Ten

Courting Public Opinion

James Madison's Strategy for Resisting Federal Usurpations

Lynn E. Uzzell

On March 23, 2010, President Barack Obama signed into law the Patient Protection and Affordable Care Act (which would soon be dubbed "Obamacare" by friends and foes alike). The battle over the bill in Congress had been bitterly contested; the vote had split sharply down party lines; and the final passage of the law brought cheers of jubilation from some quarters and howls of protest from others. Opponents of the new law claimed among other things that it was an unconstitutional exercise of federal power. In particular, the "individual mandate"—which requires people to have health insurance or pay a penalty—was deemed to lie outside even the most expansive reading of the Commerce Clause found in Article I, section 8, of the Constitution. After opponents lost the fight in Congress, they did what aggrieved parties are wont to do. They called their lawyers.

Within moments of President Obama's signing ceremony, attorneys general in numerous states began filing lawsuits.[1] Proponents of the new law were at first confident and dismissive of any legal challenge. The question of constitutionality had first been broached while the bill was still under consideration. When a reporter asked Speaker of the House Nancy Pelosi what part of

the Constitution authorized Congress to impose the individual mandate, she famously quipped, "Are you serious? Are you serious?"[2] As it turns out, they were serious, and the legal challenge that they mounted was formidable. By the time that the case was argued before the Supreme Court, twenty-six states had joined the lawsuit and the legal winds were at their back. One appeals court decision had been in their favor; the administration's counsel (according to some) had done a poor job of defending the law; and many of the questions coming from the bench had seemed sympathetic to the plaintiffs.

As the Supreme Court was poised to deliver its opinion, the pundits, prognosticators, and bookies began laying odds that substantial portions of the health care law would be overturned; the only question remaining seemed to be whether it would be overturned in its entirety or merely gutted beyond salvaging. Then, in a surprise twist, Chief Justice John Roberts led a 5-4 decision siding with the administration (though not with their arguments), ruling that the individual mandate was within the taxing powers of Congress. Once again, the cheers and howls were heard from their respective quarters, and President Obama went on national television to declare that "the highest court in the land has now spoken" and that "with today's announcement, it's time to move forward."[3] Opponents were left to lick their wounds and rejoin the battle on different fronts.

I do not propose to revisit the question of whether the Affordable Care Act was or was not constitutional, and I am even less interested in examining whether or not it is good policy. Rather, I wish to use this one example of a contretemps between state and federal authorities as a springboard to examine and evaluate the various possible *strategies* for resolving disagreements over the authoritative interpretation of American federalism. And in the interest of probing the depths of that perennially fascinating inquiry, "WWJD?"—"What Would 'Jemmy' Do?"—I explore how James Madison responded to similar perceived abuses of federal power and why he chose the avenues that he did. In this way, we may catch a glimpse of how the Father of the Constitution believed that a constitutional fracas should be resolved. And to the degree that his reasons are persuasive and his actions worthy of emulation, we may be armed with a guiding principle for how future battles over federalism should be waged.

There can be no question that Madison believed that the federal courts were a legitimate and even (in one sense) a final arbiter for determining the

boundaries of federal authority. On that question he never wavered. When attempting to untie "the Gordian knot of the . . . collision between the federal and State powers," the federal courts must have the last word, because all other roads would lead to anarchy and disunion.[4] Toward the end of his life, he recalled that he had defended the supremacy of the federal courts when he wrote the *Federalist* essays "and I have never ceased to think that this supremacy was a vital principle of the Constitution, as it is a prominent feature of its text."[5] But even if the Supreme Court would sometimes be called on as final arbiter of certain questions of federalism, it was clearly not the only arbiter, nor (and here is the nub) was it necessarily the best one. Both in theory and in practice, Madison preferred appealing to the people, either directly or through their representatives, rather than resorting to litigation. And that preference was not rooted in shortsighted considerations of achieving immediate political success for the question at hand; rather, it proceeded from his considered opinion of what was needed to make America's experiment in republican government work.

CONSTITUTIONALISM AND FEDERALISM IN THE SERVICE OF POPULAR RULE

Madison's commitment to and understanding of both federalism and constitutionalism were grounded in his more fundamental dedication to popular rule. That is not to say that he believed that every passing whim of a majority of the citizenry should be indulged. Such an indiscriminate attachment to majority rule would inevitably subvert the rights of some minority party and would ultimately cause popular government to self-destruct. Rather, he sought ways to refine and arrange popular institutions so that they might yield that rarity in political history: a stable, just, and durable republic. A few years after his retirement from public service, Madison shared with his brother-in-law the political philosophy that informed his earliest reflections on national supremacy as well as some alterations in his thinking that had taken place since then:

> For myself, having, from the first moment of maturing a political opinion down to the present one, never ceased to be a votary of the

> principle of self-government, I was among those most anxious to rescue it from the danger which seemed to threaten it; and with that view, was willing to give to a Government resting on that foundation as much energy as would insure the requisite stability and efficacy.[6]

Throughout Madison's political career, the various political principles that he advocated—whether for an extended sphere of republican government, for checks and balances on the branches of government, or for a faithful interpretation of the Constitution—always served the primary goal of ensuring that a popular form of government could succeed.[7] And many Madisonian scholars have subsequently gone off the rails because they have viewed his principles as a succession of discrete parts rather than seeing them within the interconnected and organic hierarchy in which he placed them.

Madison's initial preference for a sovereign national government and his eventual embrace of the national halfway house that the Constitution created were both grounded in his commitment to making republican government work. Heading into the Constitutional Convention, Madison had become convinced that a dramatic shift in powers from the state governments to the central government was necessary, not only to preserve the union but also to rescue republican government itself from the many ills that threatened its survival in the states.[8] He explained to Virginia's governor, Edmund Randolph, that he believed that it was "a fundamental point that an individual independence of the States, is utterly irreconcileable with the idea of an aggregate sovereignty." His idea for a new constitution, therefore, would have established "a due supremacy of the national authority" while leaving in place the authority of the state governments only insofar "as they can be subordinately useful."[9]

The individual proposals that Madison offered in his Virginia Plan and defended throughout the Constitutional Convention would have admirably accomplished the goal of subordinating the states to a national government with unambiguous sovereignty. But many of the other Framers balked at the most nationalistic tendencies of his plan, and that unequivocal supremacy that he wished to see in the federal government was precisely what he failed to get. Privately, he confided to Jefferson that his failure to achieve his objects would probably doom the success of the Constitution.[10] Publicly, however, he defended the "partly federal and partly national" character of

the Constitution like a true believer. His *Federalist* No. 39 is a model of chastened nationalism. The federal government was supreme over "certain enumerated objects only," he explained, and the state governments retained "a residuary and inviolable sovereignty over all other objects."[11]

There was nothing peculiar or esoteric about Madison's interpretation of American federalism during the ratifying period. Even Alexander Hamilton—who never saw a restraint on national powers that he liked—had defended the Constitution in the same way.[12] At the time, the defenders of the new Constitution had spoken with one voice on the subject of federalism. And in case anyone possessed lingering uneasiness that the "inviolable sovereignty" of the states was not clear enough in the original Constitution, the 1st Congress added the Tenth Amendment for good measure. Nevertheless, howsoever clearly the *principle* of federalism may have been stated in the Constitution, the devil is in the details. Boundary disputes over the legitimate spheres of state and federal authority arose almost immediately and continued to bedevil the new government for years to come. America's first parties formed in large measure over differing views on the proper extent of federal authority. In particular, the Federalist Party began interpreting the Necessary and Proper Clause in ways that endowed the federal government with far-reaching power, and the Democratic Republicans frequently kicked at those incursions into the states' sovereignty. Given Madison's earlier predilections for a strong national government, some were surprised (and some continue to express surprise) that he sided with the Republicans.[13] But the stance that he took was of a piece with his fundamental commitment to republican government.

Madison may have originally submitted to the Constitution's compromise of divided sovereignty with some misgivings, but he would thereafter and throughout his life defend it with resolute determination.[14] That apparent U-turn is the first clue to understanding Madison's approach to constitutional questions. So long as the formation of the Constitution was an open question—so long as the Framers had a free hand in constructing its outlines—Madison would fight stoutly to codify his own opinions about federal power in the proposed plan of government. But once the Constitution had been ratified—once it was no longer a lump of clay to be molded but an authoritative expression of the people's deliberate will—then Madison defended the arrangement that had received the people's consent. The

constitutional interpretation that Madison sought and defended was "the sense in which the Constitution was accepted and ratified by the nation" because "in that sense alone it is the legitimate Constitution."[15]

Therefore, when Madison came to believe that the people's own "sense of the Constitution" was under assault by Congress, he viewed it as more than simply a threat to the rule of law (although he certainly saw it as that); in his view, it was also an assault on popular government itself. Both Madison and Hamilton had wanted a much stronger central government than the Constitution gave them. Both had thought that the inherent weaknesses in the Constitution might doom its success, but both nonetheless defended it during the ratification debates because they thought that it was better than nothing. Where they parted ways was how they responded to their disappointed hopes for the Constitution after it was ratified. According to Madison's account of the rupture, Hamilton continued to fight for a version of the Constitution that he had always wanted, and he did so by interpreting certain clauses more expansively than they had been understood at the time the Constitution was adopted. By contrast, Madison had submitted to the Constitution that had received the people's consent.[16] If Madison had continued to cling to his own opinions of national supremacy after the people had definitively rejected them, then he would have been sacrificing the *end* of republican government to his preferred *means* of salvaging it. So long as the people had not yet definitively spoken, he sought to influence their choice. After they had made their solemn and deliberate choice, he was always prepared to sacrifice his private judgment to their will. That pattern would repeat itself throughout his career.

And just as preserving the people's sense of the Constitution was for Madison a question of upholding republican principles, so should the strategies adopted for its preservation be republican. Madison's strategic thinking on this question was already fully formed before it was ever tried in the crucible of public policy debates. When he tackled the abstract question of the inevitable clashes between the state and federal governments in *The Federalist*, he accused the antifederalists of having "lost sight of the people altogether in their reasonings on this subject." The rival ambitions of state and federal officials might goad them to attempt mutual encroachments—that was only natural—but "the ultimate authority, wherever the derivative may be found, resides in the people alone." Therefore, the success or

failure of any attempt at encroachment will "depend on the sentiments and sanction of their common constituents."[17] The surest defense of the federal structure of the Constitution would be the "ultimate authority" of all political power: the people themselves. And the country had not been under the new government for long before Madison had the opportunity to put his abstract theories to the test.

Within ten years of the adoption of the Constitution, Madison witnessed two measures pass Congress—the bill instituting a national bank and the Alien and Sedition Acts—that he believed were nothing less than bald-faced usurpations of powers that had never been granted to the federal government under the Constitution. With each perceived invasion he attempted different strategies for defending what he believed was the states' legitimate authority. But each of his strategies had this in common: they bypassed the courts and aimed ultimately at influencing that original font of power, the people.

It may be argued that Madison's decision to take his case before the court of popular opinion rather than federal judges was merely pragmatic. Since no federal court had yet exercised the power of judicial review at the time that these issues were being settled, some contemporaries may have doubted that they possessed the authority to strike down federal laws at all. Furthermore, at least insofar as the Alien and Sedition Acts were concerned, Madison may have had reason to believe that the federal courts would be unfriendly to his position. Be that as it may, Madison (along with many others at the time) never doubted that the courts did possess that power. Yet Madison's preference for the people as the ultimate arbiters and guardians of federal limits displays a consistency that can be seen from the ratifying period until his dying day: his position was not dictated by circumstances. Pragmatic considerations may have influenced his choices, but his republican principles were ever his lodestar.

THE NATIONAL BANK

When Treasury Secretary Alexander Hamilton introduced his sweeping proposals for economic reform in 1790, he met with unexpectedly fierce opposition from his erstwhile ally, James Madison, who was then the leading voice within Congress. By the time that Hamilton recommended the

creation of a national bank in 1791, Madison's opposition to Hamilton's policies was already firmly established. Many historians who write about Madison's constitutional objections to the Bank Bill therefore insist that his stance was little more than a smokescreen to cover his real antagonism to the oligarchical and urbanizing trend of Hamiltonian economic policy and its potential for introducing corruption into the national councils.[18] There may be much to be said for their reflections on Madison's opposition to those economic measures in general. But these peripheral reasons should not be allowed to overshadow the stubborn fact that Madison's fiercest arguments against a national bank were grounded in a principled objection to its constitutionality, not policy considerations.

The principal point of departure on this question for Madison and Hamilton lay in their respective interpretations of the Necessary and Proper Clause. Hamilton gave it an expansive reading that would have justified almost any power that was useful or even merely convenient in exercising Congress's enumerated powers. Madison read the clause much more narrowly, and he claimed that his narrower reading was warranted not only from the plain meaning of the text but from the manner in which the words were understood by the people who adopted the Constitution:

> The explanations in the state conventions all turned on the same fundamental principle, and on the principle that the terms necessary and proper gave no additional powers to those enumerated. (Here he read sundry passages from the debates of the Pennsylvania, Virginia and North-Carolina conventions, shewing the grounds on which the constitution had been vindicated by its principal advocates, against a dangerous latitude of its powers, charged on it by its opponents.)[19]

It was during those debates that Madison first gave a clear articulation of the link that he saw between a faithful interpretation of the Constitution and the cause of republican government itself. As Colleen Sheehan has written, to Madison,

> No opinion in the regime, however widespread and popular, is superior to the voice of the people expressed in its most sovereign capacity in this document. . . . He viewed Hamilton's broad construction of

the Constitution as more than a point of legal debate—it struck at the very philosophical basis of republican government.[20]

The written record of Madison's speech in Congress merely states vaguely that "he read sundry passages from the debates" at the state conventions in order to prove that the people who ratified the Constitution construed this clause in the narrower fashion that he advocated. But it is possible that among the passages that he read were arguments that he himself had delivered at Virginia's Ratifying Convention to refute Patrick Henry's dire warnings that the Necessary and Proper Clause would one day be rendered into a "sweeping clause" that would be used to justify every conceivable federal power. Madison's narrower interpretation of the Necessary and Proper Clause was not newly manufactured in 1791 to meet the immediate crisis of defeating Hamiltonian economic policies; it was consistent with the interpretation that he had given to the clause when he was actively mollifying the Constitution's opponents in Virginia.[21] If Congressman Madison were to countenance a broader interpretation of this clause just three years after he had given assurances that it could never be interpreted in that way, then he would indeed have betrayed what his own experience told him was "the sense in which the Constitution was accepted and ratified by the nation." And the zeal with which Madison threw himself into foiling that impending betrayal is evident in the closing salvo of his speech before Congress. The proposed national bank, Madison was quoted in notes of the debates as saying, "was condemned by the rule of interpretation arising out of the constitution; . . . was condemned by the expositions of the friends of the constitution, whilst depending before the public; was condemned by the apparent intention of the parties which ratified the constitution; . . . and he hoped it would receive its final condemnation, by the vote of this house."[22]

It didn't. And no Tea Party Republican could have suffered greater agonies over the final passage of the Affordable Care Act than Madison felt as he witnessed the Bank Bill sail through Congress by a comfortable majority, supplied overwhelmingly by Northern representatives. But Madison had one ace up his sleeve that Republicans in 2010 did not have: the sympathetic ear of the president. As he had already described in *Federalist* No. 44, in the event that Congress "should misconstrue or enlarge" the power vested in them by distorting the "true meaning" of the Necessary and Proper Clause, then the line of defense "in the first instance . . . will depend on the executive and judiciary departments."[23] And he had reason to hope that President Washington, who had a high regard for Madison's political opinions, would refuse his assent to the bill. Madison's arguments against the bank's constitutionality were therefore duly recycled in the report issued to Washington by Secretary of State Jefferson. And at first Washington was genuinely ambivalent about the question. Giving fresh encouragement for hope, the president asked Madison to draft a veto message for him, just in case he might need it. He didn't. In the end, Washington sided with Hamilton's arguments, signed the bill, and the Bank Bill became the law of the land.

Having lost the fight in the legislative and executive departments, Madison's next move is instructive. He did not choose to continue the fight in the federal judiciary, though he might have. Instead, he went over their heads and took his case directly to the people. As *Federalist* No. 44 had already made clear, whereas the executive and judiciary departments are remedies to congressional overreach "in the first instance, . . . in the last resort a remedy must be obtained from the people who can, by the election of more faithful representatives, annul the acts of the usurpers."[24] Bypassing the third branch, he turned instead to the fourth estate.

The same year that the Bank Bill passed Congress, Madison urged a former college friend of his, Philip Freneau, to start a newspaper in Philadelphia called the *National Gazette*. It would not be long before the paper was seen as an engine for propagating the Republican Party's party line, but in its earliest days it maintained a pretense of impartiality. Madison contributed several articles for his friend's paper, all published anonymously. But those opinion pieces were far from being the eighteenth-century version of talk-radio tirades. Like the *Federalist* essays a few years earlier, they were often short, reflective treatises that examined abstract principles of government, and the early ones in particular were divorced from the immediate context of contemporary policy debates. Unquestionably, they ultimately aimed to achieve a political end, but their modus operandi had the unmistakable stamp of education rather than sophistry: they sought to engage the minds of the citizenry rather than inflame their passions.

Within those essays, Madison attempted to interest the American public in the cause of maintaining the distinct spheres of power lodged in the state and federal governments. In the essay "Consolidation," Madison warned of the dangers inherent in concentrating powers within the central

government at the expense of the state governments. If those "local organs" were destroyed, then "neither the voice nor the sense" of the people could be heard or heeded by the distant Congress, "leaving the whole government to that *self-directed course*, which, it must be owned, is the natural propensity of every government." To avoid this fate, "let it be the patriotic study of all, to maintain the various authorities established by our complicated system, each in its respective constitutional sphere." Guarding the proper boundaries of federalism was difficult, but it was also imperative, because no less than the cause of popular rule was at stake. The reader of "Government of the United States" was presented with a similar message and the same stirring call to arms: "Those who love their country, its repose, and its republicanism, will therefore study to avoid [consolidation of the states into one government], by elucidating and guarding the limits which define the two governments."[25]

The two essays had looked outward, examining the citizen's duty to preserve the federal structure of the Constitution. But in "Public Opinion," Madison turned introspective. He seemed to be tipping his hand to reveal how he perceived his own duty, the motivation that prompted him to write these essays:

> Public opinion sets bounds to every government, and is the real sovereign in every free one.
>
> As there are cases where the public opinion must be obeyed by the government; so there are cases, where not being fixed, it may be influenced by the government.

In a free government (in other words, a republican government), public opinion is the ultimate ruler. But once again, to Madison, not every transitory shift in the public opinion polls deserves a reflexive obedience. Instead, only when public opinion was clearly the fixed and deliberate disposition of the people should it command the rulers' submission. Ephemeral inclinations might still be subject to education or persuasion. And whatever facilitates the free exchange of ideas—"and particularly a *circulation of newspapers through the entire body of the people*"—promotes free government.[26] Madison—acting as full-time legislator and part-time journalist—was doing his bit to promote republicanism. In these articles he was trying to influence public opinion—and to fix it—on the version of federalism that he believed to be essential to free government.

If Madison had hoped that his newspaper articles would inspire a groundswell of popular resistance to the Bank Bill and lead the electorate to clamor for its repeal, then again, his project was a failure. But Madison's dedication to government by consent is always even more apparent in defeat. When President Madison later found it necessary to sign a national bank into law, he was, of course, charged with hypocrisy by his critics. But according to Madison, the principle undergirding both decisions was his commitment to popular rule. He later insisted that "the inconsistency is apparent, not real" because in the intervening years numerous subsequent elections had convincingly demonstrated that the people had disagreed with Madison's interpretation of the Constitution.[27] More than twenty years of public support for a national bank had provided "the requisite evidence of the national judgment and intention" on the question of the bank's constitutionality.[28] He nonetheless stipulated that even the weight of popular opinion is not sufficient to repeal or alter a provision in the Constitution (that is what the amendment process is for). However, if a long train of elections and legislative precedents is not sufficient to "fix the interpretation of a law," then nothing else can be. Once "evidence of the public judgment" can be ascertained, then "individual opinions" on the subject must be sacrificed.[29] On the question of the national bank, it was the public's interpretation of the Constitution, not his own private judgment, to which Madison finally yielded.

THE ALIEN AND SEDITION ACTS

In his next great battle against federal encroachments, Madison tried different tactics and met with greater success. During the first half of the 1790s, conflicting interpretations of American federalism had been truly in play, but toward the end of the decade the tide had turned decidedly in the direction of the Federalists. With the adoption of the controversial Alien and Sedition Acts, however, the Federalists had clearly overplayed their hand. Authoritarian both in form and execution, the acts became increasingly unpopular

among the people. It was in response to that crisis and while the Republican Party was languishing in the political wilderness that Madison harnessed the authority of the state legislatures as a vehicle for driving public opinion.

Once again, Madison did not adopt his tactics as a response to immediate circumstances; he was simply following the playbook that he had detailed earlier when he penned his essays under the name Publius. In *Federalist* No. 44 he insisted that if the federal government tried any unconstitutional funny business at the expense of the state legislatures, they "will be ever ready to mark the innovation, to sound the alarm to the people, and to exert their local influence in effecting a change of federal representatives." In *Federalist* No. 45 he predicted that the state governments would always be a powerful defense against federal overreach because the people will be more attached to them than to any distant government. And, in a foreshadowing of the Virginia Resolutions, Madison predicted in *Federalist* No. 46 that "the embarrassments created by [state] legislative devices" could threaten federal officials with "difficulties not to be despised."[30]

So when the Adams administration passed the despicable Alien and Sedition laws, Madison anonymously drafted resolutions of protest to be passed by the Virginia legislature. (Jefferson had already written corresponding resolutions for Kentucky.) Madison denounced the Sedition Act because it fell afoul of the First Amendment's guarantee of free speech and press, the objection that seems most obvious to us today. But the preponderance of the protest was aimed at the loose construction of the Constitution and the encroaching nature of the federal government, of which the Alien and Sedition Acts were only the latest examples. It concluded with an appeal to the other states to join Virginia, "in confidence that they will concur with this Commonwealth in declaring, as it does hereby declare, that the acts aforesaid are unconstitutional."[31]

The immediate response to the Virginia and Kentucky Resolutions was not propitious. No other state formed common cause with Virginia and Kentucky, and several officially rebuked what they viewed as an invitation to disunity. After all, if individual states could declare federal laws unconstitutional, then they would be thrown back to the days of lawlessness that they had escaped when they scrapped the Articles of Confederation. (Part of the virulence of the other states' reactions may have been in response to the more intemperately worded Kentucky Resolutions, with which—to

Madison's lasting chagrin—his Virginia Resolutions would always be inextricably linked.) In an attempt to salvage the situation, Madison, who stood for election to the Virginia legislature in 1799, drafted a "report" that endeavored to explain and vindicate the previous year's resolutions. Easily twenty times longer than the original resolutions, the report explained in painstaking detail the pernicious tendencies of the Alien and Sedition Acts and the reasons why they were unconstitutional.[32] Perhaps even more important, Madison felt that he had to explain and defend the act of passing the resolutions as a legitimate form of state protest.

Madison hoped to convince his readers that the Virginia Resolutions were not an attempt to undermine the constitutional order. He affirmed, once again, that the judicial department is empowered to decide "in the last resort" all constitutional questions placed before it. But the judiciary, like any other branch, may decide wrongly. (Was it not the case that the federal courts had been busily prosecuting journalists and even a congressman under the Sedition Act?) The finality of the Court, therefore, was relative:

> this resort must necessarily be deemed the last in relation to the authorities of the other departments of the government; not in relation to the rights of the parties to the constitutional compact [in other words, the people themselves], from which the judicial, as well as the other departments, hold their delegated trusts.

Consequently, the Virginia legislature had done no more than its duty when it had volunteered "expressions of opinion" that the Alien and Sedition Acts were unconstitutional. It had never claimed for itself the final authority to decide or enforce the question of constitutionality; it had merely sought to influence the public's "opinion, by exciting reflection." The final determination of whether the Virginia and Kentucky legislatures had judged correctly could safely be left in those hands that were most truly and absolutely the last resort: "the temperate consideration and candid judgment of the American public." To view the courts as final arbiters in all respects would be as subversive to republican government as instituting a monarchy. "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."[33]

If it was true that Madison's ultimate audience was not the other state legislatures but the American people, then his strategy on this occasion must be deemed a triumph of the first order. In the election of 1800 (which came to be known as the Revolution of 1800), the Federalists suffered a rout from which they never fully recovered. The administrations of Jefferson and Madison were able to curb most of the federal excesses that had previously encroached on state sovereignty; indeed, their interpretation of federalism retained its ascendency until Southern Democrats began to overreach and clamor for the rights of nullification and secession. (Unfortunately, they tried to claim the mantle of Madison in the process.) That ultimate vindication by the electorate was enough to convince Madison that—in spite of being initially rebuffed by the other state legislatures—the Virginia Resolutions had achieved their intended purpose.[34]

CONCLUSION

So, how would Madison judge the strategy adopted by Obamacare's opponents, those who immediately took their dispute to the courts in 2010? He certainly would not claim that they had done anything illegitimate or unconstitutional. But he might have considered that approach ill-advised. By attempting to make an end run around the American people they were, in the first place, acting contrary to the spirit of the Constitution, because they preferred an authoritative decision from an unelected branch of the government to securing the consent of the governed for their position. They gave the president every justification to declare, with the authoritative finality of a gavel hitting a sounding block, that "the highest court in the land has now spoken" and that "with today's announcement, it's time to move forward." In the second place, this shortcut is unlikely to be a winning strategy in the long run. By failing to convince the public that their version of federalism was the correct one, they missed an opportunity to form a lasting corrective to what they deemed to be federal incursions on state sovereignty.

Madison's newspaper submissions of 1791–92 offer us the first lesson in what it takes to make American federalism work. The system, he said, is complicated and it cannot be sustained in a situation in which the citizenry becomes ignorant of or indifferent to the legitimate spheres of power of the

federal and state governments. In order to work, "let it be the patriotic study of all" of those who live within the system "to maintain the various authorities . . . each in its respective constitutional sphere."[35] It is therefore the duty of the American people to defend their complicated system of divided sovereignty, and it is the duty of public servants to educate the citizenry about its true meaning.

If the advocates of states' rights find Madison's first lesson in federalism to be a bitter pill to swallow, his second lesson is even more likely to stick in their craw. If the public's impulse to concentrate power in the federal government should become a part of their fixed opinion—rather than a transitory passion—then even a victorious case before the Supreme Court would be at best only a temporary interruption of the people's sovereign will. In the face of sustained public opposition (at least in matters of doubtful constitutional interpretation), the duty of public officials is to subjugate their private opinions to that of their constituents. It is the inexorable logic of republican government: if a given interpretation of federalism has the people's ready understanding and voluntary acquiescence, then the support of the judiciary is not necessary. If that interpretation fails to win their support, then no tribunal, no matter how august, will long be able to withstand their choice. In any contest between state and federal authorities, neither side is going to achieve a decisive victory without receiving the "sanction of their common constituents."[36]

But as of this writing, the ultimate arbiter of Obamacare—"the temperate consideration and candid judgment of the American public"—has not yet issued its final judgment. Some people are still predicting that the law will collapse under the weight of its own unpopularity and legislative pressure. If that is the case, popular opinion will have had the last say, although probably not because the people were weighing the conflicting claims of federalism in the balance. Beyond the particular question of health care, there may be increasing signs of pushback to other examples of expansive federal legislation. With recent referendums legalizing marijuana in some states, in defiance of federal prohibitions, we may be seeing a novel form of "grassroots nullification" of federal law.[37] Rather than waiting for the state legislatures "to sound the alarm to the people," the new vanguard for states' rights may be proceeding from the individual initiative of citizens.

Notes

1. Sheryl Gay Stolberg and Robert Pear, "Obama Signs Healthcare Overhaul Bill, with a Flourish," *New York Times*, March 23, 2010 (www.nytimes.com/2010/03/24/health/policy/24health.html?_r=0).
2. "Flashback: When Asked Where the Constitution Authorizes Congress to Order Americans to Buy Health Insurance, Pelosi Says: 'Are You Serious?,'" December 13, 2010 (http://cnsnews.com/news/article/flashback-when-asked-where-constitution-authorizes-congress-order-americans-buy-health).
3. Bill Mears and Tom Cohen, "Emotions High after Supreme Court Upholds Health Care Law," June 28, 2012 (www.cnn.com/2012/06/28/politics/supreme-court-health-ruling/index.html).
4. Letter from James Madison to Spencer Roane, June 29, 1821, in *The Mind of the Founder: Sources of the Political Thought of James Madison*, rev. ed., edited by Marvin Meyers (University Press of New England, 1973, 1981), p. 367.
5. Letter from James Madison to Nicholas P. Trist, December 1831, in *Letters and Other Writings of James Madison*, published by Order of Congress, 4 vols. (Philadelphia: J. B. Lippincott & Co, 1865), vol. 4, p. 211, cited in the American Reference Library (Orem, Utah: Western Standard Publishing Company, 1998).
6. Letter from James Madison to James G. Jackson, December 27, 1821, in *Letters and Other Writings of James Madison*, vol. 3, p. 245; see also the opening paragraphs of *Federalist* No. 39, in *The Federalist Papers*, edited by Clinton Rossiter, with new introduction and notes by Charles Kesler (New York: Penguin Group, 1961,1999).
7. Lance Banning is especially good about recognizing the underlying consistency that informs so many of Madison's individual political opinions. See Banning, *Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* (Cornell University Press, 1995).
8. Madison's prognosis of those ills, his alarm for their consequences, and his proposed remedy are found in his "Vices of the Political System of the U. States," written around April 1787.
9. Letter from James Madison to Edmund Randolph, April 8, 1787, in *The Papers of James Madison Digital Edition*, edited by J. C. A. Stagg (University of Virginia Press, 2010) (http://rotunda.upress.virginia.edu/founders/JSMN-01-09-02-0197); hereafter referred to as *JMDE*.
10. Letter from James Madison to Thomas Jefferson, September 6, 1787, in *JMDE* (http://rotunda.upress.virginia.edu/founders/JSMN-01-10-02-0115).
11. *Federalist* No. 39, in *The Federalist Papers*, edited by Rossiter, p. 242.
12. Compare Hamilton's speech at the Constitutional Convention on June 18, 1787, with the reply that he gave to Melancton Smith in the New York Ratifying Convention on June 27, 1788, in *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787*, 5 vols., edited by Jonathan Elliot (Philadelphia: J. B. Lippincott Company, 1901), vol. 5, p. 202, and vol. 2, pp. 355–56, cited in the American Reference Library (Orem, Utah: Western Standard Publishing Company, 1998). Compare also his *Federalist* No. 33.
13. Gordon S. Wood has bestowed an honorific on the scholarly befuddlement: Wood, "Is There a 'James Madison Problem'?," in *Liberty and American Experience in the Eighteenth Century*, edited by David Womersley (Indianapolis: Liberty Fund, 2006) (http://oll.libertyfund.org/title/1727/81746).
14. Drew McCoy presents a great analysis of the elderly Madison's frustrating attempts to teach the upstart younger generation the true meaning of federalism in McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* (Cambridge University Press, 1989), pp. 130–51.
15. Letter from James Madison to Henry Lee, June 25, 1824, in *Letters and Other Writings of Madison*, vol. 3, p. 443; see also Letter from James Madison to Thomas Ritchie, September 15, 1821, and Letter from James Madison to Nicholas P. Trist, December 1831.
16. Nicholas P. Trist, "Memoranda," September 27, 1834, in *The Records of the Federal Convention of 1787*, rev. ed., 4 vols., edited by Max Farrand (Yale University Press, 1966), vol. 3, p. 534.
17. *Federalist* No. 46, in *The Federalist Papers*, edited by Rossiter, p. 291.
18. See, for instance, Wood, "Is There a 'James Madison Problem'?"; Ralph Ketcham, *James Madison: A Biography* (Newtown, Conn.: American Political Biography Press, 1971), pp. 319–23; and Andrew Burstein and Nancy Eisenberg, *Madison and Jefferson* (New York: Random House, 2010), pp. 221–24 and 555–56. Once again, Banning's *Sacred Fire of Liberty* provides a useful corrective; see especially pp. 325–33.
19. James Madison's speech on the Bank Bill, February 2, 1791, in *JMDE* (http://rotunda.upress.virginia.edu/founders/JSMN-01-13-02-0282).
20. Colleen A. Sheehan, "Madison versus Hamilton: The Battle over Republicanism and the Role of Public Opinion," in *The Many Faces of Alexander Hamilton: The Life and Legacy of America's Most Elusive Founding Father*, edited by Douglas Ambrose and Robert W. T. Martin (New York University Press, 2006), p. 182.
21. See Madison's speeches on the subject of the Necessary and Proper Clause in Virginia's Ratifying Convention on June 16 and 17, 1788, in *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, edited by Elliot, vol. 3, pp. 438–39 and 455.
22. James Madison's speech on the Bank Bill, in *JMDE*.
23. *Federalist* No. 44, in *The Federalist Papers*, edited by Rossiter, p. 282.
24. Ibid.
25. Madison's articles for the *National Gazette*, "Consolidation," December 5, 1791, and "Government of the United States," February 6, 1792, in *JMDE*. See http://rotunda.upress.virginia.edu/founders/JSMN-01-14-02-0122 and http://

rotunda.upress.virginia.edu/founders/JSMN-01-14-02-0190, respectively. Colleen A. Sheehan has undertaken a thorough examination of Madison's rhetorical exploits during this period. See Sheehan, "The Politics of Public Opinion: James Madison's 'Notes on Government,'" *William and Mary Quarterly*, vol. 49, no. 4 (1992), and "Madison v. Hamilton: The Battle over Republicanism and the Role of Public Opinion," *American Political Science Review*, vol. 98, no. 3 (August 2004). Although her conclusions paint Madison as more of an Aristotelian and classical republican than the evidence seems to support, she nonetheless deserves kudos for showcasing an underappreciated facet of Madison's political thought.

26. James Madison, "Public Opinion," December 19, 1791, in *JMDE* (http://rotunda.upress.virginia.edu/founders/JSMN-01-14-02-0145). Emphasis is in the original.
27. Letter from James Madison to Nicholas P. Trist, December 1831, in *Letters and Other Writings of Madison*, p. 211.
28. Letter from James Madison to Charles Jared Ingersoll, June 25, 1831, in *Mind of the Founder*, edited by Meyers, p. 393.
29. Letter from James Madison to Nicholas P. Trist, December 1831, in *Letters and Other Writings of Madison*, p. 211. Colleen Sheehan, in "Madison v. Hamilton," p. 414, goes out of her way to emphasize that when Madison submitted to "the public judgment," it was more precisely the judgment of "*the generation who ratified the Constitution*." But that distinction, while factually true, is not made in Madison's writings.
30. *Federalist* Nos. 44, 45, and 46, in *The Federalist Papers*, edited by Rossiter; quotations on pp. 282 and 294.
31. Virginia Resolutions, December 21, 1798, in *JMDE* (http://rotunda.upress.virginia.edu/founders/JSMN-01-17-02-0128). This source and the one in note 32 also provide a good editorial introduction to the historical situation surrounding these documents.
32. "The Report of 1800," January 7, 1800, in *JMDE* (http://rotunda.upress.virginia.edu/founders/JSMN-01-17-02-0202).
33. Ibid.
34. Letter from James Madison to Edward Everett, August 28, 1830, reprinted in *The Virginia Report of 1799–1800: Touching the Alien and Sedition Laws; Together with the Virginia Resolutions of December 21, 1798, Including the Debate and Proceedings thereon in the House of Delegates of Virginia and Other Documents Illustrative of the Report and Resolutions* (Richmond, Va.: J.W. Randolph, 1850), pp. 249–56, esp. pp. 252 and 255–56.
35. "Consolidation," in the *National Gazette*, December 5, 1791. Alexis de Tocqueville made the same point in even starker terms in *Democracy in America*, trans. and ed. by Harvey C. Mansfield and Delba Winthrop (University of Chicago Press, 2000), pp. 155–56.

36. *Federalist* No. 46, in *The Federalist Papers*, edited by Rossiter, p. 291.
37. See Glenn Harlan Reynolds, "How Americans Can Kill Obamacare, Legalize Pot," *USA Today*, January 26, 2014 (www.usatoday.com/story/opinion/2014/01/26/obamacare-numbers-health-exchanges-insurance-obama-column/4913341/).