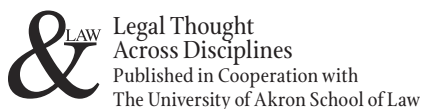


# Union & States' Rights



Elizabeth Reilly, editor, *Infinite Hope and Finite Disappointment: The Story of the First Interpreters of the Fourteenth Amendment*

Kalyani Robbins, editor, *The Laws of Nature: Reflections on the Evolution of Ecosystem Management Law & Policy*

Neil H. Cogan, editor, *Union & States' Rights: A History and Interpretation of Interposition, Nullification, and Secession 150 Years After Sumter*

# Union & States' Rights



A History and Interpretation of  
Interposition, Nullification, and  
Secession 150 Years After Sumter

Edited by Neil H. Cogan



University of Akron Press  
Akron, Ohio

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18 17 16 15 14 5 4 3 2 1

ISBN: 978-1-937378-13-4 (paper)

ISBN: 978-1-937378-38-7 (ePDF)

ISBN: 978-1-937378-39-4 (ePub)

LIBRARY OF CONGRESS CATALOGING-IN-PUBLICATION DATA

Union & states' rights : a history and interpretation of interposition, nullification, and secession 150 years after Sumter / edited by Neil H. Cogan. — First edition.

pages cm. — (& law : legal thought across disciplines)

Includes index.

ISBN 978-1-937378-13-4 (pbk. : alk. paper)

1. Federal government—United States—History—19th century. 2. States' rights (American politics)—History—19th century. 3. Nullification (States' rights)—History—19th century. 4. Secession—United States—History—19th century. I. Cogan, Neil H. (Neil Howard), 1944— editor of compilation. II. Title: Union and states' rights.

KF4612.U55 2013

342.73'042—dc23

2013014442

∞ The paper used in this publication meets the minimum requirements of ANSI / NISO Z39.48-1992 (Permanence of Paper).

*Union & States' Rights* was designed and typeset by Amy Freels, with assistance from Lauren McAndrews. The typeface, Stone Print, was designed by Sumner Stone in 1991. *Union & States' Rights* was printed on sixty-pound natural and bound by Bookmasters of Ashland, Ohio.

The following originally appeared in the *Akron Law Review*, volume 45, issue 2 and have been reproduced with permission: Neil H. Cogan, "Introduction," in a slightly different form, as "Symposium: Union and States' Rights: Secession, 150 Years After Sumter;" Daniel A. Farber, "The Fourteenth Amendment and the Unconstitutionality of Secession;" Paul Finkelman, "States' Rights and Nullification in the North: Opposition to the Fugitive Slave Laws," as "States' Rights, Southern Hypocrisy, and the Crisis of the Union;" Daniel W. Hamilton, "Still Too Close to Call? Rethinking Stamp's 'The Concept of a Perpetual Union;'" Robert G. Natelson, "James Madison and the Constitution's 'Convention for Proposing Amendments;'" and Stephen C. Neff, "Secession and Breach of Compact: The Law of Nature Meets the United States Constitution."

*For my children, Eliya, Aviel, Saraleah, Chava, Hillel, Adina, and Jacob, and my grandchildren, Jonah, Jack, Eli, Sam, Caleb, and Anabella, with love and respect.*

[A] new nation, conceived in liberty and dedicated to the proposition that  
all men are created equal.

—Abraham Lincoln



# Contents

Contributors	ix
Acknowledgments	xi
Introduction	
<i>Neil H. Cogan</i>	1
<b>Part I</b> James Madison's Views	
1 "A Real Nondescript:" James Madison's Thoughts on States' Rights and Federalism <i>Jack N. Rakove</i>	13
2 James Madison and the Constitution's "Convention for Proposing Amendments" <i>Robert G. Natelson</i>	30
<b>Part II</b> Antebellum Arguments	
3 States' Rights, Southern Hypocrisy, and the Crisis of the Union <i>Paul Finkelman</i>	51
4 Still Too Close to Call?: Rethinking Stamp's "The Concept of a Perpetual Union" <i>Daniel W. Hamilton</i>	80
5 Secession and Breach of Compact: The Law of Nature Meets the U.S. Constitution <i>Stephen C. Neff</i>	88
6 William Rawle and Secession: Legal Rights and Political Wrongs <i>H. Jefferson Powell</i>	111
<b>Part III</b> Impact of the 14th Amendment	
7 The 14th Amendment and the Unconstitutionality of Secession <i>Daniel A. Farber</i>	129
<b>Part IV</b> Contemporary Views of Interposition, Nullification, and Secession	
8 Interposition: An Overlooked Tool of American Constitutionalism <i>Christian G. Fritz</i>	165

9	Originalism's Limits: Interposition, Nullification, and Secession <i>Lee J. Strang</i>	204
<b>Part V</b>	<b>Critical Views of Federalism, States' Rights, and Memories of Secession</b>	
10	Union and States' Rights 150 Years After Sumter: Some Reflections on a Tangled Political and Constitutional Conundrum <i>Sanford V. Levinson</i>	237
11	Remembering Our Second Revolution: Sesquicentennial Reflections on Civil War Historiography <i>Norman W. Spaulding</i>	260
	<b>Index</b>	286



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## Acknowledgements

I am sincerely grateful to Paul Finkelman, who urged me to select the topic that ultimately produced this collection and gave me valuable advice along the way. Dan Farber also provided valuable advice along the way. I am much appreciative.

I was fortunate that Farber, Finkelman, Hamilton, and Neff, all eminent scholars, graciously agreed to participate in the Section on Legal History at the Annual Meeting of the Association of American Law Schools on January 7, 2011, and subsequently agreed to expand their papers for inclusion in a published law review symposium. I was also fortunate that seven other eminent scholars agreed to contribute papers to this collection. I thank each of them.

I was indeed fortunate that Elizabeth Reilly, Interim Dean and C. Blake McDowell Professor at the University of Akron Law School, agreed to comment on the papers at the annual meeting and supported the initiation and completion of this project.

As always, I am indebted to Curtis Jones, reader services librarian at Whittier Law School for his always superb, tireless, and gracious assistance, and to everyone at the University of Akron Press for their superb editing, professional judgment, and constant courtesy.



# Introduction

*Neil H. Cogan, Whittier (College) Law School*

This collection addresses questions fundamental to the American Union, from historical, legal, political, and social/moral perspectives. When deep substantive disagreements between the federal and state governments long persist without foreseeable resolution, what extraordinary options do the governments and the people have? That is, what options are available beyond discussion and compromise in the federal legislative and executive branches and political forums?

Do the states, on behalf of themselves and their citizens, have rights that authorize extraordinary options? May states interpose themselves between the federal government and the people? May states enact legislation nullifying federal law? May the states secede from the Union? May states call for regular constitutional conventions?

These are questions about the structure of our Union and the relationships of the Union, states, and people—about their ‘rights’ under the Constitution. This collection addresses the arguments and the history and memory of arguments made at the founding of our Union, during the antebellum and Civil War period, and today. The papers collected here assess those arguments, those interpretations of the Constitution.

At the beginning of national formation in the 1770s, when the states first met in Congress, they disagreed about the structure of their association and their relationships with one another. Disagreements about structure and relationships continued through and following the Revolution and War of Independence, into

the Continental Congress, and under the Articles of Confederation and Perpetual Union. And notwithstanding the historic agreement in 1787 at the Philadelphia convention, the ratification of the Constitution, and the foundational 1st Congress, the disagreements continued without abatement, as the United States of America became a nation and Americans a people.

Did the states remain sovereigns? If not, did they retain some attributes of sovereignty? If so, what attributes did they retain?

For seventy-six years, from the ratification of the Constitution through the end of the Civil War—or longer, in President Abraham Lincoln’s viewpoint, from the Articles of Association in 1774 and the Declaration of Independence in 1776—the issues of federal and state power tore the fabric of nationhood until more than six hundred thousand combatants and the President himself lay dead. Now, 150 years after South Carolina’s secession from the Union—and the *Charleston Mercury*’s declaration that “The Union is Dissolved”—and 150 years since mortar rounds were launched against federal troops holding Fort Sumter, the contributors to this collection and I think that it is important to remember and reassess the arguments used to justify those actions. The arguments were not stilled with the last gunshots at Appomattox and the surrender by the Confederacy.

In brief, the antebellum arguments fall largely within the popular political term ‘states’ rights,’ a term that remains resonant.<sup>1</sup> Within decisional constitutional law, by contrast, the courts identify various and conflicting theories of federalism (sometimes capitalized as ‘Federalism’ or ‘Our Federalism’) as defining or underlying the structure and relationships of the United States and the states and as limiting federal power to burden the ‘rights’ of the states.<sup>2</sup> However styled, the arguments are being made once again in support of state nullification of federal law and even in support of secession.

In addressing the issues of Union and states’ rights, the contributors parse the ‘original meaning’ and ‘original understanding’ of the Constitution and other founding documents, the principles at stake in the antebellum debates, and the legal effect of both the Union’s victory in the Civil War and the states’ ratification thereafter of the 14th Amendment. The chapters discuss whether the people, in ratifying the Constitution, relinquished the states’ and their option of revolution. They address contemporary arguments for interposition and nullification. The collection concludes with a chapter on revisionism in the memories of slavery, secession, and war.

As editor of this collection, I am honored by and respectful of the learned papers of each of the contributors, whether they support or oppose states’ rights

and federalism arguments for interposition, nullification, and secession, as well as constitutional convention. As editor, I am compelled to add that constitutional interpretation must reflect morality, as well as original meaning and understanding and attributes of sovereignty. The truth is that in seceding from the Union and instigating the Civil War, the states of the Confederacy were defending their dubious 'right' to subjugate and terrorize in chattel slavery more than four million descendants of Africans who survived kidnap and transportation to the United States. Moral blindness, racism, and economic self-interest, in my respectful opinion, underlay and enabled much of the legal, political, and social argument. Unconscionably, they promoted the enslavement of millions and the murder and rape of countless; and triggered the bloodiest and most senseless of our wars, what is politely termed the Civil War. Notwithstanding these tragedies and notwithstanding the postwar Reconstruction Amendments and civil rights laws, we as a nation failed to reflect adequately on the moral failures of slavery and its justifications, and the legal, political, and social restructuring that the war itself and the amendments had wrought.

## I. ANTEBELLUM STATES' RIGHTS DISPUTES, IN BRIEF

In the decades before the Civil War, disputes—about slavery's abolition and its territorial limitation or expansion, federal enforcement and opposition to the return of fugitive slaves, the availability of money and credit and imposition of tariffs, and the acquisition of territory and initiation of war—divided the states by region as well as the states and federal government. When the federal government pursued policies that antagonized deeply held state positions on these issues, states frequently responded with claims that they held rights under or beyond the Constitution to oppose federal authority and, ultimately, to secede from the Union, or the Compact as they frequently termed the relationship.

One form of the claim was interposition—that the states had authority to interpose in some manner on behalf of their citizens against the federal government in order to prevent the unlawful exercise of federal authority. The Virginia Resolution of 1798, written by James Madison, made this state's rights claim but did not specify how interposition would be carried out.

Another form of the claim was nullification—that the states had authority to nullify federal law through the enactment of state law. The Kentucky Resolution of 1798, written by Thomas Jefferson, made this claim. The resolution was considered and rejected by several states at the time, but it gained traction in subsequent years. Antislavery advocates also argued for nullification of federal

fugitive slave laws. In 1832, South Carolina adopted an Ordinance of Nullification, which declared two federal tariffs unconstitutional, and the state prepared to resist the tariffs by military force. John Calhoun resigned from the vice-presidency over the issue, and the Congress passed the Force Bill to authorize military action against South Carolina.

The third form of the claim was secession—the idea that states had a reserved or inherent right to secede from the Union because of the federal government’s breach of the Constitution or Compact. Whether the Union is perpetual and whether grounds exist for separation were issues raised during several crises, including at the Hartford Convention convened in 1814 to oppose the War of 1812 and at William Lloyd Garrison’s New England Anti-Slavery Society Convention convened in 1844 to accelerate the abolition movement. The ultimate tragedy of the claim came in 1860, when South Carolina seceded from the Union, followed by ten other states, and then in 1861 when its troops launched a bombardment of the federal military installation at Fort Sumter.

## II. POSTBELLUM JUDICIAL DEVELOPMENTS, IN BRIEF

The Civil War and the Reconstruction Amendments, it is often contended, ended once and for all the states’ sights arguments supporting interposition, nullification, and secession. While prior to the war some might have argued that the United States of America ‘are,’ after the war it could only be said that the United States of America ‘is.’ That is, prior to the war, states might plausibly have argued that as sovereigns they were not ultimately bound by the actions of the Congress and President; after the war they could no longer make that argument. After the war, states were limited to pressing their interests in the Congress—indeed, until the ratification of the 17th Amendment in 1913, state legislatures appointed the members of the Senate—and federal law ultimately reflected those interests as negotiated and compromised among Representatives and Senators. Once federal law was enacted, it was supreme, and states qua states could not assert that the law did not bind them. That contention was not unanimously shared.

However states’ rights fared in the popular arena, moreover, within the courts the ‘rights’ of states and principles and theories of federalism remained, sometimes prominent and sometimes quiescent. In the nineteenth century, particularly postbellum, and well into the twentieth century, the Supreme Court held that federal law could be challenged as overreaching the federal government’s domain when the federal government sought to regulate activity that was within the exclusive jurisdiction of the states. Thus, notwithstanding negotia-



tions and compromises by and between Representatives and Senators elected by the people of the states, the Court interpreted the Congress's power to regulate commerce and its power to tax and spend in a manner that placed 'local matters' well beyond the competence of the United States.<sup>3</sup> Then, from about 1937 until the mid-1990s, the Court reversed track.<sup>4</sup> But, then again, for the last twenty years, the Court has reverted to its earlier interpretation that there are matters that traditionally belong to the states to regulate and not the United States. The mantra is that principles of federalism (not states' rights) justify the decisions.<sup>5</sup>

Moreover, for forty years, the Court has identified areas in which the Congress may not regulate the states and state officials. The Court has created doctrines, assertedly founded in principles and theories of federalism and supported by the 10th Amendment, that preclude suits against the states unless the suits come within 'exceptions' such as voluntary and knowing state consent to suit<sup>6</sup> or 14th Amendment remedial legislation.<sup>7</sup> In my view, Court doctrines that now protect the states from federal coercion or 'commandeering' would have surprised those who prevailed in the Civil War and enacted the transformative Reconstruction Amendments.<sup>8</sup>

### III. RECENT ASSERTIONS OF NULLIFICATION AND SECESSION

Calls for states to nullify federal actions, particularly legislative actions, or to interpose the states between the federal government and the people have been frequent in recent years. Groups affiliated with the Tea Party movement are vigorously urging states to nullify federal legislation, with a special fervency against the Patient Protection and Affordable Care Act, President Barack Obama's health reform initiative. As one example, the Tenth Amendment Center lists on its website several nullification initiatives and proposals, including those against federal regulation of firearms, healthcare, and marijuana. The center urges its readers to attend national tours of prominent Tea Party activists with the slogan "Nullify Now."

Organizations that support nullification and interposition hold rallies, sponsor tours, distribute literature, and maintain websites.<sup>9</sup> Wyoming passed the Firearms Freedom Act, and the governor signed it on March 12, 2010.<sup>10</sup> The act calls for disobedience to federal firearms laws and regulations. In the 2011 session of the Texas House, H.B. 1937 was introduced to criminalize all searches, including airport screenings by the Transportation Security Administration, conducted without probable cause.<sup>11</sup> In 2010–11, bills were filed in thirteen leg-

islatures to nullify ‘Obamacare.’<sup>12</sup> In the election of 2012, voters in Colorado and Washington approved the use of recreational marijuana, ostensibly in conflict with federal law, and a recent survey found that 51 percent of persons favor an exemption from federal law for persons who follow state law in using marijuana.<sup>13</sup>

In 2009, Governor Rick Perry of Texas twice adverted to whether Texas might lawfully secede from the Union.<sup>14</sup> His comments were noteworthy because they came from the governor of a large and influential state and because Governor Perry was a well-regarded candidate for the Republican presidential nomination. But his comments are not unique. Following the election of 2012, it is reported that 60,000 Texans and citizens of fifteen other states filed petitions to secede from the Union.<sup>15</sup> At the state and local level, there have been both recent and past calls for secession from states and the formation of new states.<sup>16</sup>

Arguing that “our Republic does not work as our Framers intended,” on September 24–25, 2011, Harvard Professor Lawrence Lessig joined with Mr. Mark Meckler, a Tea Party Patriots national coordinator, to convene the Conference on the Constitutional Convention at Harvard Law School to discuss the advisability and feasibility of organizing a constitutional convention.<sup>17</sup> One of our authors, Sanford V. Levinson, is a nationally prominent critic of the defects in the Constitution’s structure and an advocate for substantial amendment.<sup>18</sup>

#### IV. THE COLLECTION

This collection grew out of the symposium on Legal History I organized at the annual meeting of the American Association of Law Schools on January 7, 2011. Five eminent scholars gave four excellent papers and commentary on the legal history of secession and the related claims of interposition and nullification. Because of the excitement generated by the symposium, I asked the panel members whether they would be willing to expand their papers for publication and other scholars agreed to join the project. The expanded scope is intended to offer a comprehensive discussion of issues arising when disagreements between the states and the federal government cannot be resolved by ordinary political arrangements.

Part I of this collection discusses James Madison, of significance in parsing the views of a principal Framer. Part II discusses antebellum arguments for and against secession and nullification. Part III examines the antebellum debate and the impact of the 14th Amendment. In part IV, contemporary arguments for interposition and nullification are examined. And in part V, one chapter looks critically at arguments for federalism, and one chapter looks critically at collective memory of secession.

In part I, Jack N. Rakove and Robert G. Natelson examine Madison's views. Rakove notes that James Madison was interested in including a power of coercion over the states in both the Articles of Confederation and the Constitution, which could be used to force the states to perform their obligations. Madison did not pursue the interest at the Constitutional Convention beyond an initial proposal. The reason, Rakove argues, is that although he was dubious about its effectiveness, Madison relied upon judicial review for the resolution of disputes between the United States and the states. Rakove argues, too, that upon reflection Madison did not endorse the power of states to interpose themselves or nullify federal law. The United States was not a league or partnership, but a new creation, which did not envision such action by the states.

Robert G. Natelson argues that after concluding that nullification was not an effective means to check federal government 'excesses,' Madison supported frequent constitutional conventions as an appropriate remedy for deep Union-state disagreements. Natelson examines materials previously not found and discussed in the constitutional scholarship.

In part II, Paul Finkelman, Daniel W. Hamilton, Stephen C. Neff, and H. Jefferson Powell critique antebellum arguments for and against secession and nullification. Finkelman argues that most people think of states' rights, nullification, and secessionist arguments as coming from Southern supporters of slavery and segregation. But from the 1820s to 1861, Northern opponents of slavery and some Northern state governments adopted states' rights arguments in the face of a proslavery national government and the implementation of a proslavery constitution. The most radical abolitionist, William Lloyd Garrison, argued for the secession of the free states under the slogan "No Union with Slaveholders." This chapter explores the application of states' rights theory by opponents of slavery.

Daniel W. Hamilton notes that in a classic article in the *Journal of American History*, Kenneth Stampp made the claim that the arguments in favor of the constitutionality of secession made by the Southern states were as strong, if not stronger, than the constitutional arguments made, then and now, in opposition to secession. In light of the 150th anniversary of secession, Hamilton says that it is useful to reconsider Stampp's famous thesis in light of the questions it raises about our current understanding of the meaning of the Civil War. Did Stampp, in his emphasis on constitutional thought standing alone, shed light on secession or mischaracterize the centrality of slavery in the secession crisis? Is it possible to answer the question: was secession legal? If so, and the answer is, as Stampp suggests, likely yes, then does this change our assessment of Lincoln's

drive to war? If there is no definitive answer to the question, then are there other essential issues revolving around the Civil War that are equally indeterminate?

Stephen C. Neff argues that in Southern political theory, the American federal union was regarded as a compact between sovereign states—and consequently as governed by general natural-law rules on pacts or agreements. Under natural law, a breach of the pact by some of the parties (the Northern states) entitled the nonbreaching parties (the Southern states) to terminate the compact—or, in popular parlance, to secede from the Union.

H. Jefferson Powell describes William Rawle as a prominent antebellum constitutionalist. He was, Powell notes, neither an adherent of the Jeffersonian compact theory of the Constitution nor a Southern defender of slavery. In his widely read 1825 book on constitutional law, however, Rawle was seen as endorsing the right of states to secede. As a result, his book attracted wide attention. But as Powell argues, readers did not fully appreciate his argument. Read as Rawle evidently intended, however, his discussion of secession was intended to cordon the option off as a moral, political, and religious wrong.

In part III, Daniel A. Farber reviews the impact of the 14th Amendment on arguments for secession. Farber argues that the constitutional status of secession was deeply intertwined with conflicting antebellum views about the relationship between state and national citizenship. The citizenship clause of the 14th Amendment made national citizenship paramount, thereby establishing the principle that Americans owed their primary allegiance to the federal government rather than their states.

In part IV, Christian G. Fritz and Lee J. Strang review and critique contemporary arguments for interposition, nullification, and secession. Fritz argues that interposition has been misunderstood because of its historic connection with nullification and secession. He argues in part that it is a mistake to associate interposition solely with federalism and that it is important to understand the people's role in constitutionalism, in checking governmental abuse of power.

Lee J. Strang argues that originalism, as a theory of constitutional interpretation, cannot answer—and does not have the resources internal to the theory to answer—some or all of the questions presented by the concepts of interposition, nullification, and secession.

In part V, Sanford V. Levinson looks critically at arguments for federalism, and Norman W. Spaulding looks critically at collective memory of secession. Levinson critically examines the federal structure of the United States and asks what boundaries the Constitution gives to that structure and what benefits, pro-

tections, and guarantees it provides to the United States and the states. Analogizing the federal structure to a marriage, he asks why the United States would oppose the secession of a state unhappy with its place in the Union.

Norman W. Spaulding reviews the Fort Sumter National Monument and critiques its embedding of secessionist memory with *no* mention of slavery. He argues that there remains a failure—not only by historians but also by political leaders and courts—to resolve the endurance of African chattel slavery and the nation’s inability to end slavery except by secession and war. And Spaulding challenges us to recognize the implications for our democracy.

## NOTES

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1. K. Johnson, *States’ Rights Is Rallying Cry for Lawmakers*, N.Y. Times, March 16, 2010.
2. Recently, a Supreme Court justice made a most remarkable argument in support of such rights. Dissenting from a decision that recognized the federal sovereign’s exclusive power to control and regulate the admission of persons entering the United States, the justice said: “The United States is an indivisible ‘Union of sovereign States.’ . . . Today’s opinion . . . deprives States of what most would consider the defining characteristic of sovereignty: the power to exclude from the sovereign’s territory people who have no right to be there. Neither the Constitution itself nor even any law passed by Congress supports this result. *Arizona v. United States*, 132 S. Ct. 2492, 2511 (2012) (Scalia, J., quoting from a decision about the rights of states to dispute where their territorial boundaries are drawn).
3. *Hammer v. Dagenhart*, 247 U.S. 251 (1918).
4. *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241 (1964).
5. *United States v. Morrison*, 529 U.S. 598 (2000) (the United States may not prohibit rape, notwithstanding extensive congressional findings that sexual assaults against women substantially interfere with their travel across state lines).
6. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981).
7. *United States v. Georgia*, 546 U.S. 151 (2006).
8. *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012).
9. *Nullify Now!*, [www.nullifynow.com](http://www.nullifynow.com) (last visited Nov. 16, 2011); the Tenth Amendment Center, [www.tenthamentendmentcenter.com](http://www.tenthamentendmentcenter.com) (last visited Nov. 16, 2011).
10. “A personal firearm, a firearm action or receiver, a firearm accessory, or ammunition that is manufactured commercially or privately in the state to be used or sold within the state is not subject to federal law or federal regulation, including registration, under the authority of congress to regulate interstate commerce.” Wy. Stat. 1977 § 6-8-404 (2011). See Jeremy Pelzer, *Firearms Freedom Act: Symbolic Declaration of Rights or State-Federal Standoff?*, Trib.com (Mar. 12, 2010), [http://trib.com/news/state-and-regional/govt-and-politics/article\\_06b41f54-b4cb-566b-8ac2-c61ecf272do4.html](http://trib.com/news/state-and-regional/govt-and-politics/article_06b41f54-b4cb-566b-8ac2-c61ecf272do4.html). See also O. Shane Balloun, *The Disarming Nature of the Wyoming Firearms Freedom Act: A Constitutional Analysis of Wyoming’s Interposition between its Citizens and the Federal Government*, 11 Wyo. L. Rev. 201 (2011).

11. Connor Boyack, Brian Roberts, & Michael Boldin, *Feds Issue Threat: No Fly Zone for Texas?*, Tenth Amendment Center (May 24, 2011), <http://www.tenthamendmentcenter.com/2011/05/24/feds-issue-threat-no-fly-zone-for-texas/>.
12. Matt Spalding, *Rejecting Nullification: Idaho Draws the Line*, Heritage Foundation (Mar. 2, 2011), <http://blog.heritage.org/2011/03/02/rejecting-nullification-idaho-draws-the-constitutional-line/print/>.
13. Micah Cohen, *Marijuana Legalization and States Rights*, N.Y. Times, December 8, 2012.
14. “When we came into the nation in 1845, we were a republic, we were a stand-alone nation,” the governor can be heard saying. “And one of the deals was, we can leave anytime we want. So we’re kind of thinking about that again.” Maggie Haberman, *Rick Perry Critics Unearth Another Secession Comment*, Politico (Aug. 10, 2011), <http://www.politico.com/news/stories/0811/61030.html>.  

I think there’s a lot of different scenarios. Texas is a unique place. When we came in the union in 1845, one of the issues was that we would be able to leave if we decided to do that. You know, my hope is that America and Washington in particular pays attention. We’ve got a great nation. There is absolutely no reason to dissolve it. But if Washington continues to thumb their nose at the American people, you know, who knows what may come out of that? But Texas is a very unique place and we’re a pretty independent lot to boot.

Interview with Kelley Shannon, Associated Press, April 2009. R. G. Ratcliffe, *Perry Says Texas Can Leave the Union if It Wants To*, Chron.com (Apr. 15, 2009), [http://blogs.chron.com/texaspolitics/archives/2009/04/perry\\_says\\_texas.html](http://blogs.chron.com/texaspolitics/archives/2009/04/perry_says_texas.html).
15. *Texas proves everything’s bigger there, including the will to secede*, MSN (11/13/2012), <http://now.msn.com/texas-secession-petition-gets-enough-signatures-to-earn-white-house-response>; *Anarchy in the USA? Folks in 15 states file petitions to secede*, MSN (11/11/2012), <http://now.msn.com/15-states-start-petitions-to-leave-the-usa>; *Texas judge says Obama re-election might trigger civil war*, MSN (8/23/2012), <http://now.msn.com/tom-head-texas-judge-says-obama-re-election-could-lead-to-civil-war>; *City of Austin files counter-petition to secede from Texas*, MSN (11/15/2012), <http://now.msn.com/austin-files-petition-to-secede-from-texas>.
16. See generally James Erwin, *Declarations of Independence* (2006).
17. Conference on the Constitutional Convention, Harvard Law School, [www.conconcon.org](http://www.conconcon.org) (last visited Nov. 16, 2011). Lawrence Lessig and Mark Meckler cochaired the conference. Lessig is the director of the Edmund J. Safra Center for Ethics at Harvard University and the Roy L. Furman Professor of Law at Harvard Law School. He cofounded Change Congress, which aims to reduce the influence of private money in American politics. Meckler is the cofounder and a national coordinator for Tea Party Patriots (along with his cofounder and fellow national coordinator, Jenny Beth Martin), the largest grassroots Tea Party organization in the nation with over 3,500 chapters spanning every state.
18. Sanford Levinson, *Our Undemocratic Constitution* (2008).



# I

## James Madison's Views







# 1

## “A Real Nondescript”

### James Madison’s Thoughts on States’ Rights and Federalism

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On March 12, 1833, four days before his eighty-second birthday, James Madison wrote Senator William Cabell Rives to commend the speech that his Virginia protégé had just given denouncing the dangerous constitutional theory of nullification emanating from South Carolina. “It seems strange that it should be necessary to disprove this novel and nullifying doctrine,” Madison observed, “and stranger still that those who deny it should be denounced as Innovators, heretics & Apostates.” That was a comment for the crisis of the moment, but Madison used it, as he often did in his writings, to introduce a more sustained analysis of the question at hand. “Our political system is admitted to be a new Creation—a real nondescript,” he observed. “Its character must therefore be sought within itself; not in precedents, because there are none; not in writers whose comments are guided by precedents.” Who could possibly know how writers like “Vattel and others of that class” could make sense of the “Compound & peculiar system” that was the American federal republic?<sup>1</sup>

“Nondescript” to Madison meant something very different from its colloquial use in American English today. Here it indicated that the object to be examined—the American form of federalism—had never been previously known, much less adequately described. Or as Madison wrote John Tyler, Virginia’s other senator, about the same time as he wrote Rives, “[T]he system was to be a new & compound one—a nondescript without a technical appellation for it.”<sup>2</sup> Tyler had

taken a position very different from that of Rives in the Senate debates, and Madison’s intention was to correct Tyler’s charge that the purpose of the Virginia Plan of May 1787 “was to render the states nothing more than the provinces of a great Government, to rear upon the ruins of the old Confederacy a Consolidated Government, one and indivisible.”<sup>3</sup> Reasoning like this drove Madison to a borderland of intellectual dejection. To analyze the nature of a constitution, he insisted, “let candor decide whether it be not more reasonable & just to interpret the name or title by facts on the face of it, than to torture the facts by a bed of Procrustes into a fitness to the title.”<sup>4</sup>

This was not a new motif in Madison’s political thinking. In *Federalist* No. 37, his remarkable meditation on the difficulty of constitution-making, Madison had laid out an epistemological model for the rational discussion of political phenomena. There he emphasized the difficulty of tidily dividing and distinguishing the powers of government either between state and nation or among its departmental institutions. The first application of this approach came only two essays later, in the discussion of the national and federal (that is, state-based) aspects of the proposed Constitution in *Federalist* No. 39. Some commentators find Madison’s fivefold analysis of this problem frustrating in its detail or perhaps even disingenuous in slighting the decisive advantages that the national government might finally obtain over the states. Yet Madison’s scheme for classifying the different modes in which the system would operate was fully consistent with the principles he had set out in *Federalist* No. 37. Equally important, it remained the basis upon which Madison continued to reason about federalism for the next four decades and thus a source of his annoyance and concern with the dangerous tendencies he saw in American politics during the final years of his life. Madison understood that the truth of American federalism—that “nondescript,” unprecedented form of government—could be grasped only in its details. Instead, he lived long enough to worry that the discourse of federalism was degenerating into a contraposition of two absolute and simplistic formulas, one based on an appeal to the irreducible primordial sovereignty of the states and the other on the invocation of a national “We the people” that could be read to threaten the residual source of state autonomy he thought needed to be preserved. Nullification was the immediate object of his concern in the early 1830s, but the threat of secession trailed not very far behind. Madison’s intellectual despair for the Union was thus a function of the risks that political leaders were taking by substituting simplistic formulae for the civic duty to understand, and thus work with, the “nondescript” federal system his generation had created.

A conventional piece of American constitutional wisdom holds that the question of secession was definitively settled on the battlefield. *Inter arma leges silent*, and why cannot that adage apply just as readily to questions of constitutional import as it does to the ordinary violence of war? In July 1863, Gettysburg and Vicksburg rendered the key initial verdicts on the controversy, opening prospects for an ultimate Union victory, and Appomattox ended any possibility for a final appeal. On the other side of the question, one can easily imagine the counterfactual alternative, that a Southern victory at arms could have established a conclusive precedent validating the right of secession. Just as the Northern victory made the idea of secession permanently unconstitutional, so a Southern victory would have confirmed the ultimate conclusion that long lay latent in states' rights thinking.

Against these suppositions, however, there stands a different premise grounded in the original statement of the promise of American constitutionalism set by Alexander Hamilton in the opening paragraph of *The Federalist*. "It has been frequently remarked," Hamilton observed, "that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force." A constitutional doctrine either established or disproven by military success would fall closer to the "accident and force" pole of Hamilton's contrast than to "the reflection and choice" model that *The Federalist* was written to support. To reduce or equate the validity of secession with the course of war would convert a basic problem of constitutional governance into a matter of military fate.

Equally important, in the absence of an explicit warrant in the text of the Constitution, the idea of either secession or nullification as legitimate constitutional options seems just as problematic. In both cases, the appeal to force is a likely, indeed necessary element in a new equation of governance. Nullification supposes that the physical intervention of state authorities will prevent the execution of national law, and secession is credible only when one can imagine the people of a state or region mobilizing to sustain such a decision. Why would a national government wielding legislative authority under the Supremacy Clause relent in enforcing its law, if the population it would govern had not already expressed its capacity to resort to force against the federal union?

Secession itself was not an issue that came under discussion during the constitutional debates of the late 1780s. If it had, modern scholars would be familiar with an array of relevant quotations, and would not need to speculate so much. Yet the question of the use of force against recalcitrant states had been part of prior discussions of the federal system. Among those most interested in this question was James Madison. As a young member of the Continental Congress, Madison was part of a committee of three appointed just as the Articles of Confederation took effect on March 1, 1781. The committee's task was to "prepare a plan to invest the United States in Congress assembled with full and explicit powers for carrying into execution in the several states all acts or resolutions passed agreeably to the Articles of Confederation."<sup>5</sup> Its report, written in Madison's hand, took the radical step of suggesting that Congress should propose a new amendment to the Confederation to deal with states that "shall refuse or neglect" to perform their federal duties under Article 13. Congress would be "fully authorized to employ the force of the United States as well by sea as by land to compel such State or States to fulfill their federal engagements," particularly by closing off their commerce with other states or foreign nations.<sup>6</sup>

This proposal did not long survive in the two succeeding committees that took over the original committee's work.<sup>7</sup> Still, the idea of using coercion as the mechanism of federal enforcement retained some appeal in Madison's thinking. Writing to Governor Thomas Jefferson on April 16, 1781, Madison suggested that the use of coercion would not be such a difficult matter. One method of enforcement might be to dispatch small contingents of Continental troops, "acting under Civil authority," into the delinquent state. "But there is a still more easy and efficacious mode," Madison continued. Virtually every state would be subject to naval coercion; park a frigate or two outside its principal port or ports, and it would soon be willing to comply. Over the long run, Madison mused, a navy formed under proper national authority would have further benefits. It "would not only be a guard against aggression & insults from abroad; but without it what is to protect the Southern States for many years to come against the insults & aggressions of their N[orthern] Brethren?"<sup>8</sup>

The shelling of Fort Sumter began exactly fourscore years (minus four days) after Madison wrote this letter. It was a grim, if perverse, echo of Madison's 1781 observation. Fort Sumter was built to defend Charleston, not to isolate it, but in 1861 it threatened to become a simple variation of Madison's notion of naval enforcement. (By contrast, the role of the federal navy in the blockade of the Confederacy is the obverse of what Madison had envisioned in 1781.) Beyond this irony, however, what remains more striking is the constitutional question with

which Madison was already wrestling. Was coercion the only or final mechanism for enforcing federal measures, or could there be some other basis for coordinating national governance with the states?

For nearly six years after Madison wrote to Jefferson, that question lay moot. The American victory at Yorktown in October 1781 made the absence of direct congressional authority over the states less urgent. The attention of nationally minded leaders shifted instead to the task of ratifying the various amendments to the Confederation that Congress sent to the states: the impost of 1781; the revenue measures, including a revised impost, proposed in April 1783; and then two amendments relating to foreign commerce recommended a year after that. So long as those amendments set the agenda for reform, the underlying premise was that the essential structure of the Confederation would remain intact, with moderate changes in the authority of Congress.

That agenda shifted, of course, after September 1786, when the rump conference at Annapolis led to the general convention that assembled at Philadelphia in May 1787. Madison played a critical role in these developments, both by attending the Annapolis Convention and then by taking on the task of framing a broad agenda for Philadelphia. As it became clear that this agenda would not be limited to enumerating incremental powers to be vested in the Continental Congress but would instead involve a fundamental reconsideration of the entire federal union, the nature of the ties between an emerging national government and the existing governments of the states again became essential.

Madison's initial thoughts about the future structure of the Union were first expressed in two sets of documents that have become quite familiar to scholars: the memorandum known as *Vices of the Political System of the U. States* and the three corresponding letters to Jefferson, Edmund Randolph, and Washington. Together, these documents show Madison moving away from, yet not wholly abandoning, the idea of coercion of the states to which he had appeared far more partial in 1781.

Item seven of the *Vices* is titled "want of sanction to the laws, and of coercion in the Government of the Confederacy." Assuming, as contemporary political scientists now do, that there are many "federalisms," Madison defined the underlying premise of the Articles of Confederation, as first drafted in 1776–77, in these terms: that the states would voluntarily comply with the decisions of Congress, legally implementing them in the means most convenient and productive within their territorial limits. Under such a condition, this form of federalism was, in reality, he now concluded, "nothing more than a treaty of amity of commerce and of alliance, between so many independent and Sovereign States." How had

this condition arisen, Madison asked? Initially because the “compilers” of the Articles acted under “a mistaken confidence” that the states would simply do the right thing—a confidence that accurately reflected the prevailing republican assumptions of the mid-1770s. Experience since then had only confirmed the error of this supposition. Indeed, Madison continued—in what was effectively a game theoretical analysis of this form of federalism—there were structural reasons why any system relying on the voluntary compliance of the states with national decisions “will never fail to render federal measures abortive.”<sup>9</sup>

Thus far, Madison’s analysis was consistent with the idea that the states might indeed need to be coerced. Compare congressional resolutions to state legislation, Madison observed: “[W]hat probability would exist, that they would be carried into execution,” if state laws were merely “recommendatory to their citizens” or left to the discretion of “County authorities” to enforce, as congressional resolutions could be said to be to the states?

Madison also mentioned the idea of a coercive power over the states in his letter to Washington of April 16, 1787, the third and most expansive of the three personal letters converting the analysis of the *Vices* into a rough agenda of reform. That idea had not appeared in the earlier letters to Jefferson and Randolph, but now Madison explicitly stated that “the right of coercion should be expressly declared.” Echoing his thoughts of 1781, Madison added, “With the resources of Commerce in hand, the national administration might always find means of exerting it by sea or land.” Yet Madison also indicated a measure of uneasiness with the idea of coercion. “The difficulty & awkwardness of operating by force on the collective will of a State, render it particularly desirable that the necessity of it might be precluded.” Perhaps his favored measure of a negative on state laws—to be used to protect both the Union from interfering laws of the states and minorities within the individual states against unjust laws—could accomplish the task, obviating the need for coercion by preventing improper legislation from acquiring legal effect *ex ante*.<sup>10</sup>

Madison often expressed key insights with a concision that later commentators often wish he had not indulged. Another sentence or two of elaboration here would be much appreciated. Still, “difficulty & awkwardness” can embrace an array of problems. Not least among them is a recognition that American federalism might become a story of repeated overt quarrels between national and state authority. The logic of Madison’s negative on state laws, as well as his gloomy views of state legislatures and legislators, presupposed that the states would remain a recurring source of difficulty in a federal system dependent on their

direct role in the administration of national measures. Any system of federalism based on the voluntary compliance of autonomous state governments with national measures would remain perpetually vulnerable to inefficiency, inconsistency, or outright conflict.

The alternative to this model was a federalism that would work not on the states but on their citizens. The states would survive as independent jurisdictions, legally regulating most of the ordinary activities of their residents and conducting federal elections (subject to various review powers vested in the national government). But the national government would deal directly with citizens in the same way, enacting, executing, and adjudicating its own laws. State governments would not be dragooned or ‘commandeered’ (a verb that appears in modern jurisprudence about states’ rights but that did not yet exist) into executing the ordinary work of national government. Coercion would apply not against the states as entities but against individuals.

This idea did not emerge in full form at the outset of the Federal Convention. Indeed, as the debate began, the Virginia Plan did include a power of coercion of the states among the prospective powers of “the National Legislature,” which the final provision of Article 6 authorized “to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof.”<sup>11</sup> But when the convention first discussed this provision on May 31, Madison immediately abandoned this proposal, and in decided terms. In his notes of debates, Madison

observed that the more he reflected on the use of force, the more he doubted the practicability, the justice and the efficacy of it when applied to people collectively and not individually. A union of the States containing such an ingredient seemed to provide for its own destruction. The use of force agst. a State, would look more like a declaration of war, than an infliction of punishment, and would probably be considered by the party attacked as a dissolution of all previous compacts by which it might be bound. He hoped that such a system would be framed as might render this recourse unnecessary, and moved that the clause be postponed.

The convention endorsed this suggestion without dissent.<sup>12</sup>

The provision was not revived in the further discussion of the Virginia Plan, but a version of it appeared in the New Jersey Plan that William Paterson presented on June 15. Its sixth resolution ended with this clause:

[I]f any State, or any body of men in any State shall oppose or prevent ye carrying into execution such acts or treaties, the federal Executive shall be autho-



rized to call forth ye. power of the Confederated States, or so much thereof as may be necessary to enforce and compel an obedience to such Acts, or an observance of such Treaties.<sup>13</sup>

When Madison briefly alluded to this proposal in his lengthy speech of June 19, he pointedly noted that it would never apply equally against all the states. “The coercion, on which the efficacy of the [New Jersey] plan depends, can never be exerted but on themselves,” he argued. “The larger States will be impregnable, the smaller only can feel the vengeance of it.”<sup>14</sup> Perhaps there was an element of bluffing in this claim, overlooking the danger that the militias of New England and Pennsylvania would execute a pincer attack on the fleshly delights of Albany. Even so, this observation illustrated the direction in which the thinking of many delegates was moving. Whatever the underlying federal structure of the Union, its governance would be national, pivoting on a division between the tasks that the national government and the states would separately discharge. It would not be a federalism in which the implementation of national measures would depend on the compliance—voluntary or coerced—of its member states.

Of course, Madison’s vision of how this federal system should function was severely damaged by two decisions that the convention took four weeks later: one granting each state an equal vote in the Senate, the misnamed “Great” or “Connecticut Compromise” of July 16, and the other taken the next day, with the rejection of the negative on state laws. In Madison’s view, a national government without this negative would remain vulnerable to a host of interfering—one could say *interposing*—acts from the states. Instead, the maintenance of the boundaries of federalism would rely primarily on enforcement by the courts, acting under the general authority of the Supremacy Clause. That provision began its life as part of the New Jersey Plan, as the clause antecedent to the provision authorizing the use of coercion against delinquent states. As first stated by Paterson, it bound the state judiciaries to obey federal acts and treaties, “any thing in the respective laws of the Individual States to the contrary notwithstanding.”<sup>15</sup> Whether the omission of any reference to state *constitutions* in this formula was inadvertent or deliberate is left uncertain. But over time, and without debate or controversy, the Supremacy Clause evolved into its final form, precluding a state constitution from barring state judicial compliance with national acts.

Madison left the convention doubting that reliance on the judiciary would work. As he explained in his lengthy letter to Jefferson of October 24, 1787, he still expected states to seek to interfere with national authority. The states, to his way of thinking, would not have much to fear from “dangerous encroachments” from



the national government. But the states, which would be “continually sensible of the abridgment of their power” by the Constitution, would remain “stimulated by ambition to resume the surrendered part of it.” Madison doubted that the judiciary would be able to “keep the States within their proper limits, and supply the place of a negative on their laws.” Not only would it be better to prevent the enactment of a harmful law than to have to deal with it reactively, Madison reasoned, but it was also the case that

a State which would violate the Legislative rights of the Union, would not be very ready to support a Judicial decree in support of them, and that a recurrence to force, which in the event of disobedience would be necessary, is an evil which the new Constitution was meant to exclude as far as possible.

Here again, Madison returned to the concerns he first considered in 1781.<sup>16</sup>

Still, this private skepticism soon yielded to a more tempered view as Madison placed his reservations behind him and moved ahead with the ratification campaign. On the question of judicial authority, he used another concise passage in *Federalist* No. 39 to endorse the idea that the Supreme Court would be the arbiter of disputes over federalism. In “the *extent* of its powers”—the fourth of his five categories for analyzing federalism—the new government would not be wholly national, Madison held, because the states retained “a residual and inviolable sovereignty over all other objects” not classed among those entrusted to the national government. “It is true that 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,” he conceded. But again, “the most effectual precautions are taken to secure this impartiality.” Equally important, it had to be agreed that “[s]ome such tribunal is clearly essential to prevent an appeal to the sword, and a dissolution of the compact.” The only way that such a system would work, he concluded, was for that tribunal to be established under the authority of the national government, not that of the states.<sup>17</sup>

Madison’s comment in *Federalist* No. 39 matters for all those scholars who still agonize over whether judicial review was part of the original constitutional understanding. In terms of Madison’s own thinking, however, judicial power remained a relatively minor concern.<sup>18</sup> It did not figure notably in his political writings during the 1790s, nor did it seem important as matters of war and peace preoccupied his attention as secretary of state and president after 1801. As is well known, he and President Jefferson ignored the purportedly landmark case of *Marbury v. Madison*,

in which Chief Justice John Marshall and his *Federalist* brethren ostensibly established the principle of judicial review. After Madison’s retirement from the presidency in 1817, however, and the development of controversies over both the Marshall Court and the rise of strong states’-rightist sentiment in both Virginia and South Carolina, the retired president and statesman had to reconsider questions that had first troubled him as a budding constitutionalist in the 1780s.

The source of concern after 1817 arose from the challenge mounted by Marshall’s leading critic, Spencer Roane, a member of the Virginia Court of Appeals and fittingly the son-in-law of Madison’s old political foe, Patrick Henry.<sup>19</sup> Since at least 1814, Roane had concluded that the Supreme Court could not review state court decisions on matters of constitutional law. That controversy grew more intense with the subsequent decisions in *McCulloch v. Maryland* and *Cohens v. Virginia*. Roane made a concerted effort to recruit Madison and Jefferson to his cause, only to discover that his views were far more popular at Monticello than they proved to be at Montpelier. In a series of three letters written between 1819 and 1821, Madison dealt politely with Roane, but the longer they wrote, the more Madison felt compelled to develop and clarify the basic position of *Federalist* No. 39.

Madison sympathized with Roane on the character of Marshall’s jurisprudence. In *McCulloch*, of course, the chief justice relied on the same appeal to the Necessary and Proper Clause that Hamilton had first invoked in 1791. Madison had made his peace with the logic of a national bank as a disputed issue finally settled through a process of political contestation and acquiescence. But the broad reading of the Necessary and Proper Clause remained objectionable on terms consistent with Madison’s longstanding concern with what he sometimes called the plasticity of legislative power. To accept that argument in full, Madison held, would erode any sense of restraint in Congress and thereby risk bringing the Union and the states into more active conflict over the boundaries of national power.

Yet on the key jurisdictional claims that formed the core of Roane’s attack, Madison ultimately sided with Marshall—or at least with the Court that Marshall embodied and symbolized. Roane’s notion that state and federal judiciaries should be coequal in their authority was unacceptable. Given the choice between them, there remained no question that legal supremacy belonged to the federal courts. To put the point more simply, the brief reference that Madison had made to the Court in *Federalist* No. 39 had now become a main plank in his mature constitutional orthodoxy. Rather than treat national and state judiciaries as rivals jealously monitoring each other’s decisions, Madison instead hoped that the increasing legal competence of state courts would enable state and federal judges to collaborate more effectively “and thereby mutually contribute to the

clearer & firmer establishment of the true boundaries of power, on which must depend the success & permanency of the federal republic.”<sup>20</sup>

In this evolving judicial federalism, Madison hoped, broad-gauged assertions of the kind he critically associated with the pronouncements of the Marshall Court should give way to more pointed, narrowly drawn judgments. The interpretive meaning of either a law or the Constitution, Madison observed, should “result from a course of particular decisions, and not these from a particular and abstract comment on the subject.”<sup>21</sup> Such a mode of reasoning would also correspond to Madison’s epistemology of federalism. That is, courts would puzzle their way through an array of questions, clarifying the issues and producing over time a doctrine that would mark an intellectual convergence between national and state judges. As Madison had remarked back in *Federalist* No. 37, “All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”<sup>22</sup> Liquidation, in this formula, became one answer to the problem of “nondescript” federalism. It would help provide the description that the absence of prior examples left open.

Beneath this hopeful prospect of judicial federalism, however, lay a more sobering political assessment. Madison’s correspondence with Roane coincided with the Missouri Crisis of 1819–21. One lesson that crisis taught, beyond its public expression of antislavery sentiments, was that the political arithmetic of the 1780s was badly miscalculated. Then it had been assumed that population movements would bring the South closer to demographic parity with the North, reinforced by the Three-Fifths Clause. Now it was apparent that even with the coefficient of reapportionment, the South would remain a permanent minority within the nation. In that situation, Madison must have understood, reliance on a Supreme Court respectful of the original understandings of American constitutionalism might provide greater security to the South than Roane, driven by his animus against Marshall, appreciated. More grimly, Madison also understood that the danger of sectional confrontation pivoting on the presence or absence of slavery remained the great exception to the advantages of a multiplicity of factions that had been the basis for his political theory since 1787. “Should a State of parties arise, founded on geographical boundaries and other permanent and Physical distinctions which happen to coincide with them,” he asked in 1819, “what is to control those great repulsive Masses from awful shocks agst. each other?”<sup>23</sup>

In the judicial realm, then, *Federalist* No. 39 remained Madison’s mature solution to the problem of resolving conflicts over federalism. He reminded Jefferson

of that in 1823, when Jefferson’s continued enthusiasm for Roane’s position led to one of those exchanges between the two friends that again illuminated the distinct ways in which they often reasoned. Should the national and state governments reach some constitutional impasse, Jefferson had suggested, let the people call a new convention to resolve the difference. This, of course, was an echo of the state-based proposal for resolving constitutional conflicts that Madison had gone out of his way to refute, rather decisively, in *Federalist* Nos. 49 and 50, and he echoed those criticisms in explaining his objections to Jefferson’s proposal. It was true, Madison conceded, that “the Court, by some of its decisions, and still more by extrajudicial reasonings & dicta,” had gone too far in enlarging national authority. “But the abuse of a trust does not disprove its existence.”<sup>24</sup> Over the long run, Southern regional interests might benefit more from the Court than they would from a legislature in which Northern majorities would dominate.

Yet within a few years, the apparent dominance of Northern economic interests in securing the enactment of the protectionist Tariff of 1828 pushed radical Southern thinking in a different direction. Nullification, not judicial review, became South Carolina’s preferred answer to the so-called Tariff of Abominations. Here again, the development of the South Carolina argument, spearheaded by its great constitutional theorist, John C. Calhoun, may have carried Madison back to his earlier thoughts. Back in 1798, and perhaps with Jefferson’s flirtation with nullification in the Kentucky Resolutions in mind, Madison had reminded Jefferson that it was important to ask *how* a state could act as “the ultimate Judge of infractions” on the Constitution. The *legislature* of the state could not go that far, Madison reasoned, but a *convention* might, because “a Convention was the organ by which the Compact was made.”<sup>25</sup>

The thought, as enunciated in 1798, was left incomplete—a personal query meant for Jefferson and another one of those occasional interjections by which Madison tried to pull his neighbor at Monticello, who was more prone to impulsive statements, back to a more prudent position. But thirty years later, the thought that Madison had left dangling in 1798 became a fundamental element of South Carolina’s nullification campaign. It was not the legislature that would take the decisive act of nullification, but a special convention—that distinctively innovative American legal fiction that gave a people an expression of popular sovereignty higher than the ordinary processes of legislative ratification.

Madison’s correspondence and papers after 1828 contain numerous references to the heresies emanating from South Carolina. To examine even the limited number of documents reprinted in the Library of America edition of Madison’s

*Writings* is to realize how profoundly troubled he was by nullification, not only for its flawed premises and conclusions but also, by implication, for the ominous light it shed on the character of American political reasoning. Madison's efforts to counteract the Calhounian discourse remained consistent with the epistemology that both guided and was reinforced by his role as constitutional lawgiver in the 1780s. He drafted these documents mindful not only of the need to explain a "non-descript" Constitution in its details but also of the fundamental ends of republican government. As Drew McCoy has aptly observed, Madison consistently understood that the logic of the South Carolina position was an attack on the fundamental principle of majority rule. Madison had long worried, of course, about the problem of factious majorities and majority misrule. But his concerns on these subjects were designed not to reject majority rule in principle, as South Carolina was surely doing, but to improve the basis on which majorities would properly form.<sup>26</sup>

Thus, in the course of a lengthy letter to Joseph Cabell on the legitimacy of a protectionist tariff, Madison used the multiple sources of power he found in the Constitution to reflect on the presence in the text of "Pleonasms, tautologies & the promiscuous use of terms & phrases differing in their shades of meaning" as evidence of the framers' overlapping concerns, "the imperfections of language," and even "the imperfection of man himself."<sup>27</sup> These were all variants on points registered in *Federalist* No. 37, where Madison had concisely distilled the linguistic analysis of John Locke's *Essay Concerning Human Understanding* into a sober lesson of the limitations and snares of political language. After then elaborating eight specific reasons why a protectionist tariff was constitutional, Madison then turned to precedent and stability as guiding values. The objections emanating from South Carolina violated four decades of settled practice—an "unbroken current . . . prolonged & universal." Any "novel construction" challenging this understanding could plausibly require only "the intervention of the same authority which made the Constitution," that is, an appeal to a superlegislative popular convention. But if that precedent of 1787–88 was now invoked, Madison warned, "there would be an end to that stability in Govt. and in Laws which is essential to good Govt. & good Laws; a stability, the want of which is the imputation which has at all times been levelled agst. Republicanism with most effect by its most dexterous adversaries." To allow so grave a challenge and cavalier a rejection of settled practice to go unanswered would ultimately lead to a situation in which "every new Legislative opinion might make a new Constitution."<sup>28</sup>

The constitutional validity of the 1828 tariff soon became a secondary concern for Madison, not least because the answer to the question seemed so

obvious. The real danger lay in the concept of nullification itself. Here the first challenge that Madison faced was to correct the pernicious misperception that the "doctrine of 1798" provided a legitimate and powerful foundation for the heresies of South Carolina, which supposed that an individual state should be entitled to resist an act of Congress until and unless its position was corrected by a common resolution or action of three quarters of the states. Madison was reluctant to speak at length about the *Kentucky Resolutions*, of which Jefferson was the original author. In his old age, as in the 1790s, Jefferson's enthusiasm for states' rights had a radical edge that Madison resisted.<sup>29</sup> Madison had much greater confidence in his recollection of the purposes and limitations of the *Virginia Resolutions*. These had never been conceived to interpose the legal authority of the state to prevent the enforcement of the Alien and Sedition Acts. The resolutions were designed instead to rally a larger set of states, acting concurrently, as agencies of political protest. Madison's views of the capacity of the state governments had obviously shifted significantly in the decade since the adoption of the Constitution. Having to deal with the effective consolidation of *Federalist* political power in all three branches of the national government, the states now appeared to be the last political forum that the Republican opposition could immediately hope to mobilize. But that mobilization would not take the path of legal interposition. Instead, it would operate as a medium for rallying public opinion. Indeed, as Colleen Sheehan has recently explained, Madison's plans for the *Virginia Resolutions* reflected the more sophisticated understanding of public opinion that he had formed since the 1780s. This was a strategy for political opposition, not legal or constitutional confrontation, and it was properly tied, not to the development of heretical doctrines, but to the political judgment that the election of 1800 soon vindicated.<sup>30</sup>

Correcting historical misperceptions about 1798, however, was only a partial step. Once it was realized that the doctrine of 1798 did not lay a foundation for the heresies of 1832, Madison still had to explain what its significance was. In Madison's view, the Federal Constitution was formed on the basis of a compact among the people of the states, and that compact created a national government possessing substantial manifestations of sovereignty that the states no longer retained. It was the collective nature of this compact as binding all states, rather than a compact between each individual state and the Union, that exposed a decisive flaw in the South Carolina position. The latter notion again carried Madison back to a position with which he had flirted in 1787: that if the Articles of Confederation were conceived as a league or treaty among sovereign states, then the failure of a state

to abide by any of its provisions might release all the states from their collective obligations.<sup>31</sup> However plausible that claim might have seemed in 1787—and it did not receive a favorable hearing when Madison mentioned it at the convention—it could not describe the situation of 1832. The implication that “the Constitutional band which holds [the states] together, is a mere league or partnership, without any of the characteristics of sovereignty or nationality” was both an absurdity and the basis for Madison’s response that the American “political system” was “a new Creation—a real nondescript.”<sup>32</sup>

Madison’s position left open the theoretical possibility that the Union could dissolve if a mutual consensus existed among the states that its continuation was no longer compelling. But that would require a collective act akin to 1787–88, when such a consensus had formed, first within the convention at Philadelphia and then among the people of the states. South Carolina’s stand-alone action could not pass that high threshold. But its lack of constitutional authority did not provide a sovereign cure to the political passions that had been released.

The natural feelings which laudably attach the people composing a State, to its authority and importance, are at present too much excited by the unnatural feelings, with which they have been inspired agst. their brethren of other States, not to expose them, to the danger of being misled into erroneous views of the nature of the Union and the interest they have in it.<sup>33</sup>

Here, as in *The Federalist*, Madison still reflected on the ways in which opinions and passions, rather than moderated reasoning, could become the determinants of political commitment. Should “an actual secession” occur “without the consent of the Co-States,” Madison concluded, “the course to be pursued by these involves questions painful in the discussion of them.” To put the point more directly, the coercion he had first contemplated in the Continental Congress half a century earlier and then abandoned as a viable mode of federal governance might yet again become the final source of national authority.

Madison understood that secession, as a revolutionary act, could not itself be nullified by constitutional means. Yet his preferred alternative throughout was that Americans should strive to understand both the origins of the federal constitutional union and the complexities of its governance. The passage of time and the inflammation of rhetoric made both tasks ever more difficult. In effect, what Madison wanted was for his countrymen to be more Madisonian, not only in their devotion to the Union but in their ability to grapple, as he repeatedly did, with the details of federalism, in the expectation that their first commitment was to the Union itself. That was why his final public text, which he called *Advice*



to *My Country*, took the form of a posthumous appeal to Union. A quarter century after his death in 1836, that hope asked more of his countrymen than they were capable of providing.

## NOTES

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1. Letter from James Madison to William Cabell Rives (Mar. 12, 1833), in James Madison: Writings 864 (Jack N. Rakove ed., 1999).
2. Letter from James Madison to John Tyler (n.d., 1833), in 9 The Writings of James Madison, 508 (Gaillard Hunt ed., 1910). Hunt notes that the letter was evidently not sent; *id.* at 502n.
3. *Id.* at 502.
4. *Id.* at 509.
5. 9 Journals of the Continental Congress, 1774–1789 236 (Worthington C. Ford ed., 1904–37).
6. *Id.* at 20: 469–71.
7. For further discussion, see Jack N. Rakove, The Beginnings of National Politics 289–91 (1979).
8. Letter from James Madison to Thomas Jefferson (Apr. 16, 1781), in 3 The Papers of James Madison 71–72 (William Hutchinson, William Rachal, et al. eds., 1962).
9. 9 Papers of Madison, *supra* note 8, at 351–52. For further discussion of this point, which offers a revealing insight into Madison's active mode of political thinking, see Jack Rakove, Revolutionaries 363–65 (2010).
10. Letter from James Madison to George Washington (Apr. 16, 1787), in 9 Papers of Madison, *supra* note 8, at 385.
11. 1 Records of the Federal Convention of 1787 21 (Max Farrand ed., 1911).
12. *Id.* at 54.
13. *Id.* at 245.
14. *Id.* at 320.
15. *Id.* at 245.
16. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 Papers of Madison, *supra* note 8, at 215.
17. Federalist 39, in 10 Papers of Madison, *supra* note 8, at 381.
18. Nor can one overlook the brief yet skeptical comment on judicial power included in his review of Jefferson's ideas for a revised Virginia constitution: *Observations on the "Draught of a Constitution for Virginia"* (Oct. 1788), in 11 Papers of Madison, *supra* note 8, at 293.
19. In this and the following paragraphs, I rely on my earlier essay, *Judicial Power in the Constitutional Theory of James Madison*, 43 William & Mary L. Rev. esp. 1533–47 (2002).
20. Letter from James Madison to Spencer Roane (June 29, 1821), in James Madison: Writings, *supra* note 1, at 779.



21. Letter from James Madison to Spencer Roane (Sept. 2, 1819), *id.* at 733.
22. *Federalist* 37, in 10 Papers of Madison, *supra* note 8, at 362.
23. Letter from James Madison to Robert Walsh (Nov. 27, 1819), in James Madison: Writings, *supra* note 1, at 744.
24. Letter from James Madison to Thomas Jefferson (June 27, 1823), *id.* at 801–2.
25. Letter from James Madison to Thomas Jefferson (Dec. 29, 1798), *id.* at 592.
26. Drew McCoy, *The Last of the Fathers* 136–39 (1989).
27. Letter from James Madison to Joseph Cabell (Sept. 18, 1828), in James Madison: Writings, *supra* note 1, at 814.
28. *Id.* at 819.
29. As McCoy and others have noted, defending Jefferson and the *Kentucky Resolutions* was a real problem that Madison's best reasoning could not wholly resolve. McCoy, *supra* note 26, at 143–51.
30. Colleen Sheehan, *James Madison and the Spirit of Republican Self-Government* 130–34 (2009).
31. *Cf.* the second point in the eighth item of Madison's *Vices of the Political System of the United States*, in James Madison: Writings, *supra* note 1, at 74.
32. Madison to Rives (Mar. 12, 1833), *id.* at 864.
33. *Id.* at 865.