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# What Kind of Constitution? James Madison, John C. Calhoun, and the Problem of Majority Rule: Constitution Day Address to the University of South Carolina, September 17, 2009

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# What Kind of Constitution?

## James Madison, John C. Calhoun, and the Problem of Majority Rule

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## Constitution Day Address to the University of South Carolina September 17, 2009

September 17, 2009 is the 222nd anniversary of the day the United States Constitution was signed in Philadelphia by members of the Federal Convention of 1787. But their signatures were not the ones that counted. The Constitution they drafted only acquired life and authority when it was ratified by the people of the United States — more precisely, by the people of nine of the thirteen states. South Carolina was the eighth state to ratify; it did so on May 23, 1788.

In 2004 the federal Congress created by our Constitution established a new holiday, Constitution Day, September 17, and directed all universities receiving federal funds to educate about the Constitution on or near that day.

I know what you're thinking: Yet another federal mandate! But I regard Constitution Day as simply an opportunity to do what as educators we should be doing any-

way, without any federal law to prompt us: teaching and talking about the Constitution and its history.

For the first Constitution Day in 2005, my own university put me in charge of activities. I decided to dress up as James Madison and talk about the Constitutional Convention. That was tricky because I'm about a foot taller than Madison was. I had to joke about my stature having grown over the years.

I'm closer in height to John C. Calhoun than to James Madison. But I'm not going to impersonate either Madison or Calhoun. Instead I will try to bring both of them back to life in another way: through their important debate in the early 1830s over what kind of Constitution we have, and in particular the role of majority rule under that Constitution.

I want to preface the Madison–Calhoun story of the 1830s by briefly mentioning some of our present-day anxieties about majority rule and whether and how to oppose a majority that you genuinely believe is unwise or unfair. Right now we have a Democratic president and Congress making policies they believe are right, and which are strongly opposed by congressional Republicans and by Republican governors and legislators in many states.

Here in South Carolina the governor, Mark Sanford, sought to refuse to accept federal stimulus money as a way of protesting a federal policy he considered wrong. To oppose the same policy the Republican governor of Texas, Rick Perry, began dropping public hints about secession. I take this not as seriously intended but instead a headline-grabbing way of expressing disagreement with the stimulus policy.

Just recently some Republican legislators in Georgia have proposed, in the event President Obama's health care reforms should pass Congress, that the state of Georgia declare them contrary to the Georgia constitution and block their implementation within the state.

But of course the roles were reversed a few years ago: there was a Republican president and Congress making domestic and foreign policies which many Democrats considered deeply wrong. Democrats in the Senate considered whether to filibuster President Bush's Supreme Court nominations, which led Republicans to consider "nuking" the filibuster (which is merely a Senate rule, not a constitutional provision).

After the 2004 election some bitter Democrats looked at the red state/blue state map and fantasized about joining the blue states to Canada.

So any of us, whatever our political views, can sometimes find ourselves on the losing end of majority rule. Nothing in our Constitution, or in our ideal of democracy, requires us fatalistically to accept laws and policies we consider wrong, simply because they have majority support.

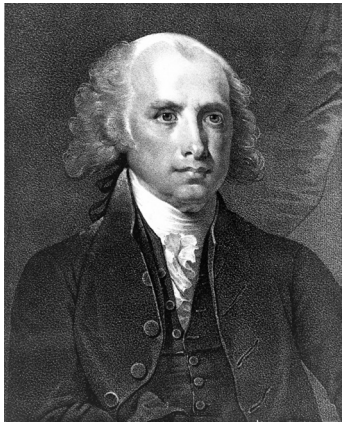
Rather the question is *how* to oppose majority-supported policies one considers unwise or unjust. The standard democratic answer is to beat the other side at its own game: to use freedom of press and elections to get the majority back on your side. (By 2006, for instance, Democrats decided that winning a majority in Congress was better than joining blue states to Canada.)

But there are times and places when the standard democratic answer — "if you don't like being in the minority, win a majority" — runs into difficulty. Sometimes, for a variety of reasons, majorities and minorities can become deeply entrenched and unlikely to trade places as the result of elections.

Then what do you do if you are a permanently outvoted minority faced with policies you consider deeply wrong?

That sets the stage for the Madison–Calhoun debate over state nullification of federal law. There was much more at stake in that 1830s debate than in any of the policy debates we're facing today. I believe that by counterposing Madison to Calhoun we can gain fresh perspective, both on the nature of our Constitution; and on the enduring dilemmas of majority rule, here in the United States as well as elsewhere in the world.

## Madison's Contributions to the Constitution



James Madison (1751–1836)

James Madison of Virginia lived from 1751 to 1836. The fact that he lived so long, after every other significant figure of the Founding generation had died, will play an important part in our story. Madison is often called the "Father of the Constitution," but that is oversimplified. Madison made three key contributions to the Constitution and our understanding of it.

First, he took the lead in getting the Federal Convention of 1787 called in the first place; he showed up early and set the agenda for deliberation; kept careful notes of the debates; and shaped the final document more than any other individual — though it diverged from what he wanted in some important respects.

Second, as co-author of the *Federalist Papers* Madison helped explain to the public how the Constitution was supposed to work and what problems it was designed to solve. Madison hoped the new Constitution would remedy two fundamental problems of republican government.

One was to create a workable *federal* form of government, one that balanced an effective national government with the proper degree of autonomy for states.

Under the Articles of Confederation — the governing document for the United States before the Constitution — one state could block laws and policies supported by all other states. Every key decision had to have the unanimous support of all states. Madison considered this a formula for anarchy. The Constitution was designed to replace minority obstruction with majority rule at the national level – but to do so without concentrating *too much* power in the central government, a tricky balancing act.

If on one hand Madison sought to make majority rule *possible* on the national level, on the other hand he sought to make majority rule *safe and responsible*. This was the other great problem he hoped the Constitution would solve. Madison and the other framers knew that, through most of human history, governments based on majority rule had been unstable and short-lived.

Madison argued in Federalist No. 10 that the "instability, injustice and confusion" produced by *unjust* majorities — what he called "majority factions" — "have in truth been the mortal diseases under which popular governments have everywhere perished." For Madison the problem was to remedy the *injustices* of majority rule, without giving up on majority rule itself; as he put it, to find "a *republican remedy* for the diseases most incident to republican government."

*How* Madison thought the Constitution solved this problem, I will come back to when I compare Madison's proposed remedy for unjust majorities with Calhoun's. For now just keep in mind that Madison understood the basic principle of the Constitution to be majority rule — compared to the Articles of Confederation where a small minority could block action. But it had to be majority rule of the right kind, or the whole experiment would fail.

Madison's third major contribution to the Constitution was as author of the Bill of Rights, and thus to enshrine in the Constitution, among other fundamental liberties, the rights to freedom of speech and press — which are essential to the kind of *healthy, deliberate, thoughtful* majority rule Madison envisioned for the United States. Madison introduced the Bill of Rights in 1789 and it was ratified in 1791.

But a few years later the constitutional guarantee of freedom of speech and press faced a major challenge: the Sedition Act of 1798, passed by the Federalist majority in Congress, which made it a federal crime to write, speak, or publish anything intended to damage the reputation of the President or a member of Congress. Madison considered that a fundamental violation of the First Amendment of the Constitution.

In his Virginia Resolutions of 1798 Madison argued that the Sedition Act violated "the right of freely examining public characters and measures, and of free communication among the people" that was essential to republican government. For Madison the whole point of republican government was that sometimes those in power *deserve* to be voted out, *deserve* to have their reputations diminished in the eyes of the people. Freedom of speech and press are essential if people are to know whether the current government should be kept in office or booted out.

For Madison the Sedition Act was the product of an unjust majority that had seized control of the national government and was determined to keep itself in office by unfair means. In the Virginia Resolutions he called upon the states to "interpose for arresting the progress of the evil." What exactly Madison meant by states "interposing" is disputed and will become part of the Madison–Calhoun story of the 1830s.

I should add that Madison's Virginia Resolutions of 1798 are often mentioned in the same breath with Thomas Jefferson's Kentucky Resolutions of the same year. But in fact the Kentucky Resolutions are very different from the Virginia Resolutions.

In the end what happened is that Madison and Jefferson remedied a bad majority by replacing it with a good majority: the Federalists were voted out of power in the 1800 election. The Sedition Act expired and was never renewed. For Madison the 1800 election proved that the *right* kind of majority rule could remedy the *wrong* kind.

After serving as Secretary of State and two terms as President, Madison settled into a long and intellectually active retirement — among other things preparing his notes of the Federal Convention for posthumous publication.

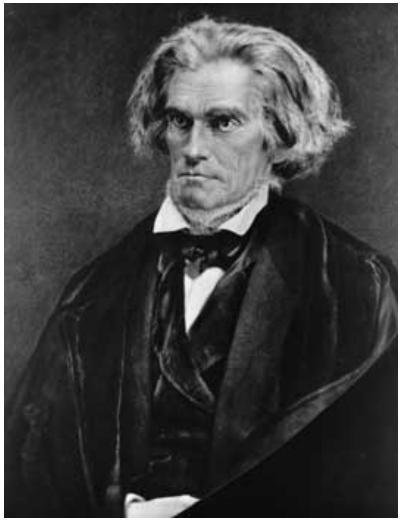
Thomas Jefferson and John Adams both died in 1826. That left Madison the last surviving leader of the generation that made the Revolution and the Constitution. In that role he was frequently called upon to explain and interpret the Founders' legacy to a new and troubled generation of Americans.

Today it is not unusual for someone to say, "If James Madison were alive today, he would take such-and-such position on some current constitutional dispute." I've made this kind of claim myself. It is a perfectly safe claim because there is no chance the real James Madison will walk into the room and dispute my use of his authority. But that is in effect what happened during the nullification controversy of the early 1830s. Ad-

vocates of nullification claimed their construction of the Constitution was supported by Madison's Virginia Resolutions and Jefferson's Kentucky Resolutions of 1798.

Jefferson was by this time safely beyond reply. But Madison was still very much alive, and in a series of publicly-circulated letters argued that nullification was unsupported by either the Virginia Resolutions or the Constitution. He claimed that state nullification of federal law would overturn the first principle of republican government by permitting a *minority* to rule a *majority*.

## Calhoun's Critique of Majority Rule



John C. Calhoun (1782–1850)

This brings us to the leading voice in the other side of that argument, John C. Calhoun of South Carolina. Calhoun claimed that permitting a state to nullify federal laws would not mean minority rule, nor would it produce deadlock or anarchy. Instead, he argued, the right of nullification would produce something much better than majority rule: a genuine consensus of all states and interests on the common good of the country.

Calhoun was born in 1782, at the tail end of the Revolutionary War, and lived to 1850, a decade before the United States fell into civil war. He was educated in the North, at Yale, and was an ardent nationalist during the War of 1812. In the aftermath of the war he supported a mildly protective tariff to sustain the northern industries that had grown up during the war, and to provide revenues for roads and canals to

benefit all sections of the country. As President Monroe's Secretary of War from 1817 to 1824 he sought to create a militarily strong and geographically unified nation.

Calhoun served as vice-president under John Quincy Adams from 1825 to 1829, and again as vice-president under Andrew Jackson from 1829 until 1832, when he resigned to become U.S. Senator from South Carolina. Calhoun became a chief political opponent of both presidents under whom he served.

In 1828, on a very close vote that sharply divided North against South, Congress passed a highly protective tariff dubbed the "Tariff of Abominations." That set the stage for nullification and the Madison–Calhoun debate over the Constitution.

I want to mention in passing here that the Madison–Calhoun debate over nullification roughly paralleled the famous U.S. Senate debate in 1830 between Daniel Webster of Massachusetts and Robert Hayne of South Carolina. But Hayne got his nullification arguments from Calhoun. And Madison had a far better understanding of the Constitution than Webster did.

To understand the nullification debate you have to first know something about the protective tariff and why southern cotton planters were so fiercely opposed to it.

The purpose of the protective tariff was to give a boost to American manufacturers by significantly raising the price of imported manufactured goods (especially textiles from Britain). That would then allow American manufacturers (located mostly in the North) to charge higher prices for their own products that competed with the foreign goods. Supporters of protection saw this as a way of enriching American industry at the expense of British industry. But that is not how southern cotton planters saw it. They saw it as northern industry enriching itself at the expense of southern agriculture.

Here's why. The protective tariff significantly raised cotton planters' costs of production — especially the cost of clothing their slave labor force; and at the same time diminished the purchasing power of British textile manufacturers, the chief buyers of southern cotton.

So the protective tariff made it more costly to produce cotton, and at the same time reduced the price at which cotton could be sold on the world market. Southern planters (including Calhoun) saw the protective tariff as a mechanism for systematically transferring southern wealth to northern pockets.

And it was majority rule that allowed this to happen. Calhoun saw the Tariff of Abominations as a majority, concentrated in one region of the country, selfishly passing laws in its own interest, completely disregarding the interests of a minority concentrated in another region of the country. This brings us to Calhoun's critique of majority rule.

Calhoun believed that over time majority rule would always become oppressive to the minority. He gives a simple example to illustrate his argument.

He asks us to imagine a political community consisting of five members governed by majority rule. By a vote of 3 to 2, a law is passed imposing a tax on all five members. Then another law is passed, by the same 3 to 2 majority, distributing all the benefits of the tax to the three who voted for it, at the expense of the two who opposed it. By this kind of process repeated over time, a selfish majority can transfer to itself most of the wealth of the minority. Calhoun believed this is exactly how the protective tariff operated in the United States. For the minority, to be subjected to "democratic" rule of this kind was no better than being subjected to the most absolute of tyrants.

To this analysis of majority rule Calhoun added a critique of *national political parties*. He treated political parties as strategic alliances for the purpose of winning a national majority and then extorting benefits from the minority.

A national majority coalition may be very difficult to put together at first, because it requires the cooperation of many diverse and conflicting interests. But once it succeeds, Calhoun argues, it will lock itself into place, sustained by its shared plunder of the minority. Thus Calhoun did not believe that who is in the majority and who is in the minority would change much over time. Instead the long-term effect of political parties would be to create permanent majorities and permanent minorities. The permanent majority would be concentrated in one region of the country, and the permanent minority in another. This threatened to break up the Union along political lines.

A healthy democracy depends on the *possibility* of power changing hands in an election. If you are in the majority today, but might be in the minority after the next election, you have an interest in treating the minority fairly.

If on the other hand you *know* you will always be in the majority, no matter how badly you govern, you have much less incentive to consider the interests of the minority. Deeply entrenched majorities and minorities, where almost no one changes sides in an election, can have lots of different causes: religious differences (as in Northern Ireland); racial, ethnic, or linguistic differences; or differences in regional economic interests — and especially differences between manufacturing states and planting states, free states and slave states — which was what Calhoun faced in the United States.

Whatever their cause, once there is almost no chance of a minority becoming a majority and vice-versa as the result of elections, democracy cannot work as it is supposed to. And Calhoun believed national political parties and protective tariffs had brought this about in the United States.

## Madison versus Calhoun

Now I want to bring Madison back into the picture. Madison and Calhoun agreed that in a system based on majority rule, there was a danger that the majority would oppress the minority. But Madison believed that this problem was best addressed through rules and mechanisms that would make the majority act more fairly and deliberately. Calhoun, as we will see, proposed a very different solution.

Madison's solution is best expressed in Federalist No. 10 and No. 51. He argues that the danger of a majority oppressing a minority is much greater in a state or city or county, where there are typically just two or three factions contending with one another, than in a large, diverse republic like the United States, where there are many different factions and interests, no one of them constituting a majority.

On a state or local level an unjust majority can form easily and quickly — think of a lynch mob as an extreme example; whereas in the United States as a whole it takes much more time and deliberation and compromise to form a majority, and the resulting majority, Madison believed, is more likely to be a fair and responsible one. In Federalist 51 Madison claims, "In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place upon any other principles than those of justice and the general good." Constitutional separation of powers also helps create a good national majority, by *slowing down* the process of legislation and avoiding the mistakes of haste and passion. Freedom of speech and press allow everyone affected by a piece of legislation to make their views known, and to criticize bad legislation and bad office-holders.

There is never any guarantee that national legislation will always be fair and wise. But Madison believed that, under the right kind of constitution, the actions taken by a *national* majority would on average be more just and fair toward the minority, than state or local majorities would be toward *their* own internal minorities. Madison believed your rights were much more likely to be violated by the majority that controlled your state than by the majority in Congress. In short, for Madison the right kind of constitution would discourage bad majorities and facilitate good majorities. You can prevent majority tyranny without giving up majority rule.

Now Calhoun understood this argument. He had read the *Federalist Papers* carefully and practically everything else written by Madison and Jefferson and other key thinkers of the Founding era. He didn't claim Madison's argument was wrong, exactly.

Instead Calhoun argued that *conditions had changed* so that the solution to majority tyranny set forth in the *Federalist Papers* no longer worked. Madison's argument in Federalist 10 and 51 does not envision national political parties, which sprang up

during the 1790s (partly through Madison's own efforts) and existed in full force by Calhoun's time. National political parties united by shared ideology, patronage, and the economic rewards of selfish legislation, Calhoun believed, were exactly the kind of *national unjust majority* that Madison believed was unlikely to form.

## Who Was Right?

Now at this point it's fair to ask, who is right? Does our democracy at the national level more resemble the process of deliberation and openness to a wide range of views that Madison envisioned? Or does it more resemble a selfish majority coalition deaf to the interests and arguments of the minority?

I'm going to leave that question to you. Our judgments about these things are so likely to be shaped by our own partisan views. What one citizen might think is a fair process of deliberation and consultation, someone else might claim is a majority shoving bad policy down the throats of the country, and vice-versa. In general I would just say that sometimes majority rule is deliberate the way Madison described, sometimes selfish and close-minded the way Calhoun described. I question Calhoun's claim that majority rule *inevitably* degenerates in the way he describes. But there is no question it *can* happen. Calhoun's critique of majority rule has to be taken seriously, even if you don't accept his proposed remedy.

### *Calhoun's Proposed Solution*

Let's turn now to Calhoun's proposed *solution* to majority tyranny, which is much more radical than Madison's.

Calhoun argued that every state should have the constitutional right to nullify any federal law, and any federal court decision, and to refuse to allow that law or decision to be enforced within the state's borders. The state's decision to nullify a federal law or decision would stand, unless and until three-fourths of the other states passed a constitutional amendment overruling that state's act of nullification. If that happened, the state would have to either rescind its nullification or secede from the Union.

Calhoun based his nullification argument on his interpretation of the character of our Constitution, and also on his consensus theory of government. I will first summarize the constitutional argument, and then the consensus theory that supported it.

Calhoun argued that under our Constitution, each state was fully sovereign — like independent nations in international law. He rejected the idea that there was any division of sovereignty between federal government and states (as Madison argued in the *Federalist Papers*). Calhoun did not base this argument on the text of the constitution.

The actual text of the Constitution does not include the term "sovereignty" at all, and the "supreme law of the land" clause gives little support to Calhoun's reading. (I should add that the post-Civil-War amendments, the 13th, 14th, and 15th, are completely irreconcilable with Calhoun's reading of the Constitution, but they weren't on the books when he was alive.)

Instead Calhoun based nullification on what he considered the inherent *structure* of *any* federal union, and on the process by which the Constitution was ratified.

To go into effect, nine of thirteen states had to ratify the Constitution. But any state that chose not to ratify it, was free to remain outside the union and would not be subject to the Constitution. Calhoun interpreted this to mean that each state was fully sovereign both *before* and *after* ratification of the Constitution. This contrasts with Madison's view, which was that in the act of ratifying the Constitution, states *gave up* any claims to full sovereignty under it: their sovereignty instead was henceforth limited by the Constitution's division of power between federal government and states.

Because Calhoun considered states fully sovereign both before and after ratification, it is not surprising he also argued that each state had a constitutional right peacefully to secede from the Union. Madison denied there was any *constitutional* right for a state to secede without the agreement of the other states. In Madison's view this was just as unconstitutional as *expelling* from the Union a state that wanted to remain.

It won't come as surprise to anyone here that Calhoun believed in a constitutional right of secession. But if we fixate on whether there is or is not a *right* of secession, we will miss the most important point: that *secession was precisely what Calhoun hoped to avoid*. He was realistic about what secession would mean. At one point he compared secession to a bloody knife cutting through a body. He made clear he was willing to secede from the Union if that was necessary to prevent abolition of slavery. But he did *not* want southern states to secede over the tariff.

In Calhoun's thinking the whole purpose of nullification was to *make secession unnecessary*. He believed that if every state possessed the right to block laws passed by the majority in Congress, then the minority would have no reason to break up the political community. The use or threat of nullification would force the majority to change its ways, and result in laws and decisions that truly benefited every state and interest in the country.

This brings us to Calhoun's consensus theory of government, or what he calls the principle of the "concurrent majority." He laid out this theory most completely in his *Disquisition on Government*, written toward the end of his life, but the basics of the theory were already in place during the nullification controversy. In the *Disquisition* he wrote that the only way to prevent the majority from injuring the minority was

"to give to each division or interest, through its appropriate organ, either a concurrent voice in making and executing the laws, or a veto on their execution."

Thus a national tariff law, for instance, would have to have majority support in Congress, but at the same time — "concurrently" — majority support within the South Carolina legislature. Just as in our ordinary legislative process a bill must pass by a majority in both House and Senate, Calhoun was proposing that it also be supported by majorities in every state affected by the law. That's what he meant by "concurrent majority."

Because in each state some particular interest predominated — cotton planting in South Carolina, manufacturing in Massachusetts, and so forth — a state would use nullification to protect that substantive interest. So state nullification of federal law was for Calhoun the practical means, within the U.S. system, for a "portion" or "interest" to block laws that they consider harmful.

It is essential to understand that Calhoun did *not* intend nullification as merely a way of engineering deadlock — simply blocking action without putting anything positive in its place. On the contrary, he assumed that the whole United States faced urgent *collective* problems and that common action was essential. He imagined that blocking action was only step one.

He believed that, when one or more states nullified a federal law, this would create a crisis that would then force all interests, parties, and states to work together and come to consensus on the true common good.

That was step two. The decision had to be unanimous, supported by all parties and interests — not just majority rule. But Calhoun insisted this wasn't *minority* rule or minority obstruction either. He assumed the costs and dangers of failure to reach agreement were the same for everyone. The shared danger of failing to reach agreement would force all states and interests to compromise. He compared this to a jury reaching a unanimous verdict: no one gets out of the room until everyone agrees.

Calhoun's consensus theory is vulnerable to a number of serious objections that I can only briefly summarize here. First, he assumes that if everyone knows failure to cooperate will bring disaster, this will force everyone to cooperate.

If that were always true, no country would ever fall into civil war. The fact that everyone hopes to avoid a disaster, does not always mean the disaster is avoided. Second, Calhoun assumes that the costs and dangers of failure to act are equal for everyone. But what if one interest is relatively advantaged by stalemate, while all other suffer? That would allow one interest to extort advantages from the others as the price of cooperation.

Third, Calhoun assumes it is clear who the "key interests" in a community are. It is never possible to secure the consensus of literally everyone. Within every state, for instance, there are internal minorities whose rights or interests may suffer from what their state does, just as states can suffer from federal action. You can't give veto rights to everyone, so in the end Calhoun's theory depends on an essentially arbitrary decision about which interests count *as* interests and which do not.

In Calhoun's view, for instance, white slave-owners counted *as* an interest with veto rights over federal policy. Slaves themselves were not in Calhoun's view a legitimate "interest" and had no veto rights over state slave codes or the actions of slave owners.

But Calhoun firmly believed a consensus model of politics could work, and that it was a vast improvement over majority rule. And his full-state-sovereignty interpretation of the Constitution and his argument for a state's constitutional right of nullification, depended on his consensus theory. For if every state nullifies every law it doesn't like, but no one can come to agreement on an alternative course of action when action is urgently needed, then nullification makes everyone worse off than before.

Calhoun believed that the actual outcome of the nullification controversy proved that consensus could work. In 1832 South Carolina (with Calhoun's active support) declared the protective tariff unconstitutional and passed an ordinance of nullification prohibiting the enforcement of federal tariff law in South Carolina. Charleston was declared an "open port" and invited the importation of goods duty-free from anywhere in the world. The effect of this act (if it had gone unchallenged) would have been to redirect most of the import trade away from states whose ports enforced the federal tariff and instead to Charleston. That in turn was intended to force Congress to reduce tariffs to a level acceptable to the state of South Carolina.

What happened instead was a tense and potentially violent showdown in 1833 between President Andrew Jackson, authorized by Congress to enforce federal law, and the state of South Carolina, which swore to resist it.

The crisis was resolved by a timely compromise: Congress passed a lower tariff, reducing but not eliminating it; and South Carolina rescinded its ordinance of nullification. Calhoun to the end of his life considered this episode and its outcome a model for how nullification can work: violence and civil war was avoided, and the protective tariff was reduced to a level South Carolina could live with. He believed South Carolina's act of nullification had brought about a true consensus in the interest of the country.

Others saw the episode differently: as one state attempting to force *its* favored tariff policy upon the rest of the United States — a minority legislating for the majority; and as a near miss with violent conflict, seriously endangering the Union, and not to be encouraged in the future. That was how Madison saw it.

## *Madison's Response to Calhoun*

This brings us back to the exchange between Calhoun and Madison. (It was not a face to face public exchange like Webster and Hayne, but carried on instead through publicly-circulated writings.) Madison and Calhoun not only had very different interpretations of the Constitution itself, and very different solutions to the problem of unjust majorities. They also had very different interpretations of Madison's own words from the Virginia Resolutions of 1798.

Recall that Madison considered the Sedition Act of 1798, which severely restricted freedom of speech and press, to be flagrantly unconstitutional. The Virginia Resolutions proclaimed that in the case of a "deliberate, palpable, and dangerous exercise" by the federal government of powers not granted by the Constitution, the states have the right and duty "to interpose to arrest the evil."

Calhoun interpreted Madison's words of 1798 — "interpose" — to mean that a single state had the right to declare a federal law unconstitutional, and to proceed to *act* on that judgment by blocking enforcement of the law. Calhoun also quoted from Thomas Jefferson's Kentucky Resolutions draft, which asserted the right of a single state to declare acts of the federal government "unauthoritative, void, and of no force." Calhoun thus claimed the authority of both the recently-deceased Jefferson and the still-living Madison in support of the right of a single state to nullify federal law.

Madison could not deny that Jefferson's Kentucky Resolutions lent support to nullification; the best he could do was point out that at other times Jefferson had written things incompatible with nullification.

But Madison forcefully denied that his Virginia Resolutions supported single-state nullification of federal law. The Virginia Resolutions do assert the unconstitutionality of the Alien and Sedition Acts. But, according to Madison, they do not claim that a single state can unilaterally *act* on the basis of that judgment by forcibly resisting federal law. When a state declares a federal law unconstitutional, Madison explains, it is *sounding the alarm* to other states and inviting collective action by many states at once to repeal the laws by methods consistent with the Constitution. Methods consistent with the Constitution would include creating a national majority in Congress to overturn the laws, and if necessary, passing a constitutional amendment (which requires a supermajority of ¾ of the states) to overturn the unconstitutional laws.

In short, Madison presented his Virginia Resolutions as fully consistent with majority rule: majority rule of the right kind, where it is admitted that majorities can sometimes act unjustly, and the remedy is to assemble a different majority committed to correcting that injustice. Madison insisted that the Virginia Resolutions never asserted the right of a single state to overturn a law duly passed by a national majority. That

in Madison's view would mean the minority ruling the majority. His own experience under the Articles of Confederation, where a single state could block legislation supported by all other states, did not predispose Madison to share Calhoun's faith in the blessings of consensus.

## Conclusion

There is much more to this Madison versus Calhoun story, and the events of the time; I've just scratched the surface.

To conclude I'd like to bring us back to the present, and ask what we can learn from Madison and Calhoun about majority rule and minority dissent amid the passionate divisions of our own time.

The first point I hope you take away is one on which Madison and Calhoun agreed: that majorities are not always right or fair. If you are politically in the minority right now, then that's exactly what you're thinking. If you're politically in the majority right now, just remember how you felt the last time you were on the losing end of an election. We may never come to consensus on every important issue, as Calhoun believed was possible. But we will act more decently toward one another if we remember that today's majority might be tomorrow's minority and vice-versa.

Second, though I believe it is possible for majorities and minorities to become rigidly entrenched and unchanging, as Calhoun feared, I do not believe that is the case in the United States today or in the foreseeable future. If we were in Northern Ireland or South Africa or Quebec we would have a different situation. But in the U.S. we have had two major political shifts within 12 years: the Republican takeover of Congress in 1994, and the Democratic takeover of Congress in 2006. Neither of these would have happened if political allegiances were as entrenched as Calhoun predicted. Our deepest and longest-lasting political division, the division over race, is of course still there, but at least in voting patterns is becoming less entrenched, not more entrenched. It may take time, but in the U.S. a minority can still win a majority to its side. A majority can still lose it if the laws they pass don't improve the lives and safeguard the liberties of the people who voted them in.

Finally, majority rule as envisioned by James Madison — and it's no secret by now that in the end I side with Madison — can only work if there is genuine deliberation.

Majority rule without deliberation is guaranteed to be bad. Where there is genuine deliberation, majority rule is more likely to produce good policy and respect the rights and interests of everyone — though there is never any guarantee.

Madison believed that a well-designed constitution, with checks and balances to prevent hasty legislation, and freedom of speech and press to allow criticism of office-holders and legislation, would best promote the kind of deliberation essential to a healthy democracy under our Constitution. But there are additional ways of encouraging deliberation. Another clause of Madison's First Amendment, was the right of the people "peaceably to assemble." Deliberation is not just something that occurs in Congress. It is something we all have the right and duty to engage in.

To take the most obvious current example: I know there have been angry words and deeply clashing views at the various Health Care forums that have been meeting around the country. You hear some good arguments. You hear some bad arguments. This is how democratic deliberation works, and however messy the process, as this debate plays out over time, most people gain a clearer understanding the issues and the choices we face. I don't know what Calhoun would have thought of this drawn-out national health care debate. I am sure Madison would have considered it healthy.

I want to conclude on a personal note. I live and work in Minnesota, in the far northern reaches of our very extended republic. Recently I have also resided and taught in California (which Calhoun thought should have been two states, not one, and maybe he was right).

Only in my reading and writing have I lived in South Carolina — in my imagination, living through the arguments over nullification and slavery and secession, trying to understand Calhoun's thinking even when he doesn't convince me. I am impressed that you would invite someone from so far north to address you on Constitution Day.

I have always been intrigued by South Carolina history and politics. For better or worse, yours is a state that takes its own path. You often give the rest of us something to think about and talk about. I hope my reflections tonight have given you something to think and talk about. I'm honored to be here. Thank you.

*Jim Read, Professor of Political Science, is the Joseph P. Farry Professor of Public Policy and Civic Engagement. He delivered the Constitution Day Address for the University of South Carolina in Columbia on September 17, 2009. The address draws from Read's book,* Majority Rule versus Consensus: The Political Thought of John C. Calhoun *(University Press of Kansas, 2009). James Madison was one of the chief framers of the U.S. Constitution. John C. Calhoun (1782–1850) was a key South Carolina statesman, and an important constitutional theorist and critic of majority rule. The speech was specifically directed to a South Carolina audience, in part because of Calhoun's connection to the state and in part because of controversies surrounding the state's resistance to the economic policies enacted by the current Democratic majority in Congress.*