



Written by [Joe Wolverton, II, J.D.](#) on June 10, 2014

1787 Constitutional Convention: Madison and Reverse Nullification

This week in 1787 was an eventful one at the Constitutional Convention underway in Philadelphia. The proposals, speeches, and votes touched on issues of federalism — states' rights that still dominate our debates some 227 years later.

At the center of the several controversies stood the diminutive but daunting James Madison. It was his work before and after the Constitutional Convention that earned the future fourth president the nickname "Father of the Constitution."



As this article will demonstrate, not only was Madison not the Father of the Constitution (a designation he rejected), but, as constitutional scholar Kevin Gutzman writes, "Far from being the father of the Constitution, then, Madison was an unhappy witness at its C-section birth. Perhaps he might more appropriately be called an attending nurse. He certainly did not think of it as his own offspring."

The events of the first fortnight of June 1787 reveal the reason Madison regarded the final product of the convention foreign to the plan he prepared in the months before the gavel sounded.

First, the delegates deliberated on the form of the national legislature (see this [previous article on the controversy conceding that word](#)), with Madison taking an unusual, and to most contemporary Americans, unexpected position.

In the Virginia Plan ([see this earlier article on that proposal](#)), Madison proposed that the "members of the second branch of the National Legislature ought to be elected by those of the first, out of a proper number of persons nominated by the individual Legislatures."

The first branch is what would become the House of Representatives, while the second branch is the Senate. In other words, then, Madison wanted senators to be elected by representatives, chosen from a pool of candidates selected by state legislatures.

This was to be the first of many significant defeats suffered by Madison during the summer of 1787.

Speeches by opponents of this resolution reveal one of the major historical and contemporary fissures among Americans concerned with the principle of federalism.

Rising first to challenge this part of the plan was Richard Dobbs Spaight of North Carolina. Spaight argued that the Senate (the so-called second branch) should be chosen by the state legislatures and he offered an amendment to that effect.

As he had done during the debate on the rules that would govern the convention, Pierce Butler of South Carolina allied himself with his northern neighbor, riding to the defense of Spaight and states' rights.

"Mr. Butler apprehended that the taking so many powers out of the hands of the States as was proposed, tended to destroy all that balance and security of interests among the States which it was



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necessary to preserve,” Madison records in his Notes on the Federal Convention.

Butler’s position presages that which would later compose the core of anti-federalist antipathy to the proposed constitution.

After Edmund Randolph responded that “details made no part of the plan” written by Madison and introduced by himself, a vote was taken, and the provision providing for the election of senators by members of the House of Representatives was defeated 7-3.

With a 11-0 vote on June 7, state legislators were granted the power to elect members of the national Senate, an authority that was preserved until the ratification of the 17th Amendment in 1913.

The second significant setback suffered by James Madison occurred only days after the first.

Remarkably, the cause of the controversy was nullification. Readers unfamiliar with the day-to-day goings-on at the Constitutional Convention likely will be surprised to learn that the nullification that Madison unsuccessfully promoted was the nullification of state laws by the national legislature.

The sixth resolution of the Virginia Plan empowered the national legislature “to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union.”

Under this article, the national legislature would have the authority to veto any state law that it believed encroached upon the powers proposed to be granted to the national legislature.

This is precisely the reverse of the position that Madison would espouse in the Virginia Resolution, written 11 years later in response to the Alien and Sedition Acts passed by Congress and signed into law by President John Adams.

Remarkably, all the states present except Maryland provisionally agreed to the nullification of state laws by the national legislature. The debate would not end there, however, and would be reconsidered on June 8 and again on July 17.

Among the leading lights of our founding generation were many who supported the grant to the national legislature of this substantial power over state governments.

Madison himself argued that this arrangement was necessary “for the security of private rights and the steady dispensation of justice.” He claimed at the convention that several state laws “threatened danger not to the harmony only, but the tranquility of the Union,” adding that “experience in all the states had evinced a powerful tendency in the legislature to absorb all power into its vortex.”

Observing the trajectory of tyranny from this end of the tunnel of time, however, we see that the national legislature habitually acts as Patrick Henry warned. “This government will operate like an ambushade. It will destroy the state governments, and swallow the liberties of the people, without giving previous notice,” Henry said during the Virginia ratifying convention in 1788.

At the convention, Charles Pinckney even argued in a motion that “the States must be kept in due subordination to the nation,” calling this situation “the corner stone of an efficient national [government].”

Gouverneur Morris came down on Madison’s side of the question of which authority — state or federal — would more regularly usurp power. He believed that “the public liberty was in greater danger from legislative usurpations than from any other source.”

John Dickson’s opinion matched those held by Madison and Morris, as well.



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“All were convinced,” Dickinson wrote, “of the necessity of making the general government independent of the prejudices, passions, and improper views of the state legislatures.”

Most remarkable and surprising of all the statements made in favor of giving the federal government power to nullify state laws it considered unconstitutional was made by Madison in a letter to his friend and author of the Kentucky Resolutions that would bring the word “nullification” into the national spotlight.

Regarding this “reverse nullification” that he supported so strongly, Madison told Jefferson:

Without this defensive power, experience and reflections have satisfied me that however ample the federal powers may be made, or however clearly their boundaries may be delineated on paper, they will be easily and continually baffled by the legislative authorities of the states. The effect of this provision 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.

Despite the passionate push by Madison, Pinckney, and others to give the federal government this immense superiority over the states, the measure was defeated 7-3, with the Delaware delegation divided.

With this recitation of James Madison’s view of the proper balance of state and federal powers, it is clear why Gutzman and Madison himself would reject the “Father of the Constitution” moniker.

Madison, of course, would later recognize that the federal government was, rather than being weakened by aggressive, power-hungry state legislatures, itself the perpetrator of policies and laws that not only violated the terms of the Constitution, but threatened “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.”

Viewed in this way, then, it seems that perhaps Madison’s position is not as mercurial as some have suggested, for by his recommendation of federal nullification of state laws and the reverse he sought to “secure its [the union’s] existence and public happiness.”

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