**Madison’s Tightrope: The Federal Union and Legitimate Government**

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Prepared for presentation at the Western Political Science Association Annual Meeting, March 28-30, 2013

The delegates to the Philadelphia Convention in 1787 faced an extraordinarily daunting political scientific riddle, one posed by the historically unique combination of their practical situation and their philosophical commitments. In order for the general government to fulfill the purposes everyone agreed were appropriate to it, and which were officially assigned to the general government by the existing Articles of Confederation, it had to be a “real” government—one that operated directly upon individuals—rather than a mere league of independent states. Real governments, moreover, have to conform to certain philosophical principles that determine their legitimacy: the principles of natural rights and social contract theory outlined in the Declaration of Independence. So far so good—but it was at this point that the chain of abstract reasoning hit an enormous practical snag: all of the individuals upon which the general government needed to operate already lived under the real and presumably legitimate governments of the states, and thus had already passed through the legitimacy-bestowing social contract process. The framers, in need of raw material for the effective accomplishment of their task, were confronted with an already finished product. If the general government hoped to be a real government, it could not aspire to legitimacy; if it hoped to be a legitimate government, it could not be a real one.

 It is this riddle of the framers that has given rise to debates about the nature of the American federal union from the time of the ratification debates through the nullification crisis and the Civil War up to the present. States’ rights advocates typically argue that since the states were in existence first, the general government established by the Constitution could not possibly possess a coordinate status with them. Through the Constitution, the existing states delegated authority to the general government by a compact with one another, leaving the states intact as the more fundamental and primary—and indeed the only “real”—governmental entities. Those of a more nationalist disposition, on the other hand, typically argue that the Constitution was intended to improve upon the Articles of Confederation precisely by creating a real government that would be coordinate with the state governments and have individuals, not states, as citizens.

 James Madison figures especially prominently in this riddle of the framers and the ensuing debates over the meaning of the American federal union since he is both widely recognized as the “Father of the Constitution” and is often accused by detractors of “having contributed to the arsenals” of both sides of the ensuing debates, of vacillating between one and the other horn of the federal dilemma as the political climate or personal motives dictated (Gutzman 1995, 589). Confronted with over-powerful and oppressive state governments in the 1780s, Madison crafted the nationalist Virginia Plan and held the states to be merely “subordinately useful”[[1]](#footnote-1) to the general government. Faced with the tyrannical Alien and Sedition Acts and the specter of a Hamiltonian national government in the 1790s, Madison penned the Virginia Resolutions and subsequent Report in which he insisted that “the Constitution is a compact to which the states are parties,” and thus that the general government established by it is in fact subordinate to the states themselves (Meyers 1981, 233).

The apparent contradiction between these two periods of Madison’s political thought has limited and even tainted his legacy as a political thinker, and understandably so. If Madison had found himself unable to settle on a favorite play of Shakespeare’s, this would be little cause for alarm; but Madison the Father of the Constitution finding himself unable to settle his opinion on a fundamental point of constitutionalism is another matter. While Madison’s immense historical importance as a political actor is secure and indisputable, his apparent incoherence on this crucial theoretical point has undoubtedly had a negative effect on his standing in intellectual history. Already hindered in this respect by his disinclination to write theoretical treatises and his proclivity to involve himself in practical political controversies throughout his life, the appearance of actual inconsistency seems to be the final straw that dooms Madison the political thinker to second-tier status. A good and cogent thinker in many respects he may be, but Madison is no Locke.

Despite the serious blow that Madison’s apparent inconsistency in his thinking about the nature of the American federal union has dealt to his intellectual legacy, his reputation as a political thinker has been significantly rehabilitated and solidified in recent years by a steady stream of excellent studies by both historians and political scientists. Scholars such as Michael Zuckert (1986; 1992), Drew McCoy (1989), Gary Rosen (1999), James Read (2000), and Lance Banning (1995) have provided cogent accounts of Madison’s thought that illumine clear and important areas of conceptual coherence and consistency in his thought. While these studies establish crucial threads of consistency and coherence across Madison’s career,[[2]](#footnote-2) almost all of them refrain from confronting in a direct and sustained way the exposed theoretical nerve in Madison’s thought consisting in his conflicting statements regarding the nature of the American federal union in the 1780s and 90s. None of them come close to approximating Madison’s own thorough and sustained defense of his own consistency and coherence on this particular point in the final years of his life (though a few, such as Rosen, may find this defense persuasive).

McCoy is an exception to this general hesitancy, and his sympathetic restatement of Madison’s arguments against the nullifiers in the 1830s offers hope that Madison may yet be found to be ultimately consistent on precisely the point at which he seems most inconsistent. In his excellent explanation of Madison’s arguments in his Notes on Nullification and various letters written around this time, McCoy hits upon and highlights the most important features of these arguments. These include Madison’s emphasis on the “people of the states” as the single ultimate source of the authority for both the national and state governments—indicating their coordinate status and underscoring Madison’s distinctive commitment to the idea of divided sovereignty—as well as Madison’s and the framers’ desire to form a “real Government” that could be challenged through the Declaration’s natural right of revolution but not through an alleged constitutional right of nullification by states (McCoy 1989, 134-139).[[3]](#footnote-3)

McCoy’s sympathetic restatement does not, however, explore Madison’s arguments in these final writings of his life, and particularly the Notes on Nullification, with the detail and thoroughness they deserve. In this paper, I will argue that a careful and sustained reading of Madison’s Notes on Nullification promises enormous rewards for understanding and appreciating Madison’s political thought as a whole as well as for assessing his place within the history of political thought. At the end of his life, Madison was able to sufficiently reflect upon and coherently articulate a theory of the American federal union that effectively solves the framers’ riddle and, in so doing, represents an original and important innovation upon social contract theory.

Clear traces of Madison’s mature theory may be found throughout his writings of the 1780s and 90s, vindicating Madison’s defense of his overall consistency despite the appearance of contradiction. Without an understanding and appreciation of Madison’s theory in the Notes on Nullification, these earlier traces are indeed nearly impossible to discern; they weren’t, in fact, fully worked out by Madison himself at the time, and he occasionally writes and acts in a manner that does fun afoul of this mature theory. Madison’s theory is so subtle and nuanced that it took careful reflection upon a political career filled with extraordinary experiences for Madison to fully discover and explicate it. Once constructed, however, this theory provides a crucial additional thread running throughout Madison’s writings and political career. This thread, unlike the others, is actually more akin to a tightrope: razor thin and nearly indiscernible in its complexity and profundity, it unites Madison’s thought from beginning to end—though he himself could not avoid occasionally falling off on either side along the way.

**Glimpsing the Tightrope: *Federalist 39***

 Madison realized more clearly than most at the time of the American Founding that what was needed was not a stronger government, a more energetic government, or a more effective government, but simply *a* government. As he puts it in the “Vices,” “A sanction is essential to the idea of law, as coercion is to that of Government. The federal system being destitute of both, wants the great vital principles of a Political Constitution.” The general government under the Articles of Confederation was not, in other words, simply too weak or ineffectual; it lacked the distinguishing characteristics of a political constitution, or a “real” government. Madison elaborates upon this point in the next section of the “Vices,” entitled “Want of Ratification by the People of the Articles of Confederation.” According to Madison, under the Articles of Confederation “the union of the States is to be regarded as a league of sovereign powers, and not as a political Constitution by virtue of which they are become one sovereign power…,” a defect directly connected with the failure of the Articles to rest on ratification “by the People.” The Articles are defective insofar as they fail to establish a “political constitution,” which is characterized by sanction and coercion as well as popular consent, and the formation of which creates “one sovereign power” (Meyers 1981, 59-61) derived from the ultimate sovereignty of “the people.”

 Having clearly established the importance in his own mind of this crucial point—that a real government, an actual “political constitution,” was required at the national level—Madison placed an enormous amount of weight on the most important prerequisite for the formation of such a government: ratification by the people. These two points are joined initially in the “Vices,” with the “Want of Ratification by the People” section immediately following the “Want of Sanction…and Coercion” section, and are inextricably linked in Madison’s thought thereafter. In his letter to Washington immediately before the Constitutional Convention, Madison asserts that “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” (Myers 1981, 69). Real governments of the sort contemplated, Madison indicates, need not only the “energy” supplied by popular support to serve as a counterweight to the energy of the existing state governments, but also the “validity” demanded by the fundamental republican/democratic idea of popular sovereignty. Madison isn’t, in other words, simply concerned with “inventing” a fictional “people” in order to throw sufficient weight behind the new national government; he also needs to find a real, if abstract, people to give this new government theoretical legitimacy or validity.[[4]](#footnote-4) Madison relatedly indicates, in an intriguing and seldom noticed passage, that the people will be called upon not only to consent to the new national government, but also to simultaneously revisit their existing state constitutions as well.

 In the debates at the Convention itself Madison continues this emphasis on the importance of ratification by the people, objecting to Patterson’s plan in part because “Its ratification was not to be by the people at large, but by the *Legislatures*” (Myers 1981, 75). Immediately following the Convention, during the course of arguing that its members had acted faithfully and responsibly, Madison goes out of his way to highlight one way in which the Constitutional Convention did in fact depart at least from “the tenor” of their commission: “Instead of reporting a plan requiring the confirmation *of the legislatures of all the States*, they have reported a plan which is to be confirmed by the *people*, and may be carried into effect by *nine States only*” (*Federalist 40*). Madison takes special note of this point despite the fact that it is both “the most plausible,” and therefore potentially the most damaging, objection to his argument, and also “the least urged in the publications which have swarmed against the convention.” This objection, according to Madison, “has been in a manner waived by those who have criticized the powers of the convention,” and therefore requires minimal response. Why, one might ask, would Madison make a point of raising what he considers the strongest available objection to his argument when it has already been waived by his opponents? Since doing so appears to run directly counter to ordinary rhetorical considerations, Madison’s raising of the ratification point here serves as an especially clear indication of its vital importance to his own understanding of the legitimacy of the Convention’s ultimate product.

 Madison’s persistent emphasis upon the necessity of ratification by the people at large is closely connected with one of the most important “broad threads of consistency” in his thought as a whole: his commitment to “the republican principle” or popular sovereignty (Gibson 2002, 335). This commitment, which is perhaps the clearest and most widely recognized unifying principle of Madison’s political thought, drives Madison’s famous determination to find “a republican remedy for the diseases most incident to republican government” (*Federalist 10*). Since the national government needs to be a real government in order to accomplish its acknowledged goals, and a real government needs to be “republican” if it is to conform to “the genius of the people of America,” “the fundamental principles of the Revolution,” and “the capacity of mankind for self-government,” the national government needs to be republican (*Federalist 39*). The first principle of republicanism—the “republican principle”—, moreover, is popular sovereignty. On Madison’s understanding, then, it is absolutely “essential” that the national government rest ultimately on the original sovereign authority of “the great body of the people,” and thus that ratification be clearly obtained from this very “people.”

 Madison’s application of the principle of popular sovereignty to the government formed by the Constitution—through his insistence on ratification by “the people” rather than the states—constitutes in many ways the root and touchstone of his early “nationalism.” A republican national government founded on popular sovereignty required a national people correlative to it, and the ratification process would serve as the mechanism by which such a people would be crystallized (whether or not a national “society” or people had existed in any sense before). For this reason Madison freely refers to “the people of America” in *Federalist* *39*, and simply to “the people” in a national sense throughout his writings and speeches around this time. Madison’s first proposed amendment to the Constitution, to take one notable example, states that “all power is originally vested in, and consequently derived from, the people.” This proposed amendment goes on to assert that the government formed by the Constitution “ought to be exercised for the benefit of the people,” who possess “an indubitable, unalienable, and indefeasible” right of revolution (Myers 1981, 164). By proposing to explicitly link the new Constitution to the political philosophical principles of the Declaration of Independence, Madison clearly signals the profoundly “nationalist” character of the government formed by this Constitution—the general government rests squarely and solely on a national political society or a national “people.”

 Given the significant importance Madison attaches to a ratification process derived from a national people whose original sovereignty will serve as the legitimating source of the new general government’s political power, it is jarring to see him list the ratification process—which serves as “the foundation on which [the government] is to be established”—as a “*federal*” aspect of the Constitution in *Federalist 39*. This jarring decision results from the collision in this essay between the demands of abstract theory or political philosophy on the one hand and the demands of practical circumstances on the other. This collision represents, in fact, an early manifestation of the original riddle faced by the delegates to the Philadelphia Convention. Abstract reasoning demands, in Madison’s view as outlined above, ratification by a national political society as opposed to ratification by the states. Practical circumstances, including most generally the preexistence of the states as political societies with governments, and more particularly the rhetorical context of the essay, on the other hand, demand ratification by the states.

 Faced with this collision, Madison importantly did not simply sacrifice abstract reasoning or political philosophical principle on the altar of practical expediency and make the easy argument for the “federal” character of the Constitution’s foundation; rather, he squinted hard enough at the two sides of the dilemma to begin to discern the tightrope emerging between them:

On examining the first relation [the foundation of the government], it appears, on one hand, that the Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but on the other, that this assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State—the authority of the people themselves (*Federalist 39*).

Caught between his theoretical need for “the people” and his equally pressing practical need for “the states,” Madison could only escape by erecting a tightrope consisting in an exceedingly subtle and potentially very slippery concept: “the people of the states.”

In this initial formulation of the concept, Madison hasn’t yet worked out its contours clearly enough to prevent himself from immediately losing his balance. While Madison initially affirms the primacy of “the people” component in stating that ratification is to be given by “the people…as composing the independent States to which they respectively belong,” he wavers dangerously toward the “states” side of the tightrope by asserting that “It is to be the assent and ratification of the several States, derived from the supreme authority in each State….” In the paragraph the follows, Madison then appears to entirely fall off on the “states” side by downplaying the significance of ratification by “the people” to such an extent that it appears inconsequential or even cosmetic: “[Ratification] must result from the *unanimous* assent of the several States that are parties to it, differing no otherwise from their ordinary assent than in its being expressed, not by the legislative authority, but by that of the people themselves.” Are “the people” merely a vehicle for the pronouncement of a state, or is it the other way around? Although Madison in *Federalist 39* has clearly discovered the beginnings of a solution to the riddle of the framers and begun to mount the tightrope leading out of this dilemma, his articulation of the concept of “the people of the states” is still in rudimentary form.

**Walking the Tightrope: The Virginia Resolutions and Report**

 In *Federalist 39* Madison had carefully laid the foundation for a middle position between the sort of nationalism that inspired his original emphasis on ratification of the Constitution by a national political society on the one hand and the sort of federalism that took the preexistence of the states seriously on the other. A decade later, in the Virginia Resolutions of 1798 against the Alien and Sedition Acts, Madison again found himself searching for the tightrope he had glimpsed in *Federalist 39* between preexistent state sovereignty and the kind of national sovereignty the Constitution sought to establish.

In the Resolutions themselves, Madison struggles to rediscover this balanced middle way and again appears to fall off on the “states” side of the tightrope by describing the Constitution as a “compact, to which the states are parties.” Madison goes on to rehearse a version of the anti-Federalist “consolidation” objection against which he had argued in *Federalist 39* by suggesting that the tendency of the Alien and Sedition Acts was to “consolidate the states by degrees, into one sovereignty…,” and concludes by invoking the language of the 10th Amendment reserving certain rights “to the States respectively, or to the people.” While Madison’s phrasing in the Virginia Resolutions was undoubtedly more guarded than Jefferson’s in the Kentucky Resolutions, most notably by describing the action being taken in terms of “interposition” rather than “nullification,” Madison’s Virginia Resolutions nevertheless defend a strong states’ rights position that is in problematic tension with some of his earlier pronouncements.

First of all, Madison leaves out the crucial nuance in the concept of “states” that he had introduced in *Federalist 39* according to which the term was understood to refer not to the states as organized into particular governments, but rather as the sovereign people who consented to these governments. Not only were the Virginia Resolutions adopted by the state legislature rather than a special convention representing “the people of the state,” but also the text of the Resolutions itself speaks against this understanding of the term “states” when it refers to the states “retaining within their respective limits, the authorities, rights, and liberties appertaining to them.” What could it mean for the *people* within the state to have such “limits?” Madison’s raising of the old anti-Federalist specter of “consolidation” into “one sovereignty,” moreover, appears to contradict Madison’s criticism of the Articles of Confederation in the “Vices” on the basis of its failure to be a “political Constitution by virtue of which [the states] are become one sovereign power” (Myers 1981, 61), and at the very least lacks any hint of the careful, nuanced answer to this objection Madison had given in *Federalist 39*. Finally, Madison’s reference to the phrasing of the 10th Amendment indicates a distinction between “the States” and “the people” that speaks clearly against the identification of “the States” with the sovereign people-in-the-states Madison had carefully constructed in *Federalist 39*.

Although it thus appears that Madison had lost the thread he had picked up in *Federalist 39* in the intervening decade, in his defense of the Resolutions two years later Madison picks it up once again. Refining even further the subtle distinction he had attempted to draw in *Federalist 39*, Madison explicates his statement that the Constitution is a “compact, to which the states are parties” by distinguishing four different senses of the term “states:” the geographical territory, the particular government, the society as organized into the particular government, and finally “the people composing those political societies, in their highest sovereign capacity” (Myers 1981, 233). Realizing that the language of the Resolutions indicated primarily the first three of these senses, Madison doesn’t argue simply and implausibly that he had actually intended the fourth, but rather that “whatever different construction of the term ‘states,’ in the resolution, may have been entertained, all will at least concur in the last mentioned” (234). All would concur in the last mentioned, Madison is careful to note, because it is in the last mentioned sense that the “states” ratified the Constitution (234, Madison’s quotation marks). In affirming that the “states” ratified the constitution in the sense according to which “states” = “people” (of the states), Madison is in effect rendering his statements in the Resolutions at least partially synonymous with his statements emphasizing the importance of popular ratification around the time of the Constitutional Convention. By introducing even more complexity and nuance into his already subtle handling of the riddle of the framers in *Federalist 39*,and providing the most charitable reading possible of his earlier Resolutions, Madison thus attempts to recover his balance on the tightrope.

 In addition to this careful repositioning, in the Report Madison also elaborates upon the concept of “the people of the states” and its role in his thought in a way that further indicates its coherence and importance. Shifting his focus clearly to “the people” side of this concept and hearkening back to his early “nationalist” arguments, Madison argues 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….” He says further that “It adds to the stability and dignity, as well as to the authority, of the Constitution, that it rests on this legitimate and solid foundation” of consent by the sovereign people of the states (Myers 1981, 234). The parties to the constitutional compact must be “the states” *only* in the fourth sense of the term, as “the people of the states,” in order to make sense of Madison’s assertion that there is no tribunal superior to their authority. Madison’s statement that the Constitution enjoys “stability,” “dignity,” “authority,” legitimacy, and solidity as a result of this foundational compact also echoes his criticism of the Articles of Confederation in the “Vices,” a criticism largely based on the character of the Articles as a compact between states in the first two or three senses of the term to the exclusion of the fourth.

 In this discussion Madison also subtly indicates the crucial distinction between his own “interposition” and Jefferson’s (and later Calhoun’s) “nullification.” He does so by elaborating on the intention of the Resolutions in terms that associate them much more with the sort of fundamental right of revolution contained in the Declaration of Independence than with any merely constitutional right. Madison asserts along these lines that a denial of the right of interposition is tantamount to “a plain denial of the fundamental principle on which our independence itself was declared,” i.e., the natural rights and social contract principles outlined in the Declaration (Myers 1981, 236). Madison similarly invokes the broad principles of “The authority of constitutions over governments, and of the sovereignty of the people over constitutions” as particularly germane to the current situation, again suggesting a natural rights position rather than a constitutional rights one (237). It is thus an unintended and unfortunate consequence of his ingenious—and perhaps somewhat disingenuous as well—near identification of “the states” with “the people” that Madison ends up dressing up the essentially natural right of revolution to look like a constitutional right of nullification.

**Illuminating the Tightrope: Notes on Nullification**

 From the preceding discussions it is not surprising either that the nullifiers would expect to find an ally in Madison, or that Madison would vehemently deny any warrant in his writings for their actions. Walking the tightrope defined by the fragile “people of the states” concept did indeed make Madison look like a nullifier, and this appearance led Madison in the final years of his life to write a considered and mature statement of his views on the American federal union. This statement is what one would expect a thinker of Madison’s caliber and a political actor of Madison’s experience to compose at the end of a long life, and rivals in cogency and intellectual historical import even his much more studied and acclaimed *Federalist* contributions. In his Notes on Nullification, Madison simultaneously solves the riddle of the framers, persuasively establishes the consistency of his constitutional theory, and cements his place among the very best thinkers of the social contract tradition.

 Much of this work is, in fact, packed within one extraordinary paragraph towards the end of the Notes:

And where does the sovereignty which makes such a Constitution reside? It resides not in a single state but in the people of each of the several states, uniting with those of the others in the express & solemn compact which forms the Constitution. To the *extent* of that compact or Constitution therefore, the people of the several States must be a sovereign as they are a united people (Myers 1981, 437).

The import of this statement is further explicated by Madison’s commentary on the only way in which “the people of the several States” differs from “the people, as one community:”

The only distinctive circumstances is in the effect of a dissolution of the system on the resultum of the parties, which, in the case of a system formed by the people, as that of the United States was, would replace the states in the character of separate communities, whereas a system founded by the people, as one community, would, on its dissolution, throw the people into a state of nature (Myers 1981, 440).

Taking these two passages together enables a clear view of Madison’s mature theory in the style of Christopher Nolan’s *Memento*: the former proceeds from the beginning of governments and the latter from the end, resulting ultimately in a complete and coherent picture.

 Madison admits that the individual political societies whose ultimate sovereignty underpins each of the state governments preexist any national political society whose ultimate sovereignty would underpin the government established by the Constitution. This is simply the historical fact of the matter, but it is a historical fact whose political philosophical consequences are crucial to Madison. The preexistence of the states as political societies with legitimate governments means that while the states themselves may be in a sort of state of nature with each other, the individuals within them are clearly not. These individuals have already united in “express & solemn compact” with each other to form distinct political societies, and subsequently have chosen certain constitutions according to which their governments operate.[[5]](#footnote-5) It would thus seem, according to the sort of social contract theory to which Madison is philosophically committed, that actual revolutions would be necessary within each state in order for the individuals within them to form a new political society and consent to a new government.

 This, however, is where Madison found an opportunity for a significant and ingenious innovation upon traditional social contract theory. This innovation consists in the following: while the traditional social contract is regarded as a once and for all event whose only end is in revolution, Madison argues that the social contract process can be “re-booted” without annulling a previous trip through the process, and hence without all of the mess of revolution and dissolution of an existing political society. In this way, according to Madison’s theory, individuals can simultaneously be party to multiple, layered social contracts, each of which creates a distinct political society and correspondingly distinct constitutions. Insofar as “the people of each of the several states” have consented to be a part of a particular state level political society and live under their own particular state constitution, or “to the *extent* of” these state-level agreements, these “people” are distinct from one another; insofar, however, as the same “people of each of the several states” have consented to be a part of a national level political society through their agreement to live under a national Constitution, or “to the *extent* of that compact or Constitution,” these same “people” are “a united people.”

This layering of compacts is also evident in the second quotation given above regarding Madison’s revolution test. If the compact which established the Constitution entailed an annulling of the previous compacts uniting individuals into political societies corresponding to the states, a dissolution of the national constitutional compact would entail a return all the way to the state of nature. If, on the other hand, Madison’s own view of the situation holds, a dissolution of the national constitutional compact would not entail a return to the state of nature, but rather would entail a peeling off of the national layer of compact to reveal the state layer of compact intact underneath. Like a smart winter traveler, a Madisonian citizen can throw off his national jacket and still find a warm state sweater underneath.

 This is why Madison refers to the people who unite “in the express & solemn compact which forms the Constitution” not simply as individuals, but rather as “the people of each of the several states,” i.e., as individuals who have already united with each other to form a political society and choose a constitution, and who do not wish to divest themselves of their previous social contractual commitments upon entering into a new one. The “people of each of the several states” left the social contract process the first time with their hands stamped, as it were, and thanks to Madison’s innovative thinking are able to return free of the usual revolutionary charge. By referring to “the people” whose ultimate sovereignty must authorize the new Constitution as “the people of the states,” Madison acknowledges the historical fact of the preexistence of legitimate state governments, and hence the status of prospective national citizens as social contract veterans. By referring to “the states” as “the people of the states”[[6]](#footnote-6)—or, in the Notes’ noticeably more precise yet cumbersome formulation, “the people of each of the several states”—on the other hand, Madison signals the application of his novel social contract doctrine according to which individuals may pass through the social contract process multiple times, resulting in layered social contracts. With his theory of layered social contracts clearly elaborated in the Notes, Madison’s tightrope between “the people” and “the states,” nationalism and states’ rights, and philosophical commitments and historical circumstances is finally in place.

 It is this theory which stands behind and justifies one of the most widely recognized and important threads of consistency running throughout Madison’s political thought: his idea of divided sovereignty. As Madison says in *Federalist 46*,

…we must consider both of them [the federal and state governments] as substantially dependent on the great body of the citizens of the United States…The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes…the ultimate authority, wherever the derivative may be found, resides in the people alone…

In order to grant the new federal government a status coordinate with that of the existing state governments, and to coherently affirm that “No constitutional right of nullification or secession remains in the states; but no claim to general supremacy inheres in the Union” (Zuckert 1986, 186), Madison’s theory of layered social contracts is absolutely essential. Without such a theory, the riddle of the framers mentioned at the beginning of this essay cannot be solved, and the idea of divided sovereignty upon which Madison consistently relies is a chimera. Madison cautions in the Notes that “…those who deny the possibility of a political system, with a divided sovereignty like that of the U.S. must chuse between a government purely consolidated, & an association of Governments purely federal” (Myers 1981, 440), and it is this very “possibility” of a third, middle, tightrope-like way out of such an unfortunate choice that Madison’s theory of layered social contracts uniquely enables. Without such a theory, divided sovereignty is impossible, and with Madison’s divided sovereignty goes also “the last hope of true liberty on the face of the Earth” (Myers 1981, 441).

 In addition to effectively solving the riddle of the framers and establishing his place as an original and important social contract thinker, Madison’s mature theory of layered social contracts in the Notes also effectively drives home his refutation of the nullifiers and indicates the precise path of Madison’s tightrope through the apparent inconsistencies of his previous positions on the American federal union. While Madison’s repeated insistence in the Notes and elsewhere on the crucial importance of the apparently minor distinction between the singular and plural in his reference to “states” throughout the Resolutions and Report might initially look like desperate grasping at straws (Gutzman 1995, 2002), once Madison’s theory of layered social contracts comes clearly into view this insistence is vindicated. Even though the mature theory of the Notes isn’t yet fully in Madison’s mind at the time of the Resolutions or the Report, in light of this theory it is highly significant that Madison refers to “states” in the plural throughout these documents and stops short of the explicit nullification doctrine of the Kentucky Resolutions. Although it requires some improbable stretching of language, by identifying “states” with “the people of the states” in the Report Madison is able to place his statements in the Resolutions in line with the theory of layered social contracts he fully enunciates later. If Madison had in fact referred to a “state” in the singular as a party to the constitutional compact, such a reconciliation would simply not have been possible, since it is “the people of each of the several states” *as united* into one political society that constitute the parties to the constitutional compact under Madison’s mature theory. The fact that Madison did consistently use the plural “states” at this time, a usage that becomes crucial in light of the theory of layered social contracts in the Notes, suggests that his hesitancy to follow Jefferson in propounding a doctrine of nullification did not result simply from his prudence or caution, but rather from the presence in his mind of an undeveloped version of this theory.

 A similar tracing of the tightrope illuminated fully in the Notes is possible in *Federalist 39*, where Madison similarly appears to fall off on the states’ side of the “people of the states” concept. Although Madison concludes that the “foundation” of the general government will be federal rather than national, the simplicity of this conclusion belies the complexity of the reasoning preceding it. In the paragraph containing this reasoning (quoted above), Madison separates his two primary considerations—the one indicating the national character of ratification and the other its federal character—not in terms of opposition, but rather in the more ambiguous terms of “on the one hand…on the other hand.” Combining the two considerations in the way invited naturally by Madison’s phrasing, Madison appears to be saying that the foundation of the general government (as reflected in the ratification process) consists in “the people of America…as composing the distinct and independent States to which they respectively belong.” In other words, Madison’s phrasing indicates that that the people who compose the states may remain “the people of the States” while becoming “the people of America” in the act of ratification. The only way, moreover, that this double nature of “the people” could be conceivable in light of the social contract theory of legitimate government would be under a theory of layered social contracts of the sort Madison outlines in the Notes. Therefore, while Madison’s theory is still in nascent form in *Federalist 39*, its presence is nonetheless discernible and establishes a line of continuity extending all the way the Notes, however thin and precarious this line may sometimes seem.

**Conclusion**

 It was the unique combination of philosophical commitments and historical circumstances mentioned at the outset—the riddle of the framers—that provided the opportunity for Madison’s theory of layered social contracts. This theory provides the crucial bridge over which a federal government, such as that established by the U.S. Constitution, must pass if it is to have republican legitimacy. In this way Madison’s theory is of vital importance to American constitutionalism. Madison’s theory is also, however, significant in light of the social contract tradition and establishes him as one of the most important thinkers in this tradition.

 While the theory of the social contract, at least in its most lasting and persuasive Lockean formulation, had been a theory of revolution, in Madison’s hands it becomes also a theory of founding. The very same social contract philosophy underlying Jefferson’s Declaration of Independence is shown by Madison to also underlie the Constitution. Madison’s theory of layered social contracts is more flexible and abstract than Locke’s theory, since it is even less tied to actual chronological or historical time lines, but it shares a common foundation with Locke’s in the idea of a state of nature characterized by the possession of natural rights. Madison’s theory prominently includes the same right of revolution explained by Locke while building in more options for the social contract situation and thus inventing new practical applications for the social contract doctrine. Madison shows that the very same premises of a state of nature characterized by the possession of natural rights can not only legitimate or undermine an existing government, but can also provide a basis for successively altering, adjusting, and layering governments to best provide for the fulfillment of the ultimate purposes of political power. In this way Madison might lay claim to greatness not only for his singular political achievements, but for his purely intellectual achievements as well.

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1. To George Washington, April 16, 1787. [↑](#footnote-ref-1)
2. According to Gibson’s excellent review of this literature, 6 such threads (2002, 335-6). [↑](#footnote-ref-2)
3. On the idea of the “people of the states,” see Adam Tate, “James Madison and State Sovereignty, 1780-1781” (*American Political Thought*, forthcoming); on Madison’s commitment to divided popular sovereignty and natural rights see Zuckert 1986, 186; and 1992, 87. [↑](#footnote-ref-3)
4. See Morgan 1988, 267-287. [↑](#footnote-ref-4)
5. These two steps—the formation of an initial political society (a unanimous decision) and the choosing of a form of government or constitution to live under (a majority decision)—are those laid out by Locke in the *Second Treatise*. Madison’s agreement with Locke on this characterization of the process of forming legitimate governments is indicated throughout his writings, perhaps most clearly in the following passage from his letter to Jefferson of February 4, 1790: “Prior, therefore, to the establishment of this principle, *unanimity* was necessary; and rigid Theory accordingly presupposes the assent of every individual to the rule which subjects the minority to the will of the majority” (Myers 1981, 178). [↑](#footnote-ref-5)
6. Although Madison does depart from this usage in the Resolutions, it is a departure he regrets by the time of the Report. [↑](#footnote-ref-6)