 256.

30Hunt, V, 294.

31Ibid., 385.
process of judicial review, but rather the insistence upon the possibility of an alternate process which would refer the contested matter to the people of the respective States who were indeed the original parties to the Constitution. Such a referral to the States as distinct from a referral to the courts was the whole inspiration and aim of Madison's Report —yet, like various forms of inspiration, it seems to have eluded the full grasp of its very creator. In a sense, Madison's Report never quite strikes home.

Nevertheless, the Report remains Madison's supreme effort to justify the devolution of power back to the people, in this case, the power to judge. Madison knew that the Federal Judiciary was the tribunal set up by the Constitution. Without going against the Constitution, Madison tried to go outside it to the extent of enlisting the political societies which had adopted the Constitution. Anyone experienced in constitutional law could tell Madison how thin the ice was on which he tread with only the current of rebellion rushing beneath. Yet he chose to follow this hazardous path.

Knowing its possible dangers, he strewed his path with arguments for its safety and reasonableness hoping other stout souls might follow. At times his report achieves clarity and precision. "The authority of constitutions over governments, and of the sovereignty of the people over constitutions, are truths which are at all times necessary to be kept in mind, and at no other time, perhaps, more necessary than at present."³²

³²Ibid., 352.
But elsewhere his arguments lead nowhere as when he is answering the charge that the judiciary should pass the final judgments. He replies, "first, that there may be instances of usurped power, which the forms of the Constitution would never draw within the control of the judicial department." History has proved the weakness of this argument for the range of topics covered by judicial action has increased steadily with the years. The second argument is more involved than the first, but no more substantial: "If the decisions of the judiciary be raised above the authority of the sovereign parties to the Constitution, the decisions of the other departments, not carried by the forms of the Constitution before the judiciary, must be equally authoritative and final." But the two laws which Madison criticises throughout the Report, the Alien and Sedition Acts, are denounced as unconstitutional; therefore they could be carried to the court. Government must touch the people: each of the departments has its own form of impression upon the people and upon the States. The impression by the court, although the most quiet, is also the most permanent. In any contested series of events—if contested properly—the last voice heard from Washington is the voice of the court. Madison admitted as much in the Federalist.

At the close of the Report, Madison is explaining the seventh resolve of his Virginia Resolutions which mentioned declarations by the other States that the Acts were unconstitutional. Attempting to explain the nature of such declarations, Madison backtracks. The Virginia

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resolutions and other declarations must not "be deemed, from any point of view, an assumption of the office of the judge. The declarations in such cases are expressions of opinion, unaccompanied with any other effect than what they may produce on opinion by exciting reflection. The expositions of the judiciary, on the other hand, are carried into immediate effect by force." 34 Like a swimmer who tried to reach a distant goal but now is happy to save himself by treading water, Madison, having led his audience through endless waves of argument, has not advanced them a foot by the end of the Report. Happy to be still afloat, he is where he started before the Resolutions themselves were written; for he tells his fellow Americans that the Resolutions effected nothing by right nor by law. They only voiced opinion. That was nothing new. Opinions had been voiced aplenty—they were the very occasion of the Sedition Act. Having pledged to cross the troubled waters of interposition and swim to some yonder point (the point was never clear), Madison is now ready to get out of the water and dry himself with a page of the Constitution.

The judgment of later generations on the Report was a cause of vexation to Madison in his final years. Many a Southerner regarded it as an exposition of that theory of nullification which it had deliberately tried to disavow. Even John Q. Adams, who professed such veneration for the Virginian, concluded that Madison believed "because the States of this Union, as well as their people, are parties to the Constitutional compact of the federal Government, therefore the State Legislatures have

34 Ibid., 402.
the right to judge of the infractions of the Constitution by the organized Government of the whole. "\(^{35}\)

This is a view that Madison definitely did not hold. What he did hold is more difficult to determine. He expresses doubts that the legislatures can act in the matter. He mentions conventions in the several States. Did he envision, after the invitation from one State (through its legislature if necessary), an adequate majority of state conventions as the rightful way to nullify and void a federal act? Such a solution might provide that partial devolution of power which Locke had despaired of finding. But how great a majority of States? Three quarters of them? Then why not take the constitutional measure of amending the existing document in the manner prescribed, rather than embarking on extra-constitutional methods? Madison ignored the two provided avenues of redress, appealing the case before the Supreme Court for a decision of the acts' constitutionality and the proposing of an amendment to the Constitution if the decision of the Court should be unsatisfactory. He persists in considering the abrupt declaration by the Virginia legislature that the federal acts are unconstitutional, "the first and most obvious proceeding on the subject. "\(^{36}\)

Like the Resolutions, the Report drifts halfway between appeals for positive action and discussions of political science. In the beginning, the Resolutions were geared for action, but the fear of nullification and


\(^{36}\)Hunt, VI, 404.
the cool reception by the other States forced Madison to change his ground. In the Report he toys with several theories never proposing any one of them as the solution to the problem. He seems to have favored as entirely legal the decision of a large majority of conventions held in the several States—if such conventions were ever held to suspend federal acts. However, he realized the impracticality of such a course since it would take many months for all the conventions to assemble, deliberate, and vote. This would be no more expeditious than conventions for amending the constitution, and thus the practicality evaporates into the air.

To regard both the Virginia Resolutions and Report as expressions of public opinion is the soundest; they were a cry of protest, a call for redress to sister States. Madison tried to persuade others not to force them, believing that in his generation the pen would still prove mightier than the sword. John Q. Adams described the age in these words: "Happy, thrice happy the people, whose political oppositions and conflicts have no ultimate appeal but to their own reason; for whose party feuds the only conquests are of argument, and whose only triumphs are of the mind." 37

The Kentucky and Virginia Resolutions were triumphant to the extent that they were excellent campaign material for the Republicans. Neither Jefferson nor Madison acknowledged their authorship publicly, but they benefited from the groundswell of public opinion against war with France, against Hamilton's brand of Federalism, against the old administration. In 1800 Jefferson was elected President and Madison was named his

37 John Q. Adams, p. 60.
Secretary of State, whereupon both lost interest in cramping federal power.
Madison's adventure with the intricacies of interposition was over, or so he thought.
CHAPTER IV

MADISON THE CONSTITUTIONALIST

Every man follows some law—the law of his members, or the law of his mind; sometimes the law of Caesar, sometimes that of God, and sometimes both when they are compatible and he willing. Even the law of man, public and recorded, has its levels ranged one upon the other. A man may serve and defend the law of his city, or of his State, or of his nation. Or he may serve and defend that fund of wisdom and experience known as constitutional law. Edward Corwin in his Introduction to the Constitution of the United States, Analysis and Interpretation defines constitutional law as that "body of rules resulting from the interpretation by a high court of a written constitutional instrument in the course of disposing of cases in which the validity, in relation to the constitutional instrument, of some act of governmental power, State or national, has been challenged."

As with any human law, this law can undergo change. As with many human dicta, this law has at times been made to stand on its head. Hundreds of reversals and overrulings by later courts have caused dismay in many who have observed the history of the Supreme Court of the United States, even in those who have observed from the bench. Justice Roberts feared that court decisions were falling "into the same class as a
restricted railroad ticket, good for this day and train only."¹ Is there no inner sanctum at the center of constitutional law? Can every precedent be set aside and every principle doubted? No, there is a core that does not change; not every ruling has been overridden. The exterior of a tree trunk grows rapidly, ring is added to ring, while the bark peels, gets dirty, breaks off. Yet within the trunk is a core of living wood, slowly growing. In defense of that core of legality Madison spent his final efforts.

Madison was seventy-seven years old when the "tariff of abominations" was passed in May, 1828. Eleven years earlier he had relinquished the Presidency of the United States and since that time had been living in retirement at his home, Montpelier. The tariff led to the South Carolina Exposition and its proposals of nullification. To defend his honor and that of Virginia, Madison took up his pen and for eight years (1828-1836) went to great efforts to show the differences between his stand in 1798-1799 and the theories then being expounded by John C. Calhoun.

There had been opportunity during his presidency to express his views on reserved powers, but Madison had declined. He had the nation to care for—and the war against England to wage. When a young New Hampshire lawyer complained against the war and hinted New England might secede, the President ignored the threat. The speech, the Rockingham Memorial, was

¹Cited in Constitution, Analysis and Interpretation where the principle of stare decisis as a limitation is being discussed, pp. 565-566.
significant, mainly on account of its author—Daniel Webster. The Memo-
rial was in the form of an open letter to the President.

James Madison, Esquire, President of the United States.

We shrink from the separation of the states, as
an event fraught with incalculable evils, and it is
among our strongest objections to the present course
of measures, that they have, in our opinion, a very
dangerous and alarming bearing on such an event. If a
separation ever should take place it will be, on some
such occasion, . . . when a small and heated majority
in the Government, taking counsel of their passions
and not their reason, contemptuously disregarding the
interests, and perhaps stopping the mouths, of a large
and respectable minority shall be harsh, rash, and
ruinous measures threaten to destroy essential rights. 2

The words could have come directly from Jefferson's Kentucky Resolutions
of the past, or from Calhoun in 1828. But these are the words of Daniel
Webster, the bulwark of the Union, speaking in the summer 1812. Every
public man condemns himself at least once in his own lifetime.

Another event during the War of 1812 which President Madison delib-
erately ignored was a meeting of numerous discontented Federalists of New
England during December, 1814. Although held in Connecticut, the moving
spirits behind the Hartford Convention were from Massachusetts. That
State, which had given the most lucid criticism of the Virginia Resolu-
tions, now embarked on a similar course of resistance. 3 Nullification
knows no flag; given a few grievances, its spirit can flame up anywhere.
Years later, when questioned about a book devoted to the Convention,

2The Writings and Speeches of Daniel Webster, ed. J. W. McIntyre
(New York, 1903), XV, 610.

Madison shows scant interest: "I have not yet seen the 'History of the Hartford Convention'; . . . I am not sure, if I possessed the book, that I should even be able, with my waning strength and fading vision, to examine a work filling so many pages." 4

Neither Webster's Memorial nor the Hartford Convention drew forth any declarations of policy from Madison. He was saving himself for the task that began in 1828 with Calhoun. It is true that once, in 1825, a flurry of States'-rights agitation occurred concerning bills for internal improvements and canals which President John Quincy Adams had endorsed. Jefferson wrote to Madison suggesting that Virginia pass new resolutions, in the spirit of 1798, denouncing the internal improvements bill as not warranted by the Constitution. In a long-winded letter, Madison gradually gets the idea across that he disapproves such a move. At this point, both men seem to be slipping. 5

Jefferson was unable to rally and died the following year. But Madison recovered that clarity of judgment which had characterized his earlier contests. The first crisis came when South Carolina replied to the alleged evils of the tariff of abominations with her Exposition of 1828. The author of the Exposition was John C. Calhoun, then Vice President of the nation which his Exposition hoped to cripple. Like Jefferson who had once been in a similar situation, Calhoun had the prudence to keep his

4Congress E4. IV, 340.

Having followed his own course of political metamorphosis, the one-time nationalist and "war hawk" now led the ranks of the States' rights theorists. He expressed his political creed in three principal works: The South Carolina Exposition, A Disquisition on Government, and A Discourse on the Constitution and Government of the United States. With slavery in his backyard, Calhoun could not avail himself of the arguments of natural right when he explained the origins of free government. It is the selfish interests of man as an economic animal that he stresses in the opening pages of his Disquisition on Government. If controlled and directed, these very interests and passions for power and property could, he believed, be made a source of vitality in society and government. Individuals pursuing their own interests in their own way made for both individual and general progress. The "highest wisdom of the State" was "a wise and masterly inactivity." This is a strange meeting of principles:


8 Ibid., I.

9 Ibid.

10 Ibid., VI, 143.
Thomas Hobbes holding hands with Thomas Jefferson; yet it set Calhoun free to declare the sort of sovereignty he wanted. As August Spain has said:

"Calhoun was not handicapped in his treatment of the concept of sovereignty by the philosophy of natural rights. He rejected the whole theory of the social compact and all rights of individuals not sanctioned by the politically organized community. Sovereignty, to him, was simply the highest law-making power within such a community. It expressed its will through law; and it logically followed, therefore, that the sovereign could not violate any law, constitutional or otherwise." 11

The very possibility, furthermore, of a divided sovereignty was categorically rejected by Calhoun. "How sovereignty itself—the supreme power—can be divided, how the people of the several states can be partly sovereign, and partly not sovereign—partly supreme, and partly not supreme, it is impossible to conceive. Sovereignty is an entire thing; to divide, is to destroy it." 12

In the South Carolina Exposition, he proposes an idea that is more difficult to grasp than any divided sovereignty. According to Calhoun, any area in the United States is controlled by two distinct governments at the same time—both governments being independent. "Our system, then, consists of two distinct and independent Governments. The general powers, expressly delegated to the General Government, are subject to its sole and separate control; ... so, also, the peculiar and local powers

reserved to the States are subject to their exclusive control; nor can the General Government interfere, in any manner, with them, without violating the Constitution."13

Calhoun is being unrealistic. Even Madison, when he was resisting the broad interpretation of the Constitution, admitted that interference with the States' laws or powers was not the criterion of those of the national government. If sovereignty is as indivisible as Calhoun contends and the States do remain sovereign, then what was called the federal government would be no true government at all, but merely a clearing house for the policies of a weak confederacy. Yet elsewhere Calhoun explicitly rejects this conclusion.14

With his concepts of sovereignty and federal union established, he was free to justify his brand of nullification. Its initial stages were those proposed by Jefferson, but Calhoun added a novel twist at the end. First, if a State believes it is suffering an invasion of its reserved powers from the federal government, it declares the act unconstitutional and, within its territories, entirely null. Secondly, the State takes whatever legislative and executive measures may be necessary to ensure that the federal act will not operate in its realm. Thirdly, the State awaits the reaction of the rest of the nation. But it is here that the novelty of Calhoun's system enters. Since each State is sovereign, the defense of its sovereign rights is within legal bounds. No cause for the

13 Ibid., VI, 36.
14 Ibid., I, 162-163.
federal government to shout rebellion when its laws are summarily declared null and void. Rather, if the federal government thinks it has cause for complaint, then it may propose an amendment to the Constituition which will clearly give it the power which the nullifying State has contested. Let the federal government then see if it can get three-quarters of the States of the Union to ratify.15

Surely one of the greatest sleight-of-hand tricks ever performed! Calhoun throws the burden of proof from the single State upon the shoulders of the whole nation. Reversing Madison's theory that a majority of State conventions might nullify a particular federal act, Calhoun holds that a large majority of State conventions are necessary to arrest a single State from nullifying what it pleases. Nor is such a majority necessarily adequate to return the nullifying State to the fold. If the State deems the new amendment has intruded into matters not properly amendable, Calhoun says it still has an option—although now a dire one. "It may choose whether it will, or whether it will not secede from the Union. One or the other course it must take. To refuse to acquiesce would be tantamount to secession."16

Before seeing how Madison met these arguments, the opinion of Webster, Calhoun's chief opponent in the Senate, is worth consulting. Webster's celebrated Reply to Hayne delivered in the Senate in January, 1830, was in reality a reply to Calhoun as well. Calhoun presided over the chamber from the chair of the President of the Senate. It is Calhoun

15Ibid., pp. 298-301.
16Ibid., p. 300.
that Webster faces in the famous mural by George Healy. Never a mere mouthpiece, Robert Hayne had spoken for two men, himself and Calhoun; and they for a whole section of the nation and a whole way of life.

Webster also represented a whole way of life and with it an understanding of government. An inquiry is needed, he said, "into the origin of this government and the source of its power. Whose agent is it? Is it the creature of the State legislatures, or the creature of the people? If the government of the United States be the agent of the State governments, then they may control it; provided they can agree in the manner of controlling it; if it be the agent of the people, then the people alone can control it, restrain it, modify, or reform it. . . . It is, Sir, the people's Constitution, the people's government, made for the people, by the people, and answerable to the people."17

Webster rejects the theory that the States may pass judgment on the national government's acts. "The people of the United States have at no time, in no way, directly or indirectly, authorized any State legislatures to construe or interpret their high instrument of government; much less to interfere, by their own power, to arrest its course and operation."18

Madison took up a similar defense of the Union, but a recent critic, Burton Hendrick, over-dramatizes the Virginian's efforts. "He Madison almost frantically denies that there is any connection between his

17 The Writings of Webster, VI, 54-55.
18 Ibid., 73.
doctrines of 1798 and those of the rampant South Carolinians. ... To refute the assumption became almost a mania. 19 Madison, on the contrary, began mildly enough. In a letter written August 2, 1828, he expresses his regrets at the dangerous turn of events in South Carolina hoping "that a foresight of the awful consequences which a separation of the States portends will soon reclaim all well meaning but miscalculating Citizens." 20 Madison then meditates on the mixed blessings which every government must confer.

All Govts even the best, as I trust ours will prove itself to be, have their infirmities. Power wherever lodged, is liable more or less to abuse. In Govts organized on Republican principles it is necessarily lodged in the majority; which sometimes from a deficient regard to justice, or an unconscious bias of interest, as well as from erroneous estimates of public good, may furnish just ground of complaint to the minority. But those who would rush at once into disunion as an Asylum from offensive measures of the Gen'l Govt would do well to examine how far there be such an identity of interests, of opinions, and of feelings, present & permanent, throughout the States individually considered, as, in the event of their separation, w'd in all cases secure minorities against wrongful proceedings of majorities. A recurrence to the period anterior to the adoption of the existing Constitution, and to some of the causes which led to it, will suggest salutary reflections on this subject. 21


20 Hunt, IX, 315.

21 Ibid., 315-316.
In the following year (1829), Madison based his arguments on strictly constitutional grounds. Here perhaps is the key difference between him and Webster. The latter, for all his command and use of constitutional decisions, relied in the last resort on the convenience and glory of the Union. With a masterly flourish he could point to the progress of the American nation in her first fifty years and ask, How else but by the Union? Madison, less inclined to the dramatic yet a legalist equal to Webster, took the constitutional arena as his own.

In August of 1829, Madison offered a simple alternative to the problem of the "superior judge." Under offenses that are not extreme, the States ought to abide by the Supreme Court; under extreme offenses "which justify and require a resort to the original rights of the parties" there is no superior judge either within or without the national government. In the latter situation, Madison seems to accept revolution as the solution although he does not openly say so.\(^2\)

This brings Madison back to Blackstone and the all-powerful but responsible government. Blackstone had regarded his Parliament as omnipotent; in the American scheme, the Supreme Court seems to hold the final power. In either case, the result is the same. Large countries need strong governments. No legal agency within the nation can pass judgment on the acts of government save some responsible branch of the same government. A permanent Court not subject to election should be

\(^{22}\text{Ibid.}, 342-343.\)
a safer arbiter than a popular parliament. To that extent the American system is an advance over Blackstone's England. Madison seems ready to admit politics as the art of the possible and dismiss theoretical questions about some other possible arbiter.

But, on reflection, Madison was not ready to follow Blackstone all the way. He still hoped to establish a check upon the omnipotence of the government from within the structure of the government itself. Years earlier he had pointed out in No. 39 of the *Federalist* those saving features of the American government which were results of its being both federal and national. If it was federal, Madison reasoned, then the American system was able to admit a partial devolution of power back to the people by some legal procedure. Such a conclusion requires as a premise divided sovereignty and it was this principle of divided sovereignty which became the keystone in the constitutional theory of the elder Madison. On February 15, 1830, he penned a comprehensive letter to his friend N. P. Trist in which divided sovereignty figures prominently.

Other Governments present an individual and indivisible sovereignty. The Constitution of the United States divides the sovereignty; the portions surrendered by the States composing the Federal sovereignty over specified subjects; the portions retained forming the sovereignty of each over the residuary subjects within its sphere. If the sovereignty cannot thus be divided, the political system of the United States is a chimera, mocking the vain pretensions of human wisdom. . .

Nothing can be more clear than that the Constitution of the United States has created a government, in as strict a sense of the term as the governments of the States created by their respective constitutions. . .If in some cases the jurisdiction Federal and State is concurrent as it is
in others exclusive, this is one of the features constituting the peculiarity of the system. 23

By facing the problem of concurrent jurisdiction—an obvious fact, but one ignored in the theories of Calhoun—Madison had isolated the storm-center. Concerning the dividing line between the two jurisdictions, this same letter presented the following solution.

The provision immediately and ordinarily relied upon is manifestly the Supreme Court of the United States of America, clothed as it is with the jurisdiction "in controversies to which the United States shall be a party;" the Court itself being so constituted as to render it independent & impartial in its decisions; (see Federalist, No. 39) whilst other and ulterior resorts would remain in the elective process, in the hands of the people themselves as the joint constituents of the parties; and in the provision made by the Constitution for amending itself.

If the Supreme Court of the United States be found or deemed not sufficiently independent or impartial, a better tribunal is a desideratum: But whatever this may be, it must necessarily derive its authority from the whole, not from the parts; from the States in some collective, not individual capacity. 24

What this "better tribunal" is Madison does not say. By inference and exclusion, the possibilities seem to narrow down to a joint action taken by special state conventions, the same sort of action which Madison hinted at during 1799. A few weeks after his letter to Trist, however, Madison rejects such joint action by the States as neither necessary nor advisable. Senator Robert Hayne of South Carolina had respectfully sent a copy of his speech against Webster to the aged Madison at Montpelier.

23 Ibid., 354.

24 Ibid., 355.
In April, 1830, Madison made his own "Reply to Hayne," something quite
different from Webster's, but of equal if not greater constitutional mer-
it.25

The letter to Hayne is actually a summation of all the principal
ideas which Madison had been expressing in one letter after another for
two years. Over half of his correspondence during the years 1828-1830
had turned about such topics as his Virginia Resolutions, their difference
from Calhoun's theories, the real meaning of the federal compact.26 All
these topics are dealt with in the Hayne letter. Near the close, however,
Madison goes a step further and rejects joint state action. As a prelim-
inary move, he quickly dismisses the notion of Calhoun that three-quarters
of the States are required to stop a State in its nullifying actions. He
then rejects the opposite and more reasonable course of three-quarters
giving support. "If 3/4 of the States can sustain the State in its deci-
sion it would seem that this extra-constitutional course of proceeding
might well be spared; inasmuch as 2/3 can institute and 3/4 can effectuate
an amendment of the Constitution, which would establish a permanent rule
of the highest authority, instead of a precedent of construction only."27
Here is evidence of Madison's concern for strictly constitutional proce-
dures. He still strives to defend a devolution of power to the people of
the States, but now his interest is in the wide and wise variety of means

25 Ibid., 383-394.

26 Ibid., IX, passim.

27 Ibid., 391, n.
already provided in and by the Constitution for such a return of power. There are the influence of the people through elections, the provisions for amendments, the power of impeaching either executive or judicial officers if they should persist in acts adverse to the common welfare. These are the resorts open to the people against irresponsible government. If all these should fail, if the government will not desist from dangerous abuses of its power, then there is no purpose in thinking up one more theoretic barrier; rather the people must refer to their rights of "self-preservation" and revolt. "This is," Madison says, "the Ultima ratio" under which all governments are formed and by which all governments can be dissolved.

Events moved forward and soon South Carolina conceived that that Ultima ratio, that ultimate reckoning was due. Provoked by another tariff which she regarded unjust, she adopted her Ordinance of Nullification on November 24, 1832. 28 What it voiced was not a new theory, but a new pitch of defiance against the national government, defiance unto self-destruction. The South Carolinians declare "that we will not submit to the application of force, on the part of the Federal Government, to reduce this State to obedience." 29

President Andrew Jackson was a hard man to bluff and no man to intimidate. In his Proclamation to the People of South Carolina he made it

28 For a copy of the Ordinance, see Commager, pp. 261-262.

29 Ibid.
clear that the course they meditated was rebellion and that he would, faithful to the trust imposed upon him as the Supreme Executive, use every force at his disposal to bring them into submission. "I consider, then, the power to annul a law of the United States, assumed by one State, incompatible with the existence of the Union, contradicted expressly by the letter of the Constitution, unauthorized by its spirit, inconsistent with every principle on which it was founded, and destructive of the great object for which it was formed." 30

Jackson cuts through the tangled theories of Calhoun and lays down facts: "The Constitution of the United States, then, forms a government, not a league; and whether it be formed by compact between the States or in any other manner, its character is the same. It is a Government in which all the people are represented, which operates directly on them individually, not upon the States." 31 If forced, however, the national government could most certainly act upon those States; for, "it is the intent of this instrument to proclaim, not only that the duty imposed upon me by the Constitution 'to take care that the laws be faithfully executed' shall be performed...but to warn the citizens of South Carolina who have been deluded into an opposition to the laws of the danger they will incur by obedience to the illegal and disorganizing ordinance." 32

30 Ibid., 264.
31 Ibid., 266.
32 Ibid., 267.
In defiance South Carolina replied that the President had gone beyond his bounds, that his opinions were "erroneous and dangerous," that he indulged his "personal hostility in the said proclamation," and that its principles were "inconsistent with any just idea of a limited government."

In the meantime Henry Clay was putting together compromise bills which would save peace within the Union. The men in Charlestown and Columbia grew cautious, and the crisis eventually passed.

What concerns us is Madison's reaction to this assertion of single state sovereignty. As his letter to Hayne in 1830 had expressed in concise form all his constitutional views, so a short letter to Alexander Rives in January, 1833, added important clarifications to those views. The letter, moreover, is the best of Madison's final efforts. Thereafter he began to decline; his two final essays "Sovereignty" and "Notes on Nullification" are vague ramblings full of repetitions. In the letter of 1833 he still has his powers of mind undimmed.

The letter to Rives was a reply to an article which had appeared in the Virginia Advocate under the signature of "A Friend of Union and State Rights." Rives, the actual author, had defended what he imagined was Madison's position on nullification and secession. Madison, however, felt he had missed the mark and decided to clear the record. His letter, just as most during this period, got under way with a defensive explanation of

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33 Ibid., 269.

34 Hunt, IX, 568-573; 573-607.
what the Virginia Resolutions were all about. However, his explanation amounts to an actual refinement rather than a restatement of his former notions.

The object of Virginia was to vindicate legislative declaration of opinion; to designate the several constitutional modes of interposition by the states against abuses of power, and to establish the ultimate authority of the states as parties to and creatures of the Constitution to interpose against the decisions of the judicial as well as the other branches of the Government—the authority of the judicial being in no sense ultimate, out of the purview and form of the Constitution.35

One must be careful to understand what Madison means when he says the decision of the Court is not ultimate. It is ultimate, as he would admit, as far as judicial steps are concerned. It is not ultimate in the sense that the Congress could pass acts removing such jurisdiction from the Court, or the Justices could be impeached, or the President could enlarge the Court. There are, in other words, measures by which the other departments, and the people through them, can check the Court. The decision of the Court, however, would stand until reversed by a subsequent decision.

The remarkable part of the letter quoted above is not what Madison says about the judiciary, but rather his statement that the States are the creatures of the Constitution. Most Unionists in Madison's day would admit that the States were subject to the Constitution, but how could they be created by it since they had existed before it? Even Webster in his Reply to Hayne did not say that. Yet it is on this point that Madison

35 Ibid., 496.
shows his higher understanding of the federal union, certainly a higher understanding than he had when he wrote in the Federalist years before: "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments." This is just the sort of division that Calhoun supposed had taken place, the irony being that, when Calhoun cited this passage from No. 51 of the Federalist, he attributed it to Hamilton instead of Madison. Madison was thus freed from the charges he deserved. 36

By 1833 Madison was ready to repair the error he had made in 1788. The Federal Government was not built by a parcelling-out of the people's power, this to the central government, that to the state, this to the central government, etc. By the ratification of people--yes, the people of the States if one likes; it makes no difference--a new nation was born. A new political life was created, and one need not be a strict Aristotelian to realize that the principle, generare est corrupi, is true of all created life. Giving life to something new means dealing death to something old. To give life to a national government meant dealing death to the sovereign life of the States. Calhoun himself had said, "Sovereignty is an entire thing; to divide is to destroy it." 37 Madison would agree:

36 Calhoun uses No. 51 of the Federalist in his South Carolina Exposition (Works, VI, 42). The contest over the authority of No. 51 has generally been concluded in favor of Madison, especially since the work of Edward G. Bourne, "The Authorship of the Federalist," American Historical Review, II (April, 1897), 449-451.

37 Works, VI, 146.
the sovereignty of the States has been sacrificed that a new nation might live. However, he would reverse the order of Calhoun. Calhoun said to divide would cause destruction. Madison would say, first the death, then the division. First the sovereignty of the States must be immolated, then let the newly formed nation recognize those States as its constituent members and accede to the wish of the people that many of their powers be vested in these States. It makes no difference if the powers of the national government be few and defined (in practice, they are vast and indefinite), for they are the supreme powers of political life and any other powers or series of powers must be understood in relation to them, and not vice versa.

Madison was admittedly far ahead of his times. He had to wait for Lincoln to have his ideas vindicated. Desperation can be an ally to the truth. Once the dreaded Civil War had broken out, Lincoln wanted the nation to know over what it was fighting. In an address to Congress in 1861, he said:

Much is said about the "sovereignty" of the States; but the word even is not in the national Constitution. . . . The States have their status in the Union, and they have no other legal Status. If they break from this, they can only do so against law and by revolution. The Union, and not themselves separately, procured their independence and their liberty. . . .The Union is older than any of the States, and, in fact, it created them as States. Originally some dependent colonies made the Union, and, in turn, the Union threw off their old dependence for them, and made them States, such as they are.38

The States live within the Union as the cells within a man's body. The

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38Commager, p. 394.
cells have their own lives, their own growth and vigor; yet they take life from the body, not the body from them.

For those who admit the views of Lincoln and Madison, the sovereignty of the State no longer elicits the dread its votaries once strove to inspire. Calhoun might speak of sovereignty in terms worthy of a deity—"It is the supreme power in a State"—but other voices from the South contradicted him in his own day, such as John Taylor, the friend of Madison, who had proposed the Virginia Resolutions. A political philosopher in his own right, Taylor was skeptical of all the commotion over the term sovereignty, which he regarded as an equivocal term that "tickled the mind" with contemplation of unknown powers and ideas of supremacy. Its use was, according to Taylor, an ingenious strategem for neutralizing constitutional restrictions by a single word "as a new chemical ingredient will often change the effects of a great mass of other matters." "Our constitution. . .wisely rejected this indefinite word as a traitor of civil rights, and endeavored to kill it dead by specifications and restrictions of power, that it might never again be used in political disquisitions." 40

A modern political philosopher agrees with Taylor. In Man and the State, Jacques Maritain shows from key texts of such men as Bodin, Hobbes, and Rousseau, that sovereignty has invariably implied a transcendent power, separate from the body politic, ruling it from above without regard

39 Works, I, 146.

for a higher moral law. The Sovereign State presumes to rule without any accountability; its power is absolute, not derived from the governed. Such authority, Maritain correctly states, belongs only to God; and Maritain believes "political philosophy must get rid of the word as well as the concept." The two concepts of Sovereignty and Absolutism have been forged together on the same anvil. They must be scrapped together.41

One may sympathize with Maritain and Taylor, but words are difficult to legislate out of existence once they come into common use. If a better word had been at hand, perhaps Madison would have obliged Maritain and used it instead of his divided sovereignty. At any rate, Madison would have nothing to do with the "mysteries of State" nor an unanswerable general will which might exist beyond the moral law. By his divided sovereignty he meant the division of powers in an independent nation. If the powers be divided, so is the sovereignty.

The nullifiers it appears, endeavor to shelter themselves under a distinction between a delegation and a surrender of powers. But if the powers be attributes of sovereignty & nationality & the grant of them be perpetual, as is necessarily implied, where not otherwise expressed, sovereignty & nationality according to the extent of the grant are effectually transferred by it, and a dispute about the name is but a battle of words. The practical result is not indeed left to argument or inference. The words of the Constitution are explicit that the Constitution and laws of the U. S. shall be supreme over the Constitution & laws of the several States; supreme in their exposition and execution as well as in their authority. Without a supremacy in those respects it would be like a scabbard in the hand of a soldier without a sword in it.42

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41 Man and the State (Chicago, 1951), pp. 29; 53.
42 Hunt, IX, 512.
Thus Madison's divided sovereignty differed from Calhoun's idea of delegated powers of an undivided sovereignty. It is consequently Calhoun the sectionalist whose theories lead toward totalitarianism, not Madison the nationalist. In order to weaken the bounds of the government in which he found himself, Calhoun developed a theory of absolutism that was far more dangerous than the system he criticized.

The passage of years has brought the argument through a full circle. Madison had to refute those who said that all sovereignty remained in the States; today he would have to refute those who say that all sovereignty has been given to the national government and consequently no sovereignty remains in the States. To this Madison would reply, no doubt, with the same answer he gave to the nullifiers. If a tree is known by its fruits, so is a government by its powers. Look to the respective powers of the two governments. If both possess substantial power, then the sovereignty has been divided. That was for Madison the only rational way of understanding the elusive character of sovereignty.

In support of such a theory, Madison could rely on the authority of such men as John Marshall, Daniel Webster, and the distinguished visitor to American shores Alexis de Tocqueville. Much of Tocqueville's analysis of the American Constitution could be taken bodily from Madison.

The first question which awaited the Americans was so to divide the sovereignty that each of the different states which composed the Union should continue to govern itself in all that concerned its internal prosperity, while the entire nation, represented by the Union, should continue to form a compact body and to provide for all general exigencies. The problem was a complex and difficult one. It was as impossible to determine beforehand, with any degree of accuracy, the share of authority
that each of the two governments was to enjoy as to foresee all the incidents in the life of a nation.43

Tocqueville also agreed with Madison that judicial review by federal courts was one of the most important single factors in determining the federal-state relationship. "This was," Tocqueville writes, "a severe blow to the sovereignty of the states, which was thus restricted not only by the laws, but by the interpretation of them, by one limit which was known and by another which was unknown."44 Yet he declares that, although the superior powers of sovereignty reside with the national government and although conflicts of power between state and nation are adjudicated by a federal court, still "the sovereignty of the United States is shared between the Union and the states."45 A better confirmation of Madison's divided sovereignty cannot be found.

In his final letters Madison says that, if and when contests arise between state and nation, those contests must be carried on within the frame of the Constitution by the various avenues open to the State against the Federal power, and to the Federal Government against the State powers. Appeal, repeal, impeachment—these are the steps which the constitutionalist urges. The devolution of power he had sought has been found—but within the bounds of the constitutional instrument, not beyond it where he had once been tempted to look.


A final testament to Madison's constitutional spirit is an unadressed letter written sometime in 1833. The draft does not state to whom the letter was addressed; possibly it was meant as a memorandum for posthumous use. The topic of the letter is majority governments. Reckless men, Madison states, have accused majority governments of being the most tyrannical of all. Driven to desperation by the frustration of their own schemes, they attack the one form of government capable of giving man both justice and security. "The Patrons of this new heresy," he notes, are at a loss to explain why the same tyranny does not work within their own States, some of which are quite large and contain a plurality of interests. He then continues;

It has been said that all Govt is an evil. It would be more proper to say that the necessity of any Govt is a misfortune. This necessity however exists, and the problem to be solved is, not what form of Govt is perfect, but which of the forms is least imperfect; and here the general question must be between a republican Govern't in which the majority rule the minority, and a Govt in which a lesser number or the least number rule the majority. If the republican form is, as all of us agree, to be preferred, the final question must be, what is the structure of it that will best guard against precipitate counsels and factious combinations for unjust purposes?

The answer, as before, is federal republicanism. In this context Madison then faces the realistic economic problem that was at the root of the political disputes of the 1830's: the fears of the Southern agricultural interests in the face of the growing industrial might of the Northeastern

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46 Hunt, IX, 520, n.

47 Ibid., 523.
States. As a case in point, the Virginian turns to his own State joining the intelligence of his arguments with a true concern for her welfare. To begin with, Virginia's agriculture is diversified among half a dozen major crops, thus providing a plurality of interests within agriculture itself. In addition Virginia is beginning, Madison says, to manufacture and sell her own products. Thus, even if she were thrown upon her own outside the Union, she would soon be subject to those clashes of majority rule which some of her citizens so bitterly complain of against the Union.

From this degression into Virginia's condition, Madison returns to the general problem of majority rule. He admits that it sometimes may happen that the constitutional majority (the larger group of elected representatives and officials) may belong to the popular minority, not the majority. "Still the constitutional majority must be acquiesced in by the constitutional minority, while the Constitution exists. The moment that arrangement is successfully frustrated, the Constitution is at an end. The only remedy, therefore, for the oppressed minority is in the amendment of the Constitution or a subversion of the Constitution. This inference is unavoidable. While the Constitution is in force, the power created by it, whether a popular minority or majority, must be the legitimate power, and obeyed as the only alternative to the dissolution of all governments."

His logic is irrefutable. A constitution, perhaps the most just and most workable ever devised by man, has been adopted by the people of the United States. Then let them live by it, seeking their redress when

\footnote{Ibid., 527.}
necessary according to its provisions, or let them throw it away. Any man who professes there is some other course is only deceiving the people he would lead to destruction. "If the will of a majority," Madison concluded, "cannot be trusted where there are diversified and conflicting interests, it can be trusted nowhere, because such interests exist everywhere."\(^{49}\)

The people of a republic must be willing to suffer the occasional inconveniences and burdens which their government imposes, understanding that having a government both responsible and amendable is better than trying to follow their own desires and the government's at the same time. Madison was aware of that interplay between government and governed which later political philosophers would call a dialectic. Sometimes the representatives are wiser than their constituents; sometimes the people are wiser than their representatives. Yet, in their common efforts toward the goals of society, neither must despair of its partner.
CHAPTER V
THE VIRGINIA HERITAGE

The heritage left by Madison of reserved powers to be defended within the framework of the Constitution has continued to this day, especially in his own State of Virginia. The 1956 Resolution of the General Assembly of the Commonwealth of Virginia "interposing the sovereignty of Virginia against encroachment upon the reserved powers of this State" is perhaps the most responsible statement of its kind to come out of the South in the last twenty years.¹ Unfortunately other recent Virginia declarations have not equalled its moderation and thoroughness.

In the opening months of 1948 President Harry Truman was calling for a series of federal bills to insure civil liberties, especially for the Negroes in the South. On February 19, Senator Harry F. Byrd of Virginia speaking in Richmond before a Jefferson-Jackson Day Democratic dinner described the President's civil rights legislation and anti-poll tax bills as "a mass invasion of States' rights never before even suggested, much less recommended, by any previous President."²

A public official has a right to voice his private opinions, but one week later Governor M. Tuck of Virginia went much further. He asked the

¹Senate Joint Resolution No. 3, February 1, 1956.

²Cited in introduction to the Koch and Ammon article, 145.
legislature of Virginia to change the election laws of the State so that
the name of Harry Truman would not appear on the October ballot. Like
Byrd, he accused Truman of "an obvious invasion" of States' rights and
invited other Southern States to follow the Old Dominion's lead. Tuck's
efforts were in vain; in the election sweep of that fall, Truman carried
Virginia as well as many other Southern States. But Tuck's extreme meas-
ures involved the danger of setting precedents for future battles.

A more serious challenge to Southern leaders came with the Supreme
The decision declared that racially segregated public schools which were
supposedly "separate but equal" were unconstitutional. Two years later--
after careful study and before the unhappy incidents in Little Rock—the
General Assembly of Virginia passed a resolution which follows closely
the Virginia Resolutions of Madison and which incorporates the clarifica-
tions and safeguards which he had added at the close of his career.

The whole document stresses the need for proper constitutional pro-
cedure. The Virginians believe that the decision of the Supreme Court
went far beyond the power to interpretate and actually amended the Four-
teenth Amendment. Whether the people of the United States would now like
such an amendment is a legitimate question, but it is not for the Supreme
Court to do the amending. The arguments of the Assembly are difficult to
answer: "the State of Virginia did not agree, in ratifying the Fourteenth
Amendment, nor did other States ratifying the Fourteenth Amendment agree,
that the power to operate racially separate schools was to be prohibited

Ibid.
to them thereby." As evidence, the Assembly shows that the very Congress which proposed the Fourteenth Amendment for ratification established separate schools in the District of Columbia; and that many of the State Legislatures that ratified the Fourteenth Amendment also provided for systems of separate schools for the two races; "and still further, the Assembly notes that both State and Federal courts, without any exception, recognized and approved this clear understanding over a long period of years and held repeatedly that the power to operate such schools was, indeed, a power reserved to the States."\(^4\)

What most concerns one who has studied the constitutional theory of Madison is the manner in which the Assembly closes its declaration. "THHEREFORE, the General Assembly of Virginia...now appeals to her sister States for that decision which only they are qualified under our mutual compact to make, and respectfully requests them to join her in taking appropriate steps, pursuant to Article V of the Constitution, by which an amendment, designed to settle the issue of contested power here asserted, may be proposed to all the States."\(^5\) The State of Virginia is willing to undertake, therefore, the task of securing the clarifying amendment and does not throw the burden of proof on someone else. This is surely an example of laudable legislative restraint.

Two years later J. Lindsey Almond, Governor of Virginia, was less

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\(^4\) Joint Resolution No. 3, p. 2. The Resolution may be had in separate copy from the Keeper of the Rolls of the State; Richmond, Virginia.

\(^5\) Ibid., 3-4.
restrained. In his criticism of the acts of the Supreme Court in relation to the Little Rock school dispute, he said, "The proclamation by the Supreme Court in the Little Rock case...is the most far-reaching and devastating blow ever to bludgeon the reserved powers of the States of this union. It is designed to reduce the States to the status of mere puppets, slavishly manacled to the sociological and personal predilections of a judicial oligarchy negating the fundamental concept of a government of law and not of men. It tears the battered remnant of the Tenth Amendment out of the Constitution and hurls it into the face of a shocked and beleaguered people." This is fine oratory but poor constitutional theory. The Tenth Amendment is still in the Constitution and to insure its maintenance, Governor Almond would be well-advised to follow the course advocated by his own Assembly.

Let enough time pass, let enough sand run through the hour-glass, and nearly every statement once made will be contradicted. It was the first Republican President who said, "The Union is older than any of the States, and, in fact, it created them as States." But Eisenhower, the most recent Republican President, has said, "The Federal Government did not create the States of this Republic. The States created the Federal Government." It is true that Lincoln speaks of the Union and Eisenhower speaks of the Federal Government. That can account for some of the difference, but


7 Cited by Noah M. Mason, Congressman from Illinois. Eisenhower was speaking in Des Moines during the campaign of 1952. Vital Speeches, XXIII (March 1, 1957), 306.
neither Lincoln nor Madison could agree with the Eisenhower statement that the States created the Federal Government. The people of the States ratified a constitution and that constitution provided those people with a national government.

Whatever may have been the views of Eisenhower when he made the above statement in 1952, he considered the sovereignty of the States sufficiently limited in 1957 to permit him to send the United States Army into the streets of Little Rock no matter what the Governor of Arkansas said about it. Was this an instance of that tradition of American Presidents whose actions make more sense than their words?

In conclusion, attention might be given to a recent study made by a qualified Southerner on the whole dynamics of power existing between State and Nation. William G. Carleton, Professor of Political Science at the University of Florida, has considered the phenomenon in detail. During the twentieth century the state governments have, he says, "enormously extended their powers. Some of these powers are old powers taken from the counties, but many of them are new powers never before exercised by any government in America. However, federal powers have grown too and... at a more rapid rate." Thus, "while the powers of the states have grown absolutely, they have declined relatively." Carleton has here exposed the over-simplification by which the powers of the States have been said to be declining. The actual problem is that, while their power in new

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8 From a speech delivered at the National Conference of Governors, San Juan, Puerto Rico, August 5, 1959, Vital Speeches, XXV (Sept. 15, 1959), 754.
matters has grown rapidly, old matters which were long regarded as their special preserve have been withdrawn from their control.

Carleton then examines the behavior of government on its various levels: Rural community, state, and national. He finds the first of these the most biased and undemocratic, and some of the state governments are not much better. "Why is liberty better safeguarded in the nation than in the states? . . . Because in the nation at large it is harder for a single group or faction to get control of the government. . . . Because with the wide scope of the nation there are many more classes, groups, interests, and values which check, restrain, and counter-balance one another." 9 Professor Carleton is historian enough to acknowledge his sources, the Federalist Papers. More precisely he is drawing from Madison's No. 10. A further point made by Carleton corroborates the "majority governments" letter of Madison written at the end of his career. Carleton mentions how the States are now filled with a great variety of commercial, cultural, and racial groups. The beginning of this trend was observed by Madison in his own Virginia of 1833. In such a broadening of State interests he recognized the hope for a more responsible State government. The hope of Madison had been partly fulfilled in 1959. The diversification he saw in Virginia is now common in most of the States in the Union. If State governments were now made truly representative, then the rest of his hopes might be realized, the States becoming not only more democratic but more powerful.

9 Ibid., 758.
The citizens of a nation want results. If the States can achieve those results, the people will not look further. If the States are not molested by irresponsible federal intrusions, those powers will solidify and grow. This was the heritage that Madison left with his fellow Virginians and fellow Americans. The wealth of that heritage is still being drawn upon.
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APPROVAL SHEET

The thesis submitted by Robert E. Larkin, S.J. has been read and approved by three members of the Department of History.

The final copies have been examined by the director of the thesis and the signature which appears below verifies the fact that any necessary changes have been incorporated, and that the thesis is now given final approval with reference to content, form, and mechanical accuracy.

The thesis is therefore accepted in partial fulfillment of the requirements for the Degree of Master of Arts.

[Signature]

Date: June 1962

Signature of Adviser: [Signature]