New American

Written by **Steve Byas** on March 9, 2020

Published in the March 9, 2020 issue of the New American magazine. Vol. 36, No. 05

How to Restore the Balance of Federalism

"What Degree of Madness?" Madison's Method to Make America STATES Again, by Joe Wolverton II, J.D., Columbia, South Carolina: Shotwell Publishing, 2020, 144 pages, paperback.

We often hear that people like to talk about the weather, but nobody does anything about it. The same thing can be said for most conservatives, even consistent constitutionalists, when it comes to the question of what to do about the way U.S. government at the national level has reduced the states to mere administrative units. Like those who often talk about rain, wind, clouds, and temperature, but believe there is nothing that can be done about it, those of us who believe we should regain federalism as envisioned by James Madison and the rest of the Framers of the Constitution lament the loss of state sovereignty, but are at a loss as to what to do about it.

In this well-written and useful volume, author Joe Wolverton not only criticizes the drift away from the federal system of government crafted at the 1787 Constitutional Convention, he also gives the reader concrete ways that this drift can be not only slowed, but actually reversed.

Madison did not believe that the federal government could become tyrannical under the Constitution he crafted. As Wolverton wrote, "Madison assumed that the people's devotion to their state legislatures would compel them to resist any effort by agents of the federal government to subordinate states to second-class status."

Why did Madison think this? Wolverton argues that there were two reasons that led Madison to this belief: Madison did not believe the people and the states would ever elect federal officers "ready to betray" the best interests of both the states and the people, and he could not conceive that the states would sit idly by as the federal government consolidated power.

Unfortunately, the American people have been deceived by centralizers into believing the myth that the federal government created the states, instead of the other way around. This is the view that is taught in history textbooks, law schools, the media, and in the courts. But, as Wolverton so ably demonstrates, this turns American history on its head.

The States Created the Federal Government

He notes that, at the Massachusetts ratifying convention on February 6, 1788, that state agreed to the Constitution if it were "explicitly declared that all Powers not expressly delegated by the aforesaid Constitution are reserved to the several States to be by them exercised." Several other states had similar proclamations. Virginia likewise declared that "the powers granted under the Constitution being derived from the People of the United States may be resumed by them whensoever the same shall be perverted to their injury or oppression."

Wolverton expertly offers evidence that the states created the federal government, including the argument that the Constitution is a "compact" of the states. "It was the sovereign states that ceded the territory of authority which the federal government occupies," Wolverton wrote. "Not once during the deliberations at the Constitutional Convention was there a proposal that their work be presented for approval to the body of the populace acting as individuals. From the beginning of the process that culminated on September 17, 1787 with the signing of the Constitution, it was understood that the ratification of at least nine states was the *sine qua non* of the start of a new government."

In other words, as Wolverton asserts, the federal government was not created *ex nihilo* (out of nothing). It was created by the states. At the Constitutional Convention, representatives voted as *states*, not as individuals. Article VII of the Constitution reads, "The ratification of the Convention of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same."

As Wolverton emphasized, this meant, "The framers of the Constitution recognized that the document they signed in September 1787 was an agreement among the states represented. Every article was written by the states, voted on by the states, accepted or rejected by the states, ultimately approved by the states, and would only become binding upon states who ratified it."

But the states' creation, the new national government, soon began violating the agreement.

In 1798, just seven years after the passage of the First Amendment, which explicitly said that Congress could not pass a law abridging freedom of speech or of the press, the Congress did exactly that with the Sedition Act. When federal judges — appointed by Federalist presidents and confirmed by a federal Senate — ignored that restriction of the First Amendment, it raised the question, "Just what can be done when the all three branches of the federal government conspire to burst out of the bonds of the -Constitution?"

Today, many contend that it is the Supreme Court alone that determines the constitutionality of a law. But the Supreme Court is part of the federal government, and history has demonstrated that it is quite rare for that body to side with a state or any combination of states in any conflict with the federal government.

Thomas Jefferson, the author of the Declaration of Independence, and James Madison, the "Father of the Constitution," wrestled with what to do if federal officials simply ignored the clear wording of the Constitution. Their answer was to write (secretly, so as to avoid being jailed themselves under the Sedition Act) the Kentucky and Virginia Resolutions, adopted by those respective state legislatures, asserting that states should *nullify*, or refuse to abide by, such unconstitutional laws.

In fact, state officials have a duty to do so, since, like their federal counterparts, they take an oath to uphold the U.S. Constitution. By refusing to allow the unconstitutional usurpation of state powers by the federal government, they are honoring their oath.

Statists claim that this is a dangerous view that amounts to secession. But how can insisting that the Constitution be upheld amount to secession? Wolverton argues that the judicious use of nullification can lead to a restoration of lost state sovereignty. He says that nullification is an alternative to secession because it offers the benefits of preserving the Union and demonstrates state allegiance to the principles of freedom that undergird the Constitution and, by extension, our Founders. "It is an ad hoc approach to ad hoc threats (acts that exceed the enumerated powers) that solves the sovereignty issue without dissolving the union," Wolverton wrote in defending the use of nullification.

He does, however, argue that secession should not be "taken off the table." After all, this was the last resort of the colonies in 1776, when they opted to secede from the British Empire.

When Should Nullification Be Used to Rein In Federal Power?

Wolverton offers two rules of thumb as to when nullification is justified. One, does the act violate the Constitution's enumeration of powers delegated to the federal government; and two, has every attempt

to redress the breach been made?

“Done right, nullification is a surgical, sparing way to remove malignant tumors of tyranny, not a chainsaw,” Wolverton explained.

One of the more interesting arguments proposed by Wolverton is that the states entered into a compact, and made their common government, which we call the “federal” government, their *agent*. That is, the federal government was set up to act on behalf of the states that created it. “Another aspect of contract law analogous to the search for legal justification of nullification is a subset of contract law — the law of agency,” he explains. “The principal may grant the agent as much or as little authority as suits his purpose. That is to say, by simply giving an agent certain powers, that agent is not authorized to act outside of that defined sphere of authority.” In other words, nullification by the states is simply the principal (the state) vetoing an act by the agent (the federal government) which was not authorized in the agreement (the -Constitution).

Clearly, then, the only powers the federal government could possibly have under the Constitution are those powers the compact parties gave to their common agent — the federal government.

To put a fine point on it, whoever heard of an agent being the one who tells the principal what to do?

But Wolverton does not just put forward the idea of nullification as a method of how the states can rein in the power of their agent (the federal government). His book tells the reader how nullification worked in practice in the past, and also how nullification could be a tool for our present predicament, and for conflicts with the federal government in the future.

Instead of just lamenting the loss of our federal system of government, patriots can read this book and take action to restore the federal system the Founders created.

Written by **Steve Byas** on March 9, 2020
Published in the March 9, 2020 issue of the New American magazine. Vol. 36, No. 05