WEEK 8

over commerce, Madison was thoroughly prepared to answer Washington's objections and defend his own position. It was surprising, he maintained, that such "peculiar stress" should have been placed on information from the Constitutional Convention. When he himself had used such information as an argument against the bank, he was rebuked by its proponents, and there was not a single instance since "in which the sense of the Convention had been required or admitted as material in any constitutional question."[45]

> Whatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as the oracular guide in expounding the Constitution. As the instrument came from them, it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several state conventions. If we were to look, therefore, for the meaning of the instrument, beyond the face of the instrument, we must look for it not in the general convention, which proposed, but in the state conventions, which accepted and ratified the Constitution.

Looking to these sources, it was clear in his opinion that the treaty power was "a limited power." None of the state conventions had supposed that powers over commerce, war and peace, and even the disbursement of the public funds could be assumed, in practice, by the Senate and executive alone.[46]

The House of Representatives approved the reassertion of its rights by a margin of twenty-two votes, and Madison condemned the treaty's substance in a major speech of April 15.[47] By this time, however, public sentiments were shifting, a petitioning campaign was under way in favor of the treaty, and Republicans in Congress were having second thoughts, fearing that the Senate might refuse appropriations for the treaties with the Northwest Tribes, the Spanish, and the Algerines, all of which had just been funded, if the House defeated funding for the pact with Britain. With Madison condemning the defections by his allies (and probably regretting his resistance to considering the matter early in the year), appropriations for Jay's Treaty passed the House on April 30 by a margin of 51 to 48. It was a heavy blow.[48] It sealed his earlier decision to retire from Congress.[49] And it led directly to the kind of crisis he particularly feared, in course of which he would pursue his search for methods of protecting limited, responsive government—and thus the cause of liberty itself—to its most dangerous and controversial extreme.

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Thomas Jefferson by a margin of three electoral votes. But Washington had left the hapless Adams with a crisis.[50] Damaged and offended by Jay's Treaty, the French Directory announced that they would treat American vessels "in the same manner as they suffer the English to treat them." Seizures followed, and the new president responded, much as Washington had done in 1794, by recommending both negotiations and increased appropriations for defense. Adams chose John Marshall of Virginia and Elbridge Gerry of Massachusetts to join Charles C. Pinckney, whom the French had refused to accept, for a mission to resolve the crisis. The negotiations stalled when unofficial agents of the French foreign minister—referred to in American dispatches as X, Y, and Z—informed the American commissioners that nothing could be done until they paid a bribe to Talleyrand and agreed to a large American loan to the Republic.

In April 1798, goaded by Republicans in Congress, Adams released the papers revealing the XYZ Affair. Patriotic fury of an unexampled nature swept the states from end to end; and on the crest of this hysteria, which swelled into a widespread fear of treasonable plots between the French and their Republican supporters, the Federalists embarked on a naval war with France. They also seized the opportunity to launch a program of repression consciously intended to destroy domestic opposition to their programs. French and Irish immigrants supported the Republicans and favored France in its collision with Great Britain. In June and July, in the Alien Acts, Congress extended to fourteen years the period of residence required for naturalization and gave the president the power summarily to deport any alien whose residence he deemed a threat to the United States. Then, in a direct blow to the opposition, Congress passed the Sedition Act, making it a criminal offense to incite opposition to the laws or to "write, print, utter, or publish . . . any false, scandalous, and malicious writing . . . against the government of the United States, or either house of the Congress of the United States, or the President of the United States with intent to defame them or to bring them . . . into disrepute."[51]

Enforced by a partisan judiciary, the Alien and Sedition Acts unleashed a bloodless reign of terror on the country. Under the Sedition Act (or under the common law of seditious libel), every important Republican newspaper in the country was attacked. William Duane of the Philadelphia *Aurora* (which had replaced the *National Gazette* as the leading Republican organ when the latter failed financially in 1793), Thomas Adams of the *Independent Chronicle* in Boston, and Republican pamphleteers such as Thomas Cooper and James Thompson Callender all faced prosecution. The *Time Piece* and the *Argus*, the only Republican newspapers in New York City, were forced out of business. Matthew Lyon of Vermont, a Republican

congressman, was imprisoned for a publication incident to his reelection campaign in 1798. Men were prosecuted under the Sedition Act for offenses as diverse and as trivial as circulating a petition for its repeal, erecting a liberty pole, or expressing a drunken wish that a cannonball had struck the president in his behind.

At first, Republicans were seriously disheartened by the drastic shift of popular opinion. At the peak of the patriotic fever, during the summer of 1798, several congressmen went home and left the Federalist majority to work its will. Jefferson and others who remained in Philadelphia were trailed by self-appointed spies, who hoped for proof of the leaders' French connections. In the elections of 1798, the Federalists made substantial gains, and some Virginians talked about secession or preparing to defend themselves against the larger federal army. To Republicans, the Quasi-War with France, the Alien and Sedition Laws, and a measure authorizing the enlistment of a provisional army of 50,000 men, which could be mobilized in the event of an invasion, seemed abundant proof that the conspiracy against the nation's liberties had burst into the open.[52] Yet neither Jefferson nor Madison lost faith in their ability to bring the people to their senses.[53]

While Albert Gallatin and Edward Livingston opposed the crisis laws in Congress, insisting that the legislation was a flagrant violation of the First Amendment and a potent danger to the people's underlying right to change their government through free elections, Jefferson (who had, of course, become vice president under the terms of the original Constitution) determined to arouse the states against the challenge to the Constitution.[54] He found a willing ally in his closest friend, who had been following developments from his retirement and who likewise understood the Constitution as a compact among the sovereign peoples of the several states.[55] Virginia had a long tradition of protesting federal measures, beginning with the General Assembly's 1790 remonstance against the funding and assumption plan. Madison had tried to organize a legislative condemnation of Jay's Treaty in 1795. In 1797, he had aided Jefferson in drafting a petition prompted by a federal presentment of Congressman Samuel Jordan Cabell for the congressman's attacks on the government in circular letters to his constituents.[56]

In 1798, the problem for the two Virginia leaders was apparent: how to check a federal government whose branches seemed united in a program that Republicans regarded as a patent violation of express provisions of the Constitution, a bald assumption of usurped authority, and a direct attack on "that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right"—

indeed, the fundamental right which underpinned elective government itself.[57] Their answer was to use Virginia and Kentucky to spearhead the resistance. Each prepared a set of legislative resolutions condemning the Alien and Sedition Laws. Jefferson sent his to John Breckinridge of Kentucky. Madison sent his to John Taylor of Caroline, Virginia's agricultural thinker and the Republican party's most influential pamphleteer. On November 16, 1798, Kentucky's legislature resolved that "whensoever the General Government assumes undelegated powers, its acts are unauthoritative, void, and of no force." On December 24, Virginia voted a similar condemnation and, like Kentucky, called on the other states to join the protest.

The authorship of the Kentucky and Virginia Resolutions was a secret closely held until John Taylor mentioned Madison in print in 1809. Little has survived about the details of their drafting. The two Republicans undoubtedly discussed the outlines of a plan when Jefferson stopped by the Madison plantation on his annual return from Philadelphia at the beginning of July. Madison returned the visit with a trip to Monticello near the middle of October, by which time the senior partner's draft had been sent to Kentucky.[58] On November 17, Jefferson sent his friend a copy of this draft and probably enclosed a copy of the Kentucky Resolutions as actually enacted, on which he carefully noted variations from his draft.[59] Madison then proceeded on his own.

Commentators on the resolutions have conventionally emphasized—indeed, they may have overemphasized—the younger partner's greater caution. Jefferson had started from the premise that the several states did not unite "on the principle of unlimited submission to their General Government," that "the government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself," and that the parties to the compact each retained "an equal right to judge for itself, as well of infractions as of the mode and measure of redress." Act by act, his draft of the Kentucky Resolutions listed legislation in which Congress had assumed authority not delegated by the Constitution, often in the face of the explicit language of the Bill of Rights. Calling each of these examples "altogether void and of no force," it argued that in all such cases "every state has a natural right . . . to nullify of their own authority all assumptions of power by others within their limits." Urging other states to join in these opinions—"they alone being parties to the compact and solely authorized to judge the last resort of the powers exercised under it, Congress being not a party but merely the creature of the compact"—Jefferson concluded by appealing also for concurrence in adopting "measures of their own for providing that neither these acts, nor any others of the General Government not plainly and intentionally

authorized by the Constitution, shall be exercised within their respective territories."[60]

The legislators of Kentucky (or, more likely, Breckinridge himself) deleted Jefferson's suggestion that the rightful remedy for federal usurpations was a "nullification" of such acts by each state acting on its own to prevent their operation within its respective bounds. Rather than suggesting individual, although concerted, measures of this sort, Kentucky was content to ask its sisters to unite in declarations that the acts were "void and of no force" and in "requesting their repeal" at the succeeding session of the Congress. Madison was similarly cautious in his draft of resolutions for Virginia, which also called on the other states to concur in declaring that the acts in question were "unconstitutional," but which did not add that they were "not law, but utterly null, void, and of no force or effect." Madison, indeed, was possibly, although not certainly, responsible for checking an attempt by Jefferson to have the latter phrase inserted in his text.[61] In consequence, years later, Madison would have good ground for his insistence that he never said that any single state could constitutionally impede the operation of a federal law.[62] Even as he wrote the resolutions, he probably already saw the problem he would bring to Jefferson's attention while they waited for the legislature's action:

> Have you ever considered thoroughly the distinction between the power of the *State* and that of the *Legislature* on questions relating to the federal pact? On the supposition that the former is clearly the ultimate judge of infractions, it does not follow that the latter is the legitimate organ, especially as a convention was the organ by which the compact was made. This was a reason of great weight for using general expressions that would leave to other states a choice of the modes possible of concurring in the substance [of the Resolutions] and would shield the General Assembly against the charge of usurpation in the very act of protesting the usurpations of Congress.[63]

For all of this, however, Madison had not avoided language that confused the several senses in which "state" was commonly employed, and it is not as certain as the standard commentaries argue—or as Madison himself would argue in the Report of 1800—that he meant the resolutions simply as a declaration of opinion and a means of stimulating popular action.[64] After an expression of Virginia's "warm attachment to the Union," the Assembly did "peremptorily declare"

> that it views the powers of the federal government as resulting from the compact to which the states are parties; as limited by the plain sense and intention of the instrument constituting that compact; as no farther valid than they are authorised by the grants enumerated in that compact, and that in case of a deliberate, palpable, and dangerous exercise of other powers not granted by the said compact, the states who are the parties thereto have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining *within their respective limits*, the authorities, rights, and liberties appertaining to them.[65]

Like Jefferson's, Madison's draft attacked specific violations of amendments to the Constitution, together with the federal government's attempts

> to enlarge its powers by forced constructions of the constitutional charter . . . so as to destroy the meaning and effect of the particular enumeration which necessarily explains and limits the general phrases; and so as to consolidate the states by degrees into one sovereignty, the obvious tendency and inevitable consequence of which would be to transform the present republican system of the United States into an absolute, or at best a mixed monarchy.

Like Jefferson, Madison called on the states, not only to concur in declaring these usurpations unconstitutional, but also in declaring "that the necessary and proper measures will be taken by each for cooperating with this state in maintaining unimpaired the authorities, rights, and liberties reserved to the states respectively, or to the people."[66] As Jefferson had said while they were planning their attack, the fundamental object was to win the other states' cooperation in condemning the repressive laws and in affirming basic principles "so as to hold to that ground in future and leave the matter in such a train as that we may not be committed absolutely to push the matter to extremities, and may yet be free to push as far as events will render prudent."[67]

Madison would soon—and many times—regret his carelessness or lack of foresight in the preparation of these resolutions. When seven other states condemned Kentucky's and Virginia's declarations, pointing out that local interventions in the federal sphere could raise again the devil that had wrecked the old Confederation, Madison reentered the Virginia legislature to defend and to refine his language (without, of course, admitting that the language was his own). As he and Jefferson discussed this measure, he rejected Jefferson's suggestion that Virginia and Kentucky should declare that they were "not at all disposed to make every measure of error or wrong a cause of scission," that they would "wait with patience till those passions and delusions shall have passed over which the federal government have artfully and successfully excited to cover its own abuses,"

but that they were nonetheless determined "to sever ourselves from that union we so much value rather than give up the rights of self-government which we have reserved and in which alone we see liberty, safety, and happiness."[68] Nevertheless, although he admitted that the language used in 1798 had been "inaccurate and inconsistent,"[69] Madison did not retract the logic of state interposition; and far from temporizing his denunciation of the measures and intentions of his Federalist opponents, he indicted them again in terms that justified his politics since the ratification of the Constitution. "Nowhere in American political literature," write Adrienne Koch and Harry Ammon, "does there exist a more careful, precise and mature reiteration of the principles of republican self-government" than in Madison's report on state responses to the Virginia Resolutions. "Nowhere is it clearer that the intermediate existence of state governments between the people and the 'General Government,'" was indispensable, as Madison conceived it, to the preservation of the large republic.[70]

The Report of 1800 was a clause by clause elaboration and defense of the Virginia (and Kentucky) Resolutions.[71] Reaffirming his contention that the Constitution was created by a compact of the states, Madison conceded "that the term 'states' is sometimes used in a vague sense, and sometimes in different senses, according to the subject to which it is applied." Sometimes it refers to territories, sometimes to the governments of these, and sometimes to "the people composing those political societies in their highest sovereign capacity." But in this final sense, at least, he thought it undeniable that "states" were parties to the compact, as it was also undeniable that compacts had to be interpreted according to the plain intentions of the parties. On these grounds, he found the logic unimpeachable which said "that where resort can be had to no tribunal superior to the authority of the parties, the parties themselves must be the rightful judges in the last resort, whether the bargain made has been pursued or violated." A decision that it had been violated, to be sure, was not to be imposed "either in a hasty manner or on doubtful or inferior occasions," but for just these reasons the Assembly had objected only to "a *deliberate, palpable,* and *dangerous* breach of the Constitution": to legislation and constructions "*dangerous* to the great purposes for which the Constitution was established."[72] And in cases of this sort, unless the parties to the compact could legitimately interpose—at least so far as to arrest the evil, to maintain their rights, and to preserve the Constitution—"there would be an end to all relief from usurped power . . . as well as a plain denial of the fundamental principle on which our independence itself was declared."[73]

It was true, of course, that other states objected that the parties to the compact *had* created a superior tribunal to decide on disagreements of

this sort: the Constitution made the *courts* the agencies of last resort in constitutional disputes. But what was the recourse, asked Madison, when the judiciary sanctioned federal usurpations? The judiciary was, indeed, the branch of last resort "in relation to the authorities of the other departments of the government," but it was not the last resort "in relation to the right of the parties to the constitutional compact, from which the judicial as well as the other departments hold their delegated trusts. On any other hypothesis, the delegation of judicial power would annul the authority delegating it."[74] "The authority of constitutions over governments, and of the sovereignty of the people over constitutions, are truths which are at all times necessary to be kept in mind; and at no time perhaps more necessary than at the present."[75]

Having reaffirmed that the Constitution is a compact, Madison proceeded to elaborate the Resolutions' condemnation of the crisis laws and of the constitutional constructions of the Federalist administration. Usurpations by construction, he insisted, had begun as early as the law establishing the national bank. From then until the present, both the general-welfare clause and the necessary-and-proper clause had been employed repeatedly to justify assumptions of authority not clearly granted by the Constitution and not intended by the parties to the compact. Madison elaborated his contention that constructions of this sort could gradually destroy the meaning and effect of the enumeration, and repeated arguments developed in the *National Gazette* that concentration of authority in federal hands would necessarily entail a vast enlargement of executive authority and the eventual replacement of elections by hereditary rule.[76] Turning next to the repressive laws of 1798, he argued at great length that the Alien and the Sedition Acts fundamentally subverted the basic maxims of the Constitution. The former exercised a power nowhere granted by the Constitution, vested the executive with legislative and judicial powers, and transgressed the Tenth Amendment. The Sedition Act was worse. Not only did it exercise a power never granted, it exercised a power "expressly and positively forbidden" by the First Amendment: a power "leveled against that right of freely examining public characters and measures, and of free communication thereon," which was essential to elective government itself.[77]

Madison's defense of First Amendment freedoms became a landmark in the libertarian tradition.[78] Federalists had argued that the First Amendment's guarantee of freedom of the press did not prevent the government from punishing seditious libels, only from prohibiting their publication—even that the common law of crimes had been adopted with the Constitution and might have been enforced without restraint if the Sedition Act had not provided new protections. Madison had always thoroughly con-

demned this last "pretension," and he seized on the occasion to present his fullest argument that British common law had never been adopted as "a law of the United States." Were it otherwise, he reasoned, the authority of Congress would be coextensive with the subjects of that law, which was to say with every possible topic of legislation; the concept of the Constitution as a grant of limited authority would be completely overturned.[79]

The argument that freedom of the press extended only to a prohibition of preventing publications (or censorship defined as prior restraint) could never, Madison insisted, be accepted as "the American idea of it." In the United States, in contrast to Great Britain, every branch of government was limited and based on free elections. Accordingly, the states themselves had generally accepted some abuses of the freedom of the press in order to protect the processes of free elections, and they had plainly meant the First Amendment "as a positive denial to Congress of any power whatever on the subject." In republics, Madison suggested, it was right and proper that officials who did not discharge their trusts "should be brought into contempt or disrepute," that such officials *should* "incur the hatred of the people." To argue that the federal act would punish only *false* opinions was a sham, since arguments and inferences could never, by their nature, be subjected to the tests required to prove a fact in court. The Sedition Act was obviously crafted to protect the current officeholders from the people's censures and contempt. But free elections were "the essence of a free and responsible government," and free elections were impossible unless the people could examine and discuss "the comparative merits and demerits of the candidates" for office. Therefore, the Virginia Resolutions had been right to say that free examination and discussion of public men and measures was "the only effectual guardian of every other right."[80]

In declaring the Sedition Act and other federal measures a transgression of the Constitution, Virginia, Madison insisted, was within its lawful bounds; and it remained within those bounds when it expressed its confidence that other states would join in taking proper measures to maintain the rights reserved to them or to the people. If the other states had joined Virginia in such declarations, these and protests flowing more directly from the people would have been sufficient to arrest the danger they protested. Other means might also have been used—petitions to the Congress, instructions to their senators to move amendments to the Constitution, or an exercise of the authority of three-fourths of the states to call for a convention—although the General Assembly did not choose "to point out to the other states a choice among the farther measures" of resistance. If the Federalists of 1788 had thought it proper to support approval of a stronger federal system by emphatically appealing "to the

intermediate existence of the state governments between the people and that government, to the vigilance with which they would descry the first symptoms of usurpation, and to the promptitude with which they would sound the alarm to the public," it was proper now for states to interpose against a train of evils that could wreck the Constitution and the Union.[81]

The Virginia Resolutions, even as refined by the Report of 1800, would return, of course, to haunt their author to his grave, as John Calhoun and his associates employed them to elaborate a doctrine that the aging champion of Union thoroughly condemned. Although it rested on an accurate historical account of how the charter had been put into effect, the logic of the compact theory of the Constitution could be extended far too easily, as nullifiers were to show, to the conclusions that the draft of the Kentucky Resolutions actually drew: that any of the parties to the compact could legitimately judge a federal act to be a violation of the terms on which it had assented to the Constitution and, accordingly, not law, but an assertion of an illegitimate authority that might be justifiably resisted. Moreover, as secessionists would one day show, the argument that plenary conventions of the sovereign people, not the ordinary legislatures of the states, had ratified the Constitution was by no means an insuperable impediment to state attempts to break the federal union.

During his retirement, Madison was not defeated by the nullifiers' logic. As an advocate of the compound republic—of a system neither wholly national *nor* merely federal in its history or its logic—he could plausibly maintain that single parties to the compact had no right to tell the other parties what the compact meant, much less to break it by a unilateral decision. Madison's distinctive concept of a covenant among the sovereign peoples of the several states was more complex than Jefferson's and fully equal to the task of answering Calhoun.[82] And yet, though he denied that any single party to the compact was entitled by the Constitution to reject a federal act, he always recognized that any sovereign people did retain the natural right of revolution. It was a fine distinction. It did not prevent secession. It was not an unimpeachable solution to the riddle that had ruined the British empire: how to keep the central government within the boundaries defined by natural rights, by "constitutional" prescription, and by powers vested in the other agencies of a complex regime without destroying the federal union.[83] *Governmental* sovereignty could *not* in practice be divided on a line that would not shift and could be recognized distinctly by an honest and dispassionate examination of the circumstances under which the compact had been made. No agency—not legislatures, federal courts, or even state conventions—could be universally acknowledged as a final judge without encountering one problem or another.

Madison, in truth, did not resolve a number of apparent tensions, ambiguities, or contradictions in his thought. His confidence in the security afforded by the multiplicity of interests in a large, compound republic always coexisted, somehow, with the old belief that liberty depended on an agricultural majority of people—not because he was unable to conceive of farmers as an interest, but perhaps because he could identify the farmers so entirely with the population that he did not see how all them could come together in the differentiated Union of his day as anything except a people with a vast variety of interests, faiths, and habits. Again, he never found a really satisfying answer to the problem posed for his republican convictions by his certainty that, over time, the land would fill, the nation would be forced to turn to complicated manufactures, and the country would be faced with what a Marxist might describe as the unavoidable proletarianization of the masses—that history would ineluctably produce majorities whose way of life would be profoundly inconsistent with their freedoms. Drew McCoy has pointed out that after the conclusion of the War of 1812, Madison acknowledged that the growth of higher manufacturing was unavoidable in light of the development of other sources for the raw materials that Europeans needed, hoping that a large republic grounded on an educated people would be able, nonetheless, to manage the transition to a higher economic stage. This hope, however—like his self-deluding hope that slavery could be ended by diffusion—was a triumph of his faith and not, in truth, a genuine solution to the problem he descried.

Yet faith, for Madison, was really what his life and thought were premised on from the beginning. As Koch and Ammon long ago observed, the strategy of 1798 was not developed for the sake of states as states, but for the sake of the republican and liberal ideals that were the essence of the Revolution. The legislatures of Virginia and Kentucky were employed, as Madison explained, as "intermediate, local authorities" which existed partly as "so many bodies of observation" on the actions of the general government and as authoritative vehicles for the collection and expression of the public will.[84] In this respect, their protests clearly operated much as he and Jefferson intended, despite the negative responses of their sisters. Assisted by the higher taxes levied to finance the Quasi-War, by Adams's decision to resolve the clash with France, and by the Federalists' continuing insistence on repression, the Republicans were overwhelmingly triumphant in the national elections at the end of 1800. The victory in the congressional as well as in the presidential contests cleared the way for a retraction of the general government into the sphere that Jefferson and Madison believed had been intended by the people. And as

long as they presided over its executive department, its policies would be the ones that Jefferson enunciated in his first inaugural address:

> A wise and frugal government which shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned. . . .
>
> Peace, commerce, and honest friendship with all nations; entangling alliances with none.
>
> The support of the state governments in all their rights as the most competent administrations for our domestic concerns and the surest bulwarks against anti- republican tendencies. . . .
>
> A well disciplined militia, our best reliance in peace and for the first moments of war, till regulars may relieve them. . . .
>
> Economy in public expense, that labor may be lightly burdened.
>
> The honest payment of our debts and sacred preservation of the public faith.[85]

As Jefferson's most trusted aid and then as his successor, Madison would tend the sacred fire on much the same conditions, keeping liberty aflame and keeping federal power—even during wartime—comfortably within the circle of its light.