

Chapter 2

From Nationalist to Republican: James Madison and the Constitutionality of Nullification, 1787-1798

For the one who would become known as the “Father of the Constitution,” James Madison’s achievements if not his reputation and public record at the end of the ratification debates were less than illustrious. As his own *Notes of Debates* and other sources reveal, not only was his highly nationalist Virginia Plan seriously modified, based as it was on proportional representation and a direct relationship between government and the citizens as individuals, but his participation in *The Federalist* and Virginia ratification debates did not prevent amendments that fundamentally changed the government to be from a quasi-federal one to real federal republic and union of the states rather than the states united. Madison’s leading idea, of course, was to cut through the knot of state sovereignty that he and other nationalists considered to be the bane of the Articles of Confederation and indeed of all ancient confederacies.¹

Writing from New York to Edmund Pendleton in February 1787, Madison first noted the on-going rebellion of Daniel Shays in Massachusetts. “The principal incendiaries have,” he observed, “unluckily made off.” In the Congress of the Confederation, affairs were not at all going well either. A “recommendation of the proposed meeting in May for revising the federal articles” was considered by some “of the States . . . as an extraconstitutional one.” As for the prospects in general of the proposed Federal Convention, Madison was not that sanguine. New York’s “disposition” did not seem “to be very federal.” While the “States from N. Ca. to N. Jersey inclusive have made their appointments, except Maryland. . . . Gentlemen from S. Ca. & Georgia, expect that those States will follow the general example.” “Upon the whole therefore it seems probable that a meeting will take place, and that it will be a pretty full one. . . . In general I find men of reflection much less sanguine as to a new than despondent as to the present system. Indeed

the present System neither has nor deserves advocates, and if some very strong props are not applied will quickly tumble to the ground.”²

As Madison further observed, “No money is paid into the public Treasury; no respect is paid to the federal authority. Not a single State complies with the requisitions, several pass them over in silence, and some positively reject them. . . .” “It is not possible that a Government can last long under these circumstances. If the approaching Convention should not agree on some remedy, I am persuaded that some very different arrangement will ensue.” With “the late turbulent scenes in Massts. & infamous ones in Rhode Island” doing “inexpressible injury to the republican character in that part of the U. States,” Madison feared “a propensity towards Monarchy” or even “a partition of the Union into three more practicable and energetic Governments.”³

Thomas Jefferson received a similar letter from New York in March. “The appointments for the Convention go on auspiciously.” “What may be the result of this political experiment cannot be foreseen. The difficulties which present themselves are on one side almost sufficient to dismay the most sanguine, whilst on the other side the most timid are compelled to encounter them by the mortal diseases of the existing constitution. These diseases . . . are at present marked by symptoms which are truly alarming, which have tainted the faith of the most orthodox republicans, and which challenge from the votaries of liberty every concession in favor of stable Government not infringing upon fundamental principles, as the only security against an opposite extreme of our present situation.” In terms of remedies, Madison listed a new government to be ratified by the people of the several states “as will render it clearly paramount to their Legislative authorities.” Secondly, and “Over & above the positive power of regulating trade and sundry other matters in which uniformity is proper, to arm the federal head with a negative in all cases whatsoever on the local Legislatures.” Such a power “would be not only to guard the national rights and interests against invasion, but also to restrain the States from thwarting and molesting each other. . . .”⁴

Thus Madison’s “Vices of the Political System of the United States” composed in April, 1787:

1. Failure of the States to comply with the Constitutional requisitions. This evil has been so fully experienced both during the war and since the peace, results from the number and independent authority of the States and has been so uniformly exemplified in every similar Confederacy, that it may be considered as not less radically and permanently inherent in, that it is fatal to the object of, the present System.

2. Encroachments by the States on the federal authority. Examples of this are numerous and repetition may be foreseen [sic] in almost every case where any favorite Object shall present a temptation. Among these examples are the wars and Treaties of Georgia with the Indians, The unlicensed compacts between Virginia and Maryland, and between Pen[ssylvani]a & N. Jersey, the troops raised to be kept up by Massts.

3. Violations of the law of nations and of treaties. . . .

To Madison, “The great desideratum in Government is such a modification of the Sovereignty as will render it sufficiently neutral between the different interests and factions, to controul [sic] one part of the Society from invading the rights of another, and at the same time sufficiently controuled [sic] itself, from setting up an interest adverse to that of the whole society.” In monarchies of an absolute nature, “the prince is sufficiently, neutral towards his subjects, but frequently sacrifices their happiness to his ambition or his avarice.” On the other hand, in “small republics, the sovereign will is sufficiently controuled [sic] from such a Sacrifice of the entire Society, but is not sufficiently neutral towards the parts composing it.” Just as “a limited Monarchy tempers the evils of an absolute one; so an extensive republic meliorates the administration of a small Republic.”⁵

With the May meeting of the Federal Convention approaching, Madison expressed his views a little differently to George Washington. “Having been lately led to revolve the subject which is to undergo the discussion of the Convention, and formed in my mind *some* outlines of a new system, I take the liberty of submitting them without apology, to your eye.”

Conceiving that an individual independence of the States is utterly irreconcilable with their aggregate sovereignty; and that a consolidation of the whole into one simple republic would be as inexpedient as it is unattainable, I have sought for some middle ground, which may at once support a due supremacy of the national authority, and not exclude the local authorities wherever they can be subordinately useful.

I would propose as the ground-work that a change be made in the principles of representation. According to the present form of the Union in which the intervention of the States is in all great cases necessary to effectuate the measures of Congress, an equality of suffrage, does not destroy the inequality of importance, in the several members. No one will deny that Virginia and Massts. Have more weight and influence both within & without Congress than Delaware or Rhode Island. Under a system which would operate in many essential points without the intervention of the State legislatures, the case would be materially altered. A vote in the national Council from Delaware, would then have the same effect and value as one from the largest State in the Union. I am ready to believe such a change would not be attended much difficulty. A majority of the States, and those of greatest influence, will regard it as favorable to them. To the Northern States it will be recommended by their present populousness; to the Southern by their expected advantage in this respect. The lesser States must in every event yield to the predominant will. But the consideration which particularly urges a change in the representation is that it will obviate the principal objections of the larger States to the necessary concessions of power. [Translation: Madison for an equal representation of the States in the Senate. My how this would soon change.]

I would propose next that in addition to the present federal powers, the national Government should be armed with positive and compleat [sic] authority in all cases which require uniformity; such as the regulation of trade, including the right of taxing both exports & imports, the fixing the terms of naturalization, &c &c.

Over and above this positive power, a negative *in all cases whatsoever* on the legislative acts of the States. . . . Without this defensive power, every positive power that can be given on paper will be evaded & defeated. The States will continue to invade the national jurisdiction, to violate treaties and the law of nations & and to harass each other with rival and spiteful measures dictated by mistaken views of interest. Another happy effect of this prerogative would be its controul [sic] on the internal vicissitudes of State policy; and the aggressions of interested majorities on the rights of minorities and of individuals. . . .

A Government composed of such extensive powers should be well organized and balanced. The Legislative department might be divided into two branches; one of them chosen every—years by the people at large, or by the legislatures; the other to consist of fewer members, to hold their places for a longer term, and to go out in such a rotation as always to leave in office a large majority of old members. Perhaps the negative on the laws might be most conveniently exercised by this branch. As a further check, a council of revision including the great ministerial officers might be superadded.

A national Executive must also be provided. . . . An article should be inserted expressly guarantying [sic] the tranquility of the States against internal as well as external dangers. In like manner the right of coercion should be expressly declared. . . . To give a new System its proper validity and energy, a ratification must be obtained from the people, and not merely from the ordinary authority of the Legislatures. This will be the more essential as inroads on the *existing Constitutions* of the States will be unavoidable. . . .

Before closing this long letter, Madison referred to “The excentricity [sic] of this place as well with regard to E[ast] and West as to N[orth] & South. . . .”²⁶

On May 29, Madison’s highly nationalist Virginia plan was introduced for debate in the Federal Convention by Edmund Randolph. As used here, the word “nationalist” does not necessarily mean a centralization of power but rather implies the concept of absolute sovereignty and the absence of any substantial federal or state features beyond the Senate. And this is precisely what some delegates favored and what got others all exercised about the Virginia Plan. On May 30, “Mr. Gov[oueno]r Morris explained the distinction between a federal and a national, supreme, Govt; the former being a mere compact resting on the good faith of the parties; the latter having a compleat [sic] and compulsive operation. He contended that in all Communities there must be one supreme power, and one only.” The next day, James Wilson “contended strenuously for drawing the most numerous branch of the Legislature immediately from the people. He was for raising the federal pyramid to a considerable altitude, and for that reason wished to give it as broad a basis as possible.”²⁷

On the other side, serious opposition began to form. On May 30, “Gen[era]l Pinkney [sic] expressed a doubt whether the act of Cong[ress]s recommending the Convention, or the Commissions of the Deputies to it, could authorise [sic] a discussion of a System founded on different principles from the federal Constitution [i.e., the Articles of Confederation].” Mr. Sherman admitted the Confederation government needed new powers. “He admitted also that the General & particular

jurisdictions ought in no case to be concurrent. He seemed however not [to] be disposed to make too great inroads on the existing system. . . .” “Mr. Reed moved that the whole clause relating to the point of Representation be postponed; reminding the Com[mittee] that the deputies from Delaware were restrained by their commission from assenting to any change of the rule of suffrage, and in case such a change should be fixed on, it might become their duty to retire from the Convention.”⁸

In another important speech on June 2, portending the more mature views of the anti-Federalists, John Dickinson observed that “The division of the Country into distinct States formed the other principal source of stability. This division ought therefore to be maintained, and considerable powers to be left with the States. This was the ground of his consolation for the future fate of his Country. Without this, and in case of a consolidation of the States into one great Republic, we might read its fate in the history of smaller ones. . . .” (John Dickinson, June 2, in Koch, ed., *Notes of Debates*, p. 56). On June 4, George Mason was becoming more alarmed. Although not opposed to a change in the Articles of Confederation, he did believe that “We are . . . going very far in this business. We are not indeed constituting a British Government, but a more dangerous monarchy, an elective one. We are introducing a new principle into our system, and not necessary as in the British Govt. where the Executive has greater rights to defend. Do gentlemen mean to pave the way to hereditary Monarchy? Do they flatter themselves that the people will ever consent to such an innovation? If they do I venture to tell them, they are mistaken. The people will never will consent. . . .”⁹

On June 5, Pierce Butler of South Carolina complained that “The people will not bear such innovations. The States will revolt at such encroachments. . . . We must follow the example of Solon who gave the Athenians not the best Govt. he could devise; but the best they w[oul]d receive.” On June 7, in the matter of representation, John Dickinson returned to his theme of state rights. “The preservation of the States in a certain degree of agency is indispensable.” Speaking to Madison’s idea of a national negative, Pierce Butler “was vehement ag[ain]st the Negative in the proposed extent, as cutting off all hope of equal justice to the different States. The people there would not he was sure give it a hearing.”¹⁰

On June 9, the proto-anti-Federalists dominated discussion of the proposed Virginia Plan. About the matter of an equal vote in the Senate, Mr. Brearly said “it had been much agitated in Cong[ress]s at the time of forming the Confederation, and was then rightly settled by allowing in each sovereign State an equal vote. Otherwise the smaller States must have been destroyed instead of being saved. The substitute of a ratio, he admitted carried fairness on the face of it. But on a deeper examination was unfair and unjust.” Following Brearly, “Mr. Patterson [sic] considered the proposition for a proportional representation as striking at the existence of the lesser States.” Besides, he noted, “the amendment of the confederacy was the object of all the laws and commissions on the subject. . . . We ought to keep within limits, or we should be charged by our Constituents with

usurpation. . . . The idea of a national Gov[ernment] as contradistinguished from a federal one, never entered into the mind of any of them, and to the public mind we must accommodate ourselves. We have no power to go beyond the federal scheme. . . . We must follow the people. . . . A confederacy supposes sovereignty in the members composing it & sovereignty supposes equality.”¹¹

As the debate about the Virginia plan continued, Oliver Ellsworth moved “to alter it so as to run ‘that the Government of the United States ought to consist of a supreme legislative, Executive and Judiciary.’ This alteration he said would drop the word *national*, and retain the proper title ‘the United States.’” The meaning here is clear and inescapable. There would be no NATIONAL GOVERNMENT in America! This point was reiterated the next day by Dr. Johnson. “He wished it therefore to be well considered whether in case the States, as was proposed, sh[oul]d retain some portion of sovereignty at least,, this portion could be preserved, without allowing them to participate effectually in the Gen[era]l Govt., without giving them each a distinct and eual vote for the purpose of defending themselves in the general councils.”¹²

For his part, James Madison continued to oppose an equality of votes in the Senate. Speaking on June 19, Madison addressed some of the concerns of those opposed to his Virginia Plan. “Much stress,” he stated, “had been laid by some gentlemen on the want of power in the Convention to propose any other than a *federal* plan. To what had been answered by others, he would only add, that neither of the characteristics attached to a *federal* would support his objection. One characteristic, was that in a *federal* Government, the power was exercised not on the people individually; but on the people *collectively*, on the *States*.” Even the plan of Mr. Paterson, he noted, had some propositions that operated “immediately on individuals.” With respect to a federal government deriving “its appointments not immediately from the people, but from the States,” here too “were facts on the other side” as in delegates from two states being “chosen, not by the Legislatures, but by the people at large; and the plan of Mr. P[aterson] intended no change in this particular.”¹³

In this long speech, Madison essentially repeated points he had outlined in his “Vices of the Political System.” Would the propositions of Mr. Paterson prevent “violations of the law of nations and of Treaties. . . .?” Would they “prevent encroachments on the federal authority?” Would they “prevent trespasses of the States on each other?” Would they “secure a good internal legislation & administration to the particular States?” Would they “secure the Union ag[ain]st the influence of foreign powers over its members [?]” Madison believed not. Then “He begged the smaller Stattes which were most attached to Mr. Pattersons [sic] plan to consider the situation in which it would leave them.” He also “begged them to consider the situation in which they would remain in case their pertinacious adherence to an inadmissible plan, should prevent the adoption of any plan.” As he admitted, “The great difficulty lies in the affair of Representation; and if this could be adjusted, all others would be surmountable.”¹⁴ By now, the Federal Convention

had come to a full stop. Little progress had been made since the introduction of the Virginia Plan on May 29. With apologies to Mr. Madison, the problem was about more than representation. It was about the nature of the government to be and whether it would be federal or national. In Dr. Johnson's words, "The fact is that the States do exist as political Societies, and a Govt. is to be formed for them in their political capacity, as well as for individuals composing them. Does it not seem to follow, that if the States as such are to exist they must be armed with some power of self-defence [?]" To Mr. Read of Delaware, "In order to obtain one [a good general government] the whole States must be incorporated."¹⁵

Continuing his opposition to the Paterson plan and to the equality of voting in the Senate, Madison "agreed with Doc[tor] Johnson, that the mixed nature of the Govt. ought to be kept in view; but [he] thought too much stress was laid on the rank of the States as political societies. There was a gradation, he observed from the smallest corporation, with the most limited powers, to the largest empire with the most perfect sovereignty." Again, "He entreated the gentlemen representing the small States to renounce a principle w[hi]ch was confessedly unjust, which c[oul]d never be admitted, & if admitted must infuse mortality into a Constitution which we wished to last forever." In language foreshadowing his essays in *The Federalist*, "He prayed them to ponder well the consequences of suffering the Confederacy to go to pieces. It had been s[ai]d that the want of energy in the large states w[oul]d be a security to the small. It was forgotten that this want of energy proceeded from the supposed security of the States ag[ain]st all external danger. Let each state depend on itself for its security, & let apprehensions arise of danger, from distant powers or from neighboring States, & the languishing condition of all the States, large as well as small, w[oul]d soon be transformed into vigorous & high toned Govt. His great fear was that their Govt. w[oul]d then have too much energy. . . . The same causes which have rendered the old world the Theatre of incessant wars, & have banished liberty from the face of it, w[oul]d produce the same effects here."¹⁶

The way out of the political impasse, finding a "middle way between a perfect consolidation and a mere confederacy of the States," was resolved temporarily by the appointment of a committee to hammer out a compromise. We know it as the Great Compromise by which States were to be represented in the Senate and each given an equal vote. "Mr. Madison opposed the Commitment. He had rarely seen any other effect than delay from such Committees in Cong[ress]es. Any scheme of compromise that could be proposed in the Committee might as easily be proposed in the House; and the report of the Committee when it contained merely the opinion of the Com[mittee] would neither shorten the discussion, nor influence the decision of the House."¹⁷

Madison and the nationalists had suffered a major defeat. The government, to reiterate a most important point, would not be national. Nor would it be like the old Confederation. Nevertheless, Madison continued to oppose the equality of votes in the Senate and he also pushed his idea of a national negative more

than once. “Mr. Madison [on July 14] expressed his apprehensions that if the proper foundation of Governm[en]t was destroyed, by substituting an equality in the place of a proportional Representation, not proper superstructure would be raised. If the small States really wish for a Government armed with the powers necessary to secure their liberties, and to enforce obedience on the larger members as well as on themselves he could help thinking them extremely mistaken in their means.” Following the adoption of the Great Compromise on July 16, 1787, “Mr. Madison, considered the negative on the laws of the States as essential to the efficacy & security of the Gen[era]l Govt. The necessity of a general Govt. proceeds from the propensity of the States to pursue their particular interests in opposition to the general interests. This propensity will continue to disturb the system, unless effectually controuled [sic]. Nothing short of a negative on their laws will controul [sic] it.”¹⁸

Reconciled to the Great Compromise, Madison and other nationalists in the Federal Convention became reluctant Federalists or those who defined federalism as the representation of the states in the Senate. As the Federal Convention was drawing to a close, Madison kept Thomas Jefferson informed of developments in Philadelphia. After referring to the “rule of secrecy” adopted by the Convention, which made “this letter barren of those communications which might otherwise be made,” Madison stated “As the Convention will shortly rise I should feel little scruple in disclosing what will be public here.” As matters stood, “The Convention consists now as it has generally done of Eleven States. . . . The term of its dissolution cannot be more than one or two weeks distant. A Government will probably be submitted to the people of the states consisting of a President clothed [sic] with executive power; a Senate chosen by the Legislatures, and another house chosen by the people of the states jointly possessing the legislative power and a regular judiciary establishment. The mode of constituting the executive is among the few points not yet finally settled.” After describing the Senate to be composed “of two members from each state and appointed sexennially” (but leaving out the equal vote provision), the Legislative power that would “extend to taxation, trade, and sundry other general matters,” and the “powers of Congress” being distributed according to their nature among the several departments [separation of powers],” Madison hazarded his opinion about its future: “the plan should it be adopted will neither effectually answer its national object nor prevent the local mischiefs which every where excite disgusts against the state governments.”¹⁹

Defeated in the Federal Convention on two accounts, his Virginia Plan and the idea of a national negative, Madison next turned his attention to the ratification contest and rightfully so. Already, he was alarmed at the growing opposition to the proposed constitution and its source from within the Federal Convention including delegates from Virginia. After returning to Congress in New York from Philadelphia, Madison confided his pessimistic thoughts to George Washington. “I found on my arrival here [New York] that certain ideas unfavourable [sic] to the

Act of the Convention which had created difficulties in that body, had made their way into Congress. They were patronized [sic] chiefly by Mr. R[ichard] H[enry] L[ee] and Mr. Dane of Massts. It was first urged that as the new Constitution was more than an Alteration of the Articles of Confederation under which Congress acted, and even subverted these articles altogether, there was a Constitutional impropriety in their taking agency in the work. The answer given was that the Resolution of Congress in Feby. Had recommended the Convention as the best means of obtaining a firm *national Government*; that as the powers of the Convention were defined by their Commissions in nearly the same terms with the powers of Congress given by the Confederation on the subject of alterations, Congress were not more restrained from aceding to the new plan, than the Convention were from proposing it. If the plan was within the powers of the Convention it was within those of Congress; if beyond those powers, the same necessity which justified the Convention would justify Congress; and a failure of Congress to Concur in what was done, would imply either that the Convention had done wrong in exceeding their powers, or that the Government proposed was in itself liable to insuperable objections. . . . [Madison here was being a bit ingenious as his own *Notes of Debates* clearly indicate. The Commissions of some delegates specifically limited them to an alteration of the Confederation only.]”²⁰

Madison next informed Washington of the attempt made by Richard Henry Lee “to amend the Act of the Convention before it should go forth from Congress. He proposed a Bill of Rights—provision for juries in civil cases & several other things corresponding with the ideas of Col. [George] M[ason]. He was supported by Mr. Me[lancton] Smith of this State [New York; and a leading anti-Federalist to be].” As for a Bill of Rights, Madison did not deny “the right of Congress” in this matter, “but the inexpediency of exerting it was urged on the following grounds. 1. . . .that the introduction of Congress as a party to the reform, was intended by the States merely as a matter of form and respect. 2. . . .that a discussion of its merits would consume much time, without producing agreement even among its adversaries. 3. that it was clearly the intention of the States that the plan to be proposed should be the act of the Convention with the assent of Congress, which could not be the case, if alterations were made, the Convention being no longer in existence to adopt them. 4. that . . . the Act of the Convention, when altered would instantly become the mere act of Congress. . . .”²¹

In conclusion, “The general voice of this City seems to espouse the new Constitution. It is supposed nevertheless that the party in power is strongly opposed to it. The Country must finally decide, the sense of which is as yet wholly unknown. As far as Boston & Connecticut has [sic] been heard from, the first impression seems to be auspicious. I am waiting with anxiety for the eccho[sic] from Virginia, but with very faint hopes of its corresponding to my wishes. . . .”²²

In October, Madison received from Washington “a copy of Col. Mason’s objections to the Work of the Convention.” In reply, Madison commented as follows:

As he persists in the temper which produced his dissent it is no small satisfaction to find him reduced to such distress for a proper gloss on it; for no other consideration surely could have led him to dwell on an objection which he acknowledged to have been in some degree removed by the Convention themselves—on the paltry right of the Senate to provide alterations in money bills—on the appointment of the vice President, President of the Senate instead of making the President of the Senate the vice President . . . and on the *possibility*, that the Congress may misconstrue their powers & betray their trust so far as to grant monopolies in trade & c. . . .

Besides recalling Mason's approbation of "the term allowed for the further importation of slaves, " his suspicion of the Judiciary, and their disagreement about the Common Law,

Madison more favorably alluded to a letter from Mr. Pendleton who views "the act of the Convention in its true light, and gives it his unequivocal approbation. His support will have great effect." Yet, as Madison could not avoid to mention, "Much will depend on Mr. [Patrick] Henry." At the same time, and ominously, "The Newspapers here begin to teem with vehement & virulent calumniation[sic] of the proposed Govt.. As they are chiefly borrowed from the Pennsylvania papers, you see them of course. . . ." ²³

In a very long letter of October 24, 1787, Madison apprised Jefferson of the results of the Federal Convention. Throughout, his sense of frustration and defeat are evident. Nor can it be said that he told the whole story of what had transpired at Philadelphia. ²⁴

It appeared to be the sincere and unanimous wish of the Convention to cherish and preserve the Union of the States. No proposition was made, no suggestion was thrown out in favor of a partition of the Empire into two or more Confederacies [although this would be a principal charge against the anti-Federalists]. It was generally agreed that the objects of the Union could not be secured by any system founded on the principle of a confederation of sovereign States. A voluntary observance of the federal law by all the members could never be hoped for. A compulsive one could evidently never be reduced to practice, and if it could, involved equal calamities to the innocent and the guilty, the necessity of a military force both obnoxious and dangerous, and in general, a scene resembling much more a civil war, than the administration of a regular Government. Hence was embraced the alternative of a Government which instead of operating on the States, should operate without . . . intervention [of the States] on the individuals composing them: and hence the change in the principle and proportion of representation. This ground-work being laid, the great objects which presented themselves were 1. to unite a proper energy in the Executive and a proper stability in the Legislative department, with the essential characters [sic] of Republican Government. 2. to draw a line of demarkation [sic] which would give to the General Government every power requisite for general purposes, and leave to the States every power which might be most beneficially administered by them. 3. To provide for the different interests of different parts of the Union.

4. to adjust the clashing pretensions of the large and small States. Each of these objects was pregnant with difficulties. . . .

By November, Madison, who was still in New York, had agreed to become one of the authors of *The Federalist*. As he confided to George Washington, after acknowledging “enthusiasm in favor of the new Constitution as subsiding [in Virginia]” and pointing to the opposition to Elbridge Gerry in Massachusetts, Madison enclosed “the 7 first numbers of the federalist, a paper addressed to the people of this State [New York]. They relate entirely to the importance of the Union. If the whole plan would be executed, it will present to the public a full discussion of the merits of the proposed Constitution in all its relations. . . . I will not conceal *from you* that I am likely to have such a degree of connection with the publication here, as to afford a restraint of delicacy from interesting myself directly in the [their?] republication elsewhere. You will recognize one of the pens concerned in the task. There are three in the whole. A fourth may possibly bear a part.”²⁵

The purpose of these essays as noted in the previous chapter were to secure a fast ratification of the proposed constitution and to prevent amendments that would further diminish national authority. Beginning with scare tactics and a smear campaign in essays #1-8, Publius decried confederate governments that were failures historically and impugned those who opposed a national government because of their own special and state interests to serve not to mention being too enamored with the past and philosophers of old. While this strategy was successful early on as states began to ratify the constitution, in the end it failed. It did so because Federalists and *The Federalist* spoke with a divided voice and because they never addressed satisfactorily the issues of individual and state rights. Either the government to be was limited and federal or it was national and “consolidated.” To James McClurg, “There [were] Objections made by Men heartily dispos’d towards an energetic federal government, & conceiving y[e]t defects in its frame must be equally obnoxious to ye people of all ye States, they hope to see them amended.” “Philanthropos” meanwhile said that the opponents were falsely attacked. “Our present constitution [the Confederation], with a few additional powers to Congress, seems better to preserve the rights, and defend the liberties of our citizens than the one proposed, without proper amendments.”²⁶

For his part, and despite his contributions to *The Federalist*, Madison was not optimistic. As of February, 1788, the tide in favor of the new constitution had subsided. Massachusetts had ratified but also had insisted upon amendments. New Hampshire was “deliberating” and conventions in Maryland and the Carolinas were still to be held. “The temper of Virginia,” he wrote to Jefferson, “as far as I can learn, had undergone but little change of late. At first there was an enthusiasm for the Constitution. The tide next took a sudden and strong turn in the opposite direction. The influence and exertions of Mr. Henry, and Col. Mason, and some others will account for this. Subsequent information again represented the Constitution as regaining in some degree its lost ground.” Although nine states had

adopted the new constitution, “I am told that a very bold language is held by Mr. H[enr]y and some of his partisans. . . .”²⁷

Since the Virginia ratification convention would be a most important one, Madison now turned his attention to getting elected as a delegate. His experience is recounted in a letter to Eliza House Trist of March 25, 1788. “I had the satisfaction to find all my friends well on my arrival; and the chagrin to find the County [Orange] filled with the most absurd and groundless prejudices against the federal [sic] Constitution. I was therefore obliged at the election which succeeded the day of my arrival to mount for the first time in my life, the rostrum before a large body of the people, and to launch into a harangue of some length in the open air and on a very windy day. What the effect might be I cannot say, but either from that experiment or the exertion of the federalists or perhaps both, the misconceptions of the Government were so far corrected that two federalists one of them myself were elected by a majority of nearly 4 to one.” However, he cautioned, “The elections as yet are not sufficiently known to authorize any judgment on the probable complexion of the Convention.” In particular, “I have heard little from the great district of Country which is said to be most tainted with antifederalism.”²⁸

In Richmond, Madison more or less repeated views previously expressed although his identity as one of the authors of *The Federalist* was not known. In a long speech on June 6, for example, he reiterated that the threat to liberty came from licentiousness. “Since the general civilization of mankind,” he noted, “I believe there are more instances of the abridgment of the freedom of the people, by gradual and silent encroachments of those in power, than by violent and sudden usurpations: but on a candid examination of history, we shall find that turbulence, violence and abuse of power, by the majority trampling on the rights of the minority, have produced factions and commotions, which, in republics, have more frequently than any other cause, produced despotism.” At the same time, Madison trod over the ground of the many crises facing the republic. “Why have complaints of national and individual distresses been echoed and re-echoed throughout the continent? Why has our general government been so shamefully disgraced, and our constitution violated?”²⁹

Addressing the issue of “consolidation,” Madison said “Give me leave to say something of the nature of the government, and to shew [sic] that it is safe and just to vest it with the power of taxation. There are a number of opinions; but the principal question is, whether it be a federal or consolidated government [?]” In now familiar language, Madison described the proposed new government as being “of a mixed nature; it is in a manner unprecedented: we cannot find one express example in the experience of the world: it stands by itself. In some respects, it is a government of a federal nature; in others it is of a consolidated nature. . . . Who are parties to it? The people—but not the people as composing one great body—but the people as composing thirteen sovereignties.” In the amending process, a simple majority of the states cannot prevail but this un-federal feature was counter-balanced with the representation of the states in the Senate. Additionally,

“the powers of the federal government are enumerated” and “can only operate in certain cases.”³⁰

In the end, Virginia did ratify the constitution. The close vote, however, was not as clear-cut as he supposed. Amendments there had to be as the price of union. Whether anterior or recommendatory, it made no real difference. Once adopted, they would in effect become constitutional. In the meantime, the nature of the union had been fundamentally changed from a quasi-federal one to a real federal republic. The United States would be a union of the states rather than the states united.³¹

Madison, however, went out of his way to oppose amendments. “I beg that gentlemen in deliberating on this subject, would consider the alternative. Either nine states shall have ratified it, or they will not. If nine states will adopt it, can it be reasonably presumed or required, that nine states having freely and fully considered the subject, and come to an affirmative decision, will, upon the demand of a single state, agree that they acted wrong, and could not see its defects—tread back the steps which they have taken, and come forward and reduce it to uncertainty, whether a general system shall be adopted or not?” Continuing on, Madison spun out the problems with amendments. “The gentlemen who within this house have thought proper to propose previous amendments, have brought no less than forty [40] amendments—a bill of rights which contains twenty [20] amendments, and twenty other alterations, some of which are improper and inadmissible. Will not every state think herself equally entitled to propose as many amendments? And suppose them to be contradictory; I leave it to this convention, whether it be probable that they can agree, or agree to any thing but the plan on the table; or whether greater difficulties will not be encountered, than were experienced in the progress of the formation of this constitution[?]”³²

Significantly, Madison continued his opposition to amendments and a Bill of Rights. To his own satisfaction, he “revolved this question” in his mind, “with . . . much serious attention. . . . I can see no reason for the apprehensions of gentlemen. . . .” Considering “the most happy effects for this country” should adoption prevail,” it would nevertheless give “me infinite pain to reflect, that all the earnest endeavours [sic] of the warmest friends of their country, to introduce a system promotive of our happiness, may be blasted by a rejection, for which I think with my honorable friend, that previous amendments are but another name. . . .”³³

Writing to Alexander Hamilton on the same day that the Virginia convention adjourned, Madison expressed his dissatisfaction with the outcome. “This day put an end to the existence of our Convention. The inclosed is a copy of the Act of Ratification. It has been followed by a number of recommendatory alterations; many of them highly objectionable. One of the most so is an article prohibiting direct taxes where effectual laws shall be passed by the States for the purpose. It was impossible to prevent this error. The minority will sign an address to the people. The genesis of it is unknown to me. It is announced as an exhortation to acquiescence in the result of the Convention. Notwithstanding the fair professions

made by some, I am so uncharitable as to suspect that the ill will to the Constitution will produce . . . every peaceable effort to disgrace & destroy it.”³⁴

Madison’s misgivings about the Virginia convention made him even more doubtful about events in New York. Although nine states had ratified, anti-Federalism there as in Virginia filled him with alarm about amendments. As he wrote Hamilton in July, “I am sorry that your situation obliges you to listen to propositions of the nature you describe [in Hamilton’s letter of July 19]. My opinion is that a reservation of a right to withdraw if amendments be not decided on under the form of the Constitution within a certain time, is a *conditional* ratification, that it does not make N. York of the New Union, and consequently that she could not be received on that plan. Compacts must be reciprocal, this principle would not in such a case be preserved. The Constitution requires an adoption *in toto*, and *for ever*. It has been so adopted by the other States. An adoption for a limited time would be as defective as an adoption of some of the articles only. In short any *condition* whatever must viciate [sic] the ratification.” In a postscript, Madison added: “This idea of reserving right to withdraw was started at Richm[on]d & considered as a conditional ratification which was itself considered as worse than a rejection.”³⁵

Keeping his friend Jefferson informed of events relating to the ratification of the constitution and the process of “putting it into action in March next [1789],” Madison penned another long letter on October 17, 1788. Besides mentioning the contest for the presidency, which “alone unites the conjectures of the public” and no doubt “will be from a Southern State,” Madison took the time to reiterate his opposition to a Bill of Rights. “As far as these may consist of a constitutional declaration of the most essential rights, it is probable they will be added; though there are many who think such addition unnecessary, and not a few who think it misplaced in such a Constitution.” For himself, he added, “My own opinion has always been in favor of a bill of rights, provided it be so framed as not to imply powers not meant to be included in the enumeration. At the same time I have never thought the omission to be a material defect, nor been anxious to supply it even by *subsequent* amendment, for any other reason than that it is anxiously desired by others. I have favored it because I suppose it might be of use, and if properly executed could not be of disservice. I have not viewed in in an important light 1. because I conceive that in a certain degree, though not in the extent argued by Mr. Wilson, the rights in question are reserved by the manner in which the federal powers are granted. 2 because there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. . . .” A bill of rights, Madison continued, would at best be only a paper barrier against the real danger in a republican government, i.e., “not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major members of the constituents.”³⁶

Madison’s continued opposition to a bill of rights and to amendments is important to say the least not only for his reputation as the “father of the constitu-

tion,” but for his less than enthusiastic role in supporting the final passage of the Bill of Rights as we know them today. Knowing that the elections for the new federal Congress (House and Senate) would be of paramount importance, Madison expressed his desires to Edmund Randolph in early November. After referring again to “opposition to the federal Government,” Madison got to the point at hand about his “sentiments with regard to the Legislative service under the new Constitution. My first wish is to see the Government put into quiet and successful operation; and to afford any service, that may be acceptable from me, for that purpose.” His second wish was for “an opportunity of contributing service in the House of Reps. Rather than in the Senate; provided the opportunity be attainable from the spontaneous suffrage of the Constituents. . . .” As he also confided to Randolph, election would not be an easy task. “I take it for certain that a clear majority of the [Virginia] Assembly are enemies to the Govt. and I have no reason to suppose that I can be less obnoxious than others on the opposite side.”³⁷

As the new year of 1789 dawned, Madison outlined his legislative goals in the new House of Representatives. His attention focused on amendments which he now favored! Writing to George Eve, Madison explained why. “I freely own that I have never seen in the Constitution as it now stands those serious dangers which have alarmed many respectable Citizens. Accordingly whilst it remained unratified, and it was necessary to unite the States in some one plan, I opposed all previous alterations as calculated to throw the States into dangerous contentions, and to furnish the secret enemies of the Union with an opportunity of promoting its dissolution. Circumstances are now changed. The Constitution is established on the ratifications of eleven States, and a very great majority of the people of America; and amendments, if pursued with a proper moderation and in a proper mode, will not only be safe, but may serve the double purpose of satisfying the minds of well meaning opponents, and of providing additional safeguards in favour [sic] of liberty.” In very Machiavellian terms, however, Madison expressed, privately, another reason. He favored amendments “to be proposed by the first Congress” to forestall another “General Convention” and because “The Congress, who will be appointed to execute as well as to amend the Government, will probably be careful not to destroy or endanger it.” Madison, it appears, was not as disinterested as he has been made out to be and not above practicing “real politik.”³⁹

In Congress, Madison made it very clear that the subject of amendments would be addressed once other pressing business was dispatched like raising a revenue for the new government. It would be done so, moreover, on his terms. “When I first hinted to the house [sic] my intention of calling their deliberations to this object [amendments], I mentioned the pressure of other important subjects, and submitted the propriety of postponing this till the more urgent business was dispatched; but not finding that business dispatched, when the order of the day for amendments arrived, I moved the postponement accordingly.” In what is most curious language, Madison cited that “the same reason still exists in some degree; but operates with less force when it is considered, that it is not now proposed to

enter into a full and minute discussion of every part of the subject [amendments], but merely to bring it before the house [sic], that our constituents may see we pay a proper attention to a subject they have much at heart. . . .”⁴⁰

About the amendments, Madison noted, they “come from a very respectable number of our constituents, and it is certainly proper for congress [sic] to consider the subject, in order to quiet that anxiety which prevails in the public mind. . . .” If he had his ‘druthers, he himself would have preferred early action on the amendments to “stifle the voice of complaint, and make friends of many who doubted its merits.” Indeed, “Our future measures would have been more universally agreeable and better supported; but the justifiable anxiety to put the government in operation prevented that; it therefore remains for us to take it up as soon as possible. . . .”⁴¹

Continuing his remarks, Madison proceeded to “state the amendments” so far as *HE* thought “they ought to be proposed but not before alluding once more to the debate over the constitution. In doing so, he reaffirmed the strength of the opposition of the anti-Federalists and the widespread demand for amendments. “It cannot be a secret to the gentlemen in this house [sic], that, notwithstanding the ratification of this system of government by eleven of the thirteen United States, in some cases unanimously, in others by large majorities; yet still there is a great number of our constituents who are dissatisfied with it; among whom are many respectable for their talents, their patriotism, and respectable for the jealousy they have for their liberty, which, though mistaken in its object, is laudable in its motive. There is a great body of the people falling under this description, who at present feel much inclined to join their support to the cause of federalism, if they were satisfied in this one point: We ought not to disregard their inclination, but, on principles of amity and moderation, conform to their wishes, and expressly declare the great rights of mankind secured under this constitution. . . .” In particular, Madison referred “to those two states who have not thought fit to throw themselves into the bosom of the confederacy [note Madison choice of terminology here].” In this matter and in others, principle and pragmatism combined to make Madison a friend of amendments and a Bill of Rights.⁴²

No sooner were these calming words spoken than Madison rushed to qualify them. “But I will candidly acknowledge, that, over and above all these considerations, I do conceive that the constitution may be amended; that is to say, if all power is subject to abuse, that then it is possible the abuse of the powers of the general government may be guarded against in a more secure manner than is now done, while no one advantage, arising from the exercise of that power, shall be damaged or endangered by it. We have in this way something to gain, and, if we proceed with caution, nothing to lose; and in this case it is necessary to proceed with caution, for while we feel all these inducements to go into a revisal of the constitution, we must feel for the constitution itself, and make that revisal a moderate one.” By caution, Madison meant no door being opened “for a re-consideration of the whole structure of the government” or “a re-consideration of the prin-

principles and substance of the powers given.” “But I do wish to see a door opened to consider, so far as to incorporate those provisions for the security of rights, against which I believe no serious objection has been made by any class of our constituents, such as would be likely to meet with the concurrence of two-thirds of both houses, and the approbation of three-fourths of the state legislatures.”⁷⁴³

With all of this said, “The amendments which have occurred to me, proper to be recommended by congress [sic] to the state legislatures are these:

First. That there be prefixed to the constitution a declaration—That all power is originally vested in, and consequently derived from the people.

That government is instituted, and ought to be exercised for the benefit of the people, which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.

That the people have an indubitable, unalienable, and indefeasible right to reform or change their government, whenever it be found adverse or inadequate to the purposes of its institution.”⁷⁴⁴

Second on Madison’s list was a change in the ratio of representation followed thirdly by “no law varying the compensation last ascertained shall operate before the next ensuing election of representatives.” Items four through seven relate to familiar civil rights and freedom of religion while number eight was divided into two parts as follows: “The powers not delegated by this constitution, are appropriated to the departments to which they are respectively distributed: so that the legislative department shall never exercise the powers vested in the executive or judicial; nor the executive exercise the powers vested in the legislative or judicial; nor the judicial exercise the powers vested in the legislative or executive departments.” Then came “The powers not delegated by this constitution, nor prohibited by it to the states, are reserved to the States respectively.”⁷⁴⁵

Admitting again that “what may be called a bill of rights” he never “considered . . . so essential to the federal constitution,” to Madison “paper barriers” were never effective as in Magna Charta and “the policy of Great Britain,” he nevertheless acquiesced. His reasoning is worth reiterating. “But altho’ the case may be widely different [between England and America], and it may not be thought necessary to provide limits for the legislative power in that country, yet a different opinion prevails in the United States. The people of the many states, have thought it necessary to raise barriers against power in all forms and departments of government, and I am inclined to believe, if once bills of rights are established in all the states as well as the federal constitution, we shall find that altho’ some of them are rather unimportant, yet upon the whole, they will have a salutary tendency.” Indeed, “whatever may be the form which the several states have adopted in making declarations in favor of particular rights, the great object in view is to limit and qualify the powers of government, by excepting out of the grant of power those cases in which the government ought not to act, or to act only in a particular mode. . . .”⁷⁴⁶