

## **The Principles of '98: How the Virginia and Kentucky Resolutions Impacted States' Rights and Nullification in the Early Republic**

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### **Abstract**

In 1798, one of the first major Constitutional crises occurred. In response to the Alien and Sedition Acts of 1798—which they believed to be unconstitutional—Thomas Jefferson and James Madison wrote resolutions that they introduced into the Virginia and Kentucky state legislatures. Known as the Virginia and Kentucky Resolutions, they challenged the constitutionality of the Alien and Sedition Acts. Two constitutional theories arose from these resolutions: nullification and interposition. Thomas Jefferson introduced his theory of nullification in the Kentucky Resolutions and James Madison introduced his theory of interposition in the Virginia Resolutions. These two theories hinged on the premise that states, as parties to the national compact, have the right to judge (under strict circumstances), whether or not an act of Congress is constitutional. Furthermore, if deemed unconstitutional by the states, the act would become null and void and states would not have to comply with it. Although the resolutions found no support from other states, the theories contained within them laid the foundations for further arguments on states' rights. By analyzing writings by Thomas Jefferson, James Madison and John Calhoun as well as using supporting evidence from current scholarship, this essay demonstrates how states' rights grew from these initial assertions of state power and developed over six decades. Ideas contained in the Virginia and Kentucky Resolutions reappeared during the nation's early years (1798-1860) in events such as the Hartford Convention and the nullification crisis of 1828-1832. States' rights advocates in both the North and South broadened Jefferson's and Madison's theories into a powerful critique of federal power that eventually separated the country and led the nation to civil war.

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### **1. Body of Paper**

In 1798, one of the first major Constitutional crises for the United States occurred. In response to the Alien and Sedition Acts of 1798—which they believed to be unconstitutional—Thomas Jefferson and James Madison wrote resolutions that they introduced into the Virginia and Kentucky state legislatures. Known as the Virginia and Kentucky Resolutions, they challenged the constitutionality of the Alien and Sedition Acts—recently passed with the urging of President John Adams. Madison and Jefferson proposed theories that would limit federal power and enable states to assess the Constitutionality of federal laws. Ideas contained in the Virginia and Kentucky Resolutions reappeared during the nation's early years (1798-1860) in events such as the Hartford Convention of 1814-15, the Nullification Crisis of 1828-1833 and the Fugitive Slave Act of 1850. They influenced States' rights advocates in both the North and South who broadened Jefferson's and Madison's theories of nullification, interposition and States' rights into a powerful critique of federal power that eventually separated the country and led the nation to civil war. The question of how power should be divided between the federal and state governments pre-dated the 1798 crisis. Indeed, debates over the proper role of government emerged during the ratification debates

over the Constitution and subsequently, continued in the first congress as well. The earlier debates and eventual formation of factions and political parties influenced Jefferson and Madison. Examining the earlier discussions and setting these two great political theorists into context helps illuminate the development of their critique of constitutional power and federalism.

In 1783, after eight years of war, the guns fell silent; the Revolutionary War came to a close and out of the ashes a new nation arose. In 1777, the Continental Congress created a new government under the Articles of Confederation. Many problems arose from the Articles and it became insufficient to sustain the new government. The major problem was states had too much power, while the Federal government virtually had none. Representatives from the newly formed states met in Philadelphia in 1788 to address the flaws in the government and by the summer of 1789, plans for a revised version of the Articles were abandoned and replaced by the Constitution.<sup>1</sup> During the debates over the Constitution, two factions emerged, the Federalists and the Anti-Federalists. The Federalists sought a stronger, more centralized government and the Anti-Federalists believed the states should have more power and argued for a decentralized government. Following ratification of the Constitution, the Anti-Federalists dissolved; their ideas, however, lived on.

During the decade after adopting the Constitution, Thomas Jefferson and James Madison began transforming themselves politically. Madison was originally a Federalist in support of the Constitution and a nationalist; he and Alexander Hamilton wrote most of the Federalist Papers together as well as a majority of the Constitution itself.<sup>2</sup> He silenced the Anti-Federalists' concerns over the Constitution by including the Bill of Rights. Despite his original beliefs in the nature of federalism, Madison came to a different conclusion in the 1790s. He began to embrace Anti-Federalists' political and constitutional theories and brought former Anti-Federalists' who had transformed themselves from an opposition of the Constitution into a loyal opposition of the Federalist Party into the Democratic-Republican Party and he expanded the public sphere by establishing loyal Democratic-Republican publications.<sup>3</sup>

Jefferson shared some of the concerns over the Constitution that the Anti-Federalists had. In a letter to Madison in December of 1787, he too argued for the inclusion the Bill of Rights into the Constitution, "Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, & what no just government should refuse, or rest on inferences."<sup>4</sup> Jefferson shared the same fears of government that the Anti-Federalists had, "I own I am not a friend to a very energetic government. It is always oppressive."<sup>5</sup> Influenced by these beliefs, Jefferson joined forces with Madison to create the Democratic-Republican Party. The party embraced several Anti-Federalist ideas such as: small, local, decentralized government, strict construction of the Constitution and a strong belief in the tenth amendment which delegates to the states anything which is not yielded to the Union by the Constitution. They were able to convert former Anti-Federalists into their party and took the best of their ideas and refined them. They created the party in order to combat the new Federalist Party and with the Democrat-Republican party embracing Anti-Federalist conceptions of federalism, Jefferson was able to gain enough support to win the election of 1800.<sup>6</sup>

Due to fears of a war with France, and French operatives living in the United States, the Federalist-dominated Congress passed the Alien and Sedition Acts in July, 1798. The Alien Acts were passed to make it harder to become citizens and the Sedition Acts made it so people who spoke out against the government, which included Congress and the President, but not the Vice President (Thomas Jefferson), would be thrown in jail and in fact many people were imprisoned. To Jefferson and Madison as well as other Democrat-Republicans, this was the type of tyranny that Anti-Federalists predicted and warned about during the constitutional ratification debates.<sup>7</sup>

Jefferson and Madison weighed their options on how they wished to respond to the Alien and Sedition Acts; they needed a strategy that would win the hearts and minds of the people. The question was over which entity would put the government in check: the people, the judiciary or the states. Jefferson and Madison believed that using state legislatures to check federal power offered the best course of action and they wanted an amendment to be brought forth by the states to challenge the constitutionality of the Alien and Sedition Acts. Their answer came from the U.S. Senator from Virginia, John Taylor of Caroline. Taylor, as an Anti-Federalist, wrote several letters during the ratification debates in 1788 and 1789 in opposition to the Constitution and throughout the 1790s, he wrote pamphlets in opposition to the the Federalist Party and influenced Jefferson and Madison.<sup>8</sup> Taylor, a former Anti-Federalist turned Democratic-Republican, wrote a letter to Jefferson in June of 1798, with a plan that would allow the states to assert the power to put the Federal government in check, a power that Taylor and other believed lied in the tenth amendment of the Constitution.<sup>9</sup> Taylor believed it was inevitable that the Federal government would violate the Constitution and he believed it was the duty of the states to be the enforcer of the Constitution.<sup>10</sup> Taylor's proposal that states should limit federal power formed the structural foundation on which the Kentucky and Virginia Resolutions rested.

Taylor crafted the compact theory of the Constitution based on the assumptions from other compacts that had existed in Virginia during the colonial period: this became the foundation for states' rights. Compact theory asserts that the states created the Federal Union and not the individual people because the states, not individual voters, ratified the Constitution. Accordingly, states had the right to decide the constitutionality of a law and if necessary, nullify it.<sup>11</sup> Taylor's theory became influential partly because Virginians, and other Americans, already understood the concept of compacts. Compact theory was not a foreign concept to Virginians. When attempting to sell the Constitution to the Richmond Ratification Convention, Edmund Randolph made the Constitution more palatable to Virginians than the Articles of Confederation. While arguing with Patrick Henry over the vagueness of the "necessary and proper" and the "general welfare" clauses, he insinuated that the Constitution would be similar to other compacts including the Articles of Confederation in that the Federal government can only derive powers specifically delegated to it. Virginia had a history of compacts dating back to the early seventeenth century; Randolph characterized the Constitution as just another one of those types of compacts.<sup>12</sup> As far as Virginians were concerned, compact theory had existed for a long time prior to the Constitution in some form; Taylor had simply refined the theory and made it more concrete and concise.<sup>13</sup>

Taylor influenced Jefferson and Madison, but Madison too was influenced by other events. In the 1790s, the Virginia legislature protested Alexander Hamilton's plan for assuming state debts. Virginia had paid off most of its debts accrued during the Revolutionary war and did not want its citizens to pay the debts of states, what he considered to be an unfair tax burden. Virginia's politicians agreed with Madison; the legislatures in Virginia passed resolutions in 1790 that condemned the assumption of state debts. By passing such resolutions Virginia asserted itself as a sovereignty to be reckoned with. As a result, a compromise was brokered which placed the Capital near the Potomac in exchange for Virginia's cooperation. Virginia's assertion had paid off and it certainly seems that the earlier Virginia Resolutions were a prototype for the resolutions of 1798. Madison also observed the ever increasing power within the Washington administration. He once again found himself at odds with Hamilton over the Bank Bill which he also believed to be unconstitutional. Madison began to observe what the Anti-Federalists had warned about years earlier and recognized the dangers of the encroaching power of the Federal government over the states. With that in mind, it would have made perfect sense to Madison to use the Virginia legislature to challenge the constitutionality of the Alien and Sedition Acts.<sup>14</sup>

The Virginia and Kentucky Resolutions raised questions over who has the right to challenge the constitutionality of laws. They introduced two political and constitutional theories, interposition and nullification that gave states the right to decide the constitutionality of an act or law passed by Congress. By allowing states to assert this power, it allowed the voice of the people to be heard through their respective states. The people would choose which laws to follow and which to declare null and void. In the case of *Marbury v. Madison* in 1803, the Supreme Court rejected interposition and nullification and made itself "the final arbiter on all Constitutional matters."<sup>15</sup> Jefferson and Madison, however, continued to believe that the right to challenge the constitutionality of certain laws belonged to the states and not the courts, as the states better represented the people. Jefferson believed the courts could be potentially dangerous, "A judiciary independent of a king or executive alone, is a good thing; but independence of the will of the nation is a solecism, at least in a republican government."<sup>16</sup> Jefferson believed the courts should be subject to the same checks and balances that the other two branches of the federal government had, therefore they too should be beholden to the will of the people. By placing the right to judge the constitutionality of a law in the hands of the states and the states being ultimately responsible to the people, Jefferson and Madison believed this was the best way to ensure that checks and balances would be properly maintained. The Virginia and Kentucky Resolutions put a check on the judiciary that was not contained within the Constitution; the check would be consistent with the Constitution, however, according to Jefferson and Madison's interpretation of the wording of the tenth amendment and their belief that the Constitution had resulted from a compact among the states. The Virginia and Kentucky Resolutions had a great impact on the early Republic; both Northern and Southern states used them to defend states' rights. The core ideas in the Virginia and Kentucky Resolutions, interposition and nullification, were expanded as years passed and eventually comprised part of the ideology that would lead the country into Civil War.

The Kentucky Resolutions, written by Thomas Jefferson in 1798, introduced the idea of nullification which gave states, "the unquestionable right to judge of the infraction; and That [sic] a *Nullification by those sovereignties*, of all unauthorized acts done under color of that instrument is the rightful remedy."<sup>17</sup> A state legislature would declare null and void a law they believed unconstitutional and the state would not enforce the law it nullified.<sup>18</sup> Nullification was to be a multi-state process; if a majority of states agreed, then the law would be nullified nationwide.

The Virginia Resolutions, written by James Madison in a less threatening tone than the Kentucky Resolutions, introduced the theory of interposition, essentially the first step of the nullification process. The Virginia Resolutions maintained that the states entered into a compact with the Federal government via the Constitution and, "have the

right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights, and liberties appertaining to them.”<sup>19</sup> When a state believed a law unconstitutional, it could pass a resolution stating the unconstitutionality of the law and then attempt to convince other states to do the same. This could eventually lead to nullification and possibly overturn the law. Interposition and nullification would have been the ultimate assertion of power by the states.

Both Jefferson and Madison believed the Alien and Sedition Acts to be unconstitutional and they both believed in following the will of the people, through state action as the correct remedy, but the distinction between nullification and interposition was significant. Indeed, Jefferson and Madison agreed that judicial review did not solely belong to the Supreme Court. Jefferson wrote in the Kentucky Resolutions, “[t]he Government created by this compact was not made the exclusive or final *judge* of the extent of the powers delegated to itself; since that would have made its [sic] discretion, and not the Constitution, the measure of its powers; but that as in all other cases of compact among parties having no common Judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress.”<sup>20</sup> Jefferson is essentially saying that since all three branches of government are co-equal, each branch has the power of judicial review; including the states. Madison agreed with Jefferson; in his report of 1800 to the Virginia State Legislatures Madison wrote, “The resolution supposes that dangerous powers not delegated, may not only be usurped and executed by the other departments, but that the Judicial Department also may exercise or sanction dangerous powers beyond the grant of the Constitution; and consequently that the ultimate right of the parties to the Constitution, to judge whether the compact has been dangerously violated, must extend to violations by one delegated authority, as well as by the executive or the legislature.”<sup>21</sup> Despite these beliefs, Madison also believed, “the people, not the government, possess the absolute sovereignty.”<sup>22</sup> This belief illuminates as to why Madison chose to use interposition to combat the Alien and Sedition Acts. Nullification relied on state legislatures to declare an act of Congress unconstitutional whereas interposition relied on state legislatures to hold conventions to declare an act of Congress unconstitutional. This process is more deliberate and reflects Madison’s experience during the constitutional convention. Both approaches sought the will of the people as reflected in the states; however, interposition attempted to achieve a process that was reminiscent of the ratification of the Constitution through state conventions, thus reflecting the preamble of the Constitution which grants, “We the people” the ultimate authority over the government.<sup>23</sup>

Both the Kentucky and the Virginia Resolutions reflected earlier Anti-Federalists beliefs regarding government, the embodiment of the will of the people laid in the states and the states were checked by the people, giving the people the ultimate authority. The Anti-Federalists valued local communities over a distant ruler; they feared tyranny would come from the consolidation of the states. They feared that like Britain, a centralized government would be too distant and become corrupt and would not beholden to the will of the people.<sup>24</sup>

The resolutions went to each state legislature and met with strong opposition in the North. Evidence suggests that opposition towards the Virginia and Kentucky Resolutions split along sectional lines; nine Northern states flat out rejected the resolutions.<sup>25</sup> Federalist leaning newspaper editorials as well as state responses from Federalist dominated states was harsh; several newspapers printed responses from the states and editorial opinions about their opposition to the resolutions. **And what did they say?** Despite their lack of approval, the Northern states that did respond to the resolutions, however, acknowledged that the Constitution is in fact a compact, thus giving credence to Taylor’s compact theory. The Southern states fell silent; they neither approved nor disapproved the resolutions, despite the Democratic-Republican dominance in those states.<sup>26</sup>

Jefferson and Madison did not receive the type of response they had hoped for; however, they were able to raise questions over the constitutionality of the Alien and Sedition Acts. Madison recognized the urgency of the situation; in his report of 1800, he wrote, “As the act was passed on July 14, 1798, and is to be in force until March 31, 1801, it was of course, that during its continuance, two elections of the entire House of Representatives, an election of part of the Senate, and the election of a President were to take place.”<sup>27</sup> Madison expressed his fear that, “will not those in power derive an undue advantage for continuing themselves in it; which by impairing the right of election, endangers the blessings of the government founded on it.”<sup>28</sup> The point that Madison was making was that if the press was not free to say anything damaging towards the current government, then the Adams administration as well as members of Congress would gain an unfair advantage in the election. To Democratic-Republicans, a strong centralized government was not the best way to unite the country, but an expanded centralized public sphere was. Madison believed in using public forums and public opinion as a means to convey his message; if he could place his arguments within the state legislatures and local newspapers, then the people would have a voice and make informed decisions. Because there were not any popular elections in the Senate and the presidential electors, the people’s true power lied in local and state elections, thus holding State legislatures more accountable to their will. What Madison wanted in particular with the idea of interposition was to bring the question over constitutionality into the public sphere. If the citizenry was informed, they could better oppose tyranny and protect liberty through the states.<sup>29</sup>

Once the resolutions entered the public sphere, public opinion became strong in deciding the issue. Out of the debates over the resolutions, two men--Tunis Wortman and George Tucker-- created strong opposition to the Federalist Party. Wortman and Tucker both wrote papers supporting the resolutions. Wortman wrote *Treatise Concerning Political Enquiry and the Liberty of the Press* which gained support from former Anti-Federalists in New York, Pennsylvania and parts of New England. Tucker wrote *Blackstone's Commentaries* which helped gain support in parts of the South. These pamphlets, like the Federalist Papers successfully gained support for the Democratic-Republicans and-for the ideas advocated by the Kentucky and Virginia Resolutions. As a result of this newly gained support, Jefferson and Madison successfully put into question the viability of Federalists beliefs This newly found support helped Jefferson win the presidency.<sup>30</sup>

For the time being; the constitutional crisis settled down, but the principles outlined in the Kentucky and Virginia Resolutions remained dominant within the Democratic-Republican Party. After eight years of service, Jefferson followed the precedent set by Washington and chose to step down from the Presidency. Despite Jefferson's popularity, his Embargo Act of 1807 hurt the economy in New England and the South due to restrictions on trade with the British. New England merchants relied on trade with Britain and the South relied on New England shippers to export their goods.<sup>31</sup> As soon as Madison stepped into office in 1808, he faced a proposal to repeal the Embargo Act due to the problems it caused and in the spring of 1809, Congress repealed the act. After decades of impressments from British ships on American commerce ships and years of tension, war broke out with the British in 1812.<sup>32</sup> Ironically, a little more than a decade after New England States staunchly rejected the Kentucky and Virginia Resolutions, they embraced the principles of '98 (as the Virginia and Kentucky Resolutions were known), in a convention in Hartford, Connecticut in the winter of 1814-1815. New England states opposed war with Britain and were outraged at President Madison; in response, several delegates from New England held a secret convention in Hartford to discuss possible actions they might take towards the President and the war. They discussed nullification of certain measures the government made to ensure victory and proposed a separate peace with the British that may have included disunion as a last resort.<sup>33</sup>

Little is known about the Hartford Convention, but what available evidence suggests is that the delegates embraced some of the principles of '98. They did not mention the resolutions by name, but specifically mentioned interposition and accepted that the states were part of a compact stating, "when the national compact is violated, and the citizens of the state are oppressed by cruel and unauthorized law, this legislature is bound to interpose its power and wrest from the oppressor his victim."<sup>34</sup> It was Madison's resolution which first proposed interposition, clearly, the delegates in Hartford embraced Madison's position on State power. Even after the bitter rivalry between the Federalists and the Democratic-Republicans; the Federalists still understood the doctrine that Jefferson and Madison constructed and were prepared to use them for their own purposes.

The Hartford Convention spelled the end for the already troubled Federalist Party. Democratic-Republicans portrayed the Federalist Party as treasonous, disloyal and oppressive. According to James M. Banner, author of, *A Shadow of Secession: The Hartford Convention*, "the meeting at Hartford put an end to the already waning national fortunes of the Federalist Party while giving a legitimacy to the notion of nullification which would haunt the nation later."<sup>35</sup> The Hartford Convention was the first major event where the resolutions were invoked. Nullification, interposition and states' rights based on the compact theory were taking hold in the American lexicon. Giving credence to nullification would have a lasting impact on the country; it would soon lead to the sectionalism that was building up for some time.

Another decade passed before the questions raised in the resolutions were invoked. They were called forth in a time of crisis that threatened disunion thirty years prior to the Civil War. President Andrew Jackson was considered the heir to Jeffersonian Democrats, the party as well as the country was beginning to split along sectional lines. The crisis began in 1828; Andrew Jackson was just elected president when a high, protective tariff known as the "tariff of abominations", favored Northern manufacturers passed in congress. Jackson was a Southerner, but had support in the North and despite the calls from Southerners to reduce the tariff; he appeased his Northern allies, by increasing the tariff despite the Southern States' objections. All of the Southern states besides Louisiana opposed the tariff, but the biggest opponent came from Jackson's own Vice President, John C. Calhoun. A former representative from South Carolina and member of Madison's cabinet, Calhoun fought to reduce the tariff and employed the VA and KY Resolutions as his weapons.<sup>36</sup>

Calhoun, like Madison during the constitutional debates, was a nationalist at least through 1816; he supported national programs such as internal improvements, and was a strong supporter of the Federal government over state governments. After losing hopes of becoming President in 1824 and the rise of protectionist tariffs in his home state of South Carolina as well as the rest of the South, he began rethinking his positions and transformed himself into a strong advocate for states' rights. He always admired James Madison and by 1827, he fully embraced the principles of '98. In 1828, he anonymously wrote a pamphlet titled, *The South Carolina Exposition and Protest* in which he

borrowed heavily from Madison when he said in regards to South Carolina's resistance to the tariff that the state is, "to arrest the progress of a usurpation which, if not arrested, must, in its consequences, corrupt the public morals and destroy the liberty of the country"<sup>37</sup> In his *Exposition*, Calhoun outlined in detail his views on states' rights that included theories on nullification and interposition, which South Carolina adopted. He took the original ideas from the Virginia and Kentucky Resolutions and expanded them by explaining the nullification process and allowing for secession as a last possible resort.<sup>38</sup> He believed strongly in interposition, as he made clear in his 1831 *Fort Hill Address*. "This right of interposition, thus solemnly asserted by the state of Virginia", Calhoun stated, "be it called what it may, State right, veto, nullification, or by any other name, I conceive to be the fundamental principle of our system."<sup>39</sup> Calhoun's phrasing in the South Carolina protest as well as the Fort Hill Address and his interpretation of the Virginia and Kentucky Resolutions was almost identical to Jefferson's and Madison's in its sentiments. Calhoun agreed with Jefferson and Madison that judicial review ultimately resided in the people through the states. Calhoun wrote in the *Fort Hill Address*, "[i]f each party has a right to judge, then, under our system of government, the final cognizance of a question of contested power would be in the States, and not in the General government."<sup>40</sup>

For Calhoun as with Jefferson and Madison, the states were the stewards of the Constitution and it was not only their right, but duty to use interposition and nullification in the face of a usurpation of the Constitution by any of the three branches of government. He believed that interposition and nullification were the correct remedy and would act as an intermediate step between a violation of the Constitution and a state leaving the Union. Calhoun leaned heavily on the Virginia and Kentucky Resolutions in speeches and letters when discussing states' rights. In 1832, the Senate reached a compromise that Jackson believed would cease the calls for nullification, but South Carolina believed the tariff was not lowered enough. In November of 1832, the South Carolina state legislature held a convention which passed an ordinance declaring the tariffs of 1828 and 1832 unconstitutional refused to collect the tariff. Calhoun resigned as Vice President in December and was elected to the senate by his home state. Evidence suggests that in the winter of 1833, Calhoun believed other states would join in the fight; in a letter to Armstead Burt on January 15, 1833, Calhoun wrote, "Our cause looks well. If the tariff be not adjusted, the South will be united."<sup>41</sup> The next day, he wrote a letter to his friend Samuel Ingham in which he invoked the principles of '98, "The doctrines of '98' will triumph again and will again save the Republic."<sup>42</sup> Calhoun was mistaken that the Virginia and Kentucky Resolutions saved the Republic at the time; however, they helped Jefferson build a coalition and gain a political triumph over the Federalists. Perhaps this is what Calhoun meant since the Federalists were finally defeated and Jeffersonian democracy prevailed and perhaps Calhoun was seeking the same kind of "revolution" Jefferson experienced; one that would gain support in the public sphere and allow Calhoun to rise to the same level as Jefferson, thus cementing states' rights into not only tradition, but law and crushing his opposition.

Calhoun believed that judicial review belonged to the states; he derived his beliefs from the Virginia and Kentucky Resolutions and the compact theory. For those who criticized him on the compact theory, he argued, "proof if possible, still more decisive, may be found in the celebrated resolutions of Virginia on the Alien and Sedition Law, in 1798, and the responses of Massachusetts and other states."<sup>43</sup> Calhoun was correct; all of the states that responded to the Virginia and Kentucky Resolutions in 1798 mentioned that they indeed viewed the Constitution as a compact. Calhoun's biggest opposition came from none other than James Madison who believed Calhoun's brand of states' rights was too aggressive and could set a dangerous precedent. Madison believed that interposition should be used sparingly and only when the usurpation was clearer and a violation of the enumeration of powers set forth within the Constitution. To Madison, a tariff supported by a majority in Congress hardly merited interposition and Madison vehemently denied the power of nullification.<sup>44</sup> Calhoun insisted that his idea of nullification was not advocating disunion. Calhoun confronted this claim in his Fort Hill Address, "I yield to none, I trust, in a deep and sincere attachment to our political institutions and the union of these states. I never breathed an opposite sentiment; but, on the contrary, I have ever considered them the great instruments of preserving our liberty, and promoting the happiness of [sic] our selves and our posterity; and next to these I have ever held them most dear."<sup>45</sup> While Calhoun may not have advocated disunion, he did not rule it out. In his remarks on the President's message on South Carolina in the Senate on January 16, 1833, Calhoun claimed, "We made no such government. She [South Carolina] entered the Confederacy with the understanding that a State, in the last resort, has a right to judge of the expediency of resistance to oppression or secession from the Union."<sup>46</sup> Perhaps the reason why Calhoun was willing to entertain secession as a last resort whereas Madison was not, was because Calhoun recognized the danger that the tariff represented, "The danger in our system is, that a General Government, which represents of the whole, may encroach on the States, which represent the peculiar and local interests, or that the latter may encroach on the former", Calhoun reiterated later in his Address, "a tariff imposed for purposes of protection, and not for purposes of revenue only, was unconstitutional...in a country of such great extent and diversity as ours, extreme caution and moderation should be observed in imposing upon one region the economic theories of another."<sup>47</sup> Calhoun recognized that the tariff would hurt the economy of the South, included slavery. While Calhoun's concerns were

legitimate, the crux of Calhoun's argument over nullification may have been an indirect protection of the institution of slavery. Calhoun clearly recognized the threat that the tariff had on the South in his Exposition, "It imposes on the agricultural interest of the South, including the Southwest, and that portion of the country particularly engaged in commerce and navigation, the burden not only of sustaining the system itself, but that also of the Government."<sup>48</sup> Indeed, Calhoun knew what the tariff would do to the South and its economy and he recognized the unconstitutional nature of the tariff as well as the implications of industrialization. With that in mind, it made perfect sense for Calhoun to advocate nullification; it was not a rush to secession, but instead, he believed it to be a peaceful solution that was reminiscent of what Jefferson and Madison hoped to achieve with the principles of '98.<sup>49</sup>

Madison may have disagreed with Calhoun's aggressive approach to state's rights, but it seems evident that Calhoun drew from Madison's and Jefferson's own words. In his later years, he returned to his nationalist roots from the days of the constitutional convention and earlier years. Madison and Jefferson both insisted that the Union be maintained at all costs and Calhoun insisted this as well. It would seem that Calhoun's ideas were practically identical to Jefferson's in the Kentucky Resolutions and not too distant from Madison's as well. The only difference is in the manner in which they would be carried out. What Calhoun added was the actual process, he argued that since there must be three-fourths of the states to amend the constitution, each state, "have conceded to each other by compact the right to add new powers or subtract old."<sup>50</sup> He continued to argue, "the amendments are effected, not by any one three-fourths, but by any three-fourths of the states, indicating that the sovereignty is in each of the states."<sup>51</sup> Perhaps Calhoun mistakenly conflated nullification and interposition, but Calhoun's addition was consistent with what Jefferson believed the process should be; multiple states would pass nullification orders and the law would be repealed. If the states upheld the law, then the last recourse for the state with the grievance would be to secede. Secession was to be the last resort and it was an action that South Carolina was prepared to take.

Jackson was going to send the Army in to deal with the nullifiers and a possible secession, but at the last minute Calhoun and Senator Henry Clay were able to work out a compromise in the Senate. South Carolina rescinded the nullification order and the crisis ended in 1833. Calhoun believed that interposition and nullification would be used to slow down a state that may be considering seceding and in fact, that is what was accomplished with the nullification crisis. By reaching a compromise, Jackson's plans to send the Army into South Carolina was halted and Calhoun's nullification may have prevented an earlier Civil War.<sup>52</sup> The Jacksonian period, however added fuel to a fire that began in the earlier part of the decade. This fire of sectionalism and Calhoun's stance on states' rights would be used in the fight over slavery and sowed the seeds of the Civil War. It would be almost two decades before secession and nullification were brought up again, but the next time it would come in the protection of runaway slaves and not slavery.

Ironically, the Northern states turned to the principles of '98 once more. In 1850, Milliard Fillmore signed into law the Fugitive Slave Law which required that all states must return runaway slaves to their owner. Southern states believed the Fugitive Slave Law to be consistent with the Constitution because the Constitution protected private property, which slaves were considered at that time. To the Southern states, any violation of the Fugitive Slave Law would in turn, be a violation of the Constitution. Abolitionists in the North; however, opposed the law and on November 13, 1850, Vermont's legislature passed the Habeas Corpus Law which essentially nullified the Fugitive Slave Law. The Habeas Corpus Law gave aide to any slave arrested as a fugitive; provided a writ of habeas corpus which would have been obtained from a judge and protected fugitive slaves by providing them a safe haven in which they were granted constitutionally protected rights that was normally only reserved for citizens. The law was a de facto nullification since it was not a nullification ordinance written by state legislatures, but in fact, it still accomplished the same effect as a nullification ordinance because it refused to obey the Fugitive Slave Law. Though there is no clear connection from South Carolina's Nullification Ordinance of 1833 to the Habeas Corpus, what is known is that several of the state legislatures in Vermont were around during the time of the crisis and likely drew their ideas from that period. Several newspapers condemned Vermont and compared the law to the nullification crisis. Several Southern newspapers condemned the law as well and Virginia's Governor John B. Floyd called for a national convention to discuss the issue. In the end, cooler heads prevailed and President Fillmore backed down from a threat to intervene in Vermont. The Habeas Corpus Law sparked a debate that led to most of New England not enforcing the Fugitive Slave Law.<sup>53</sup> This lack of enforcement from abolitionists in the North built up tensions that existed for a long time. Southern states directly mentioned the lack of enforcement of the Fugitive Slave Law as one of the several reasons for their secession.

The Virginia and Kentucky Resolutions had a profound impact on the nation; they influenced the outcome of the election of 1800 by gaining support from former Anti-Federalists and in the public sphere, they influenced the delegates of the Hartford Convention who considered nullification and secession as a possible way to end the war and they set a precedent for John C. Calhoun to follow when building his arguments for nullification and states' rights. The nullification crisis set the stage for abolitionists in the North to protest slavery and for South Carolina to

secede from the Union in 1860. Compact theory and the principles of '98 are partly how the rest of the Southern states justified their secession as well.

The Virginia and Kentucky Resolutions were transformed over time into a belief system that still resonates today. The belief in states' rights that John C. Calhoun developed from the Virginia and Kentucky Resolutions were used to defend and protect slavery and later Jim Crow laws. Despite the destructive events that evolved from these beliefs, they should not be seen as a negative influence on the country. The Kentucky and Virginia Resolutions were never intended to disrupt the Union, Jefferson, Madison and Calhoun were adamant that the Union should be held together and interposition and nullification be used only in dire circumstances and only as a last resort. They believed that the use of these two theories were the proper way to put the government in check and to place that power in the hands of the people through the state legislatures. This would ensure that the people maintained power and the republic would endure. The Virginia and Kentucky Resolutions were created to assert long held beliefs that can be traced from the late Colonial Virginia period, to the Articles of Confederation, and the Anti-Federalists. They are a testament to how influential the "father of the Constitution", James Madison and the author of the Declaration of Independence, Thomas Jefferson, have been throughout American history.

## 2. End Notes

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1 K. R. Constantine Gutzman, "The Virginia and Kentucky Resolutions Reconsidered" 66, no. 3 (August 2000) 474-479.; Don E. Ferenbacher, *Sectional Crisis and Southern Constitutionalism comprising, The South and Three Sectional Crises' and Constitutions and Constitutionalism in the Slaveholding South*. (Baton Rouge: Louisiana State University Press, 1989), 116.

2 Gordon S. Wood, *Empire of Liberty: A History of the Early Republic 1789-1815*. (New York: Oxford University Press, 2009), 141.

3 Saul Cornell, *The Other Founding Fathers: Anti-Federalism and the Dissenting Tradition in America, 1788-1828*. (Chapel Hill: University of North Carolina Press, 1999), 166-171.

4 Thomas Jefferson to James Madison, Paris, December 9, 1787. Thomas Jefferson on Constitutional Issues, Selected writings, 1787-1825, (Richmond: The Virginia Commission on Constitutional Government, April, 1960), 2. Hereafter referred to as TJ. Selected Writings.

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6 Cornell, *The Other Founding Fathers* 166-171.

7 Ibid, 230-232.

8 Gutzman, "The Virginia and Kentucky Resolutions Reconsidered", 479-480.

9 Cornell, *The Other Founding Fathers*, 238-239.

10 Gutzman, "The Virginia and Kentucky Resolutions Reconsidered", 480.

11 Ferenbacher, *Sectional Crisis and Southern Constitutionalism*, 241.

12 Gutzman, "The Virginia and Kentucky Resolutions Reconsidered", 475-476.

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15 Robert Allen Rutland, *The Presidency of James Madison*. (Lawrence: University of Kansas Press, 1990), 55.

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22 Ibid, 61.

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- 24 Cornell, *The Other Founding Fathers*, 63-64.
- 25 Wood, *Empire of Liberty*, 270.
- 26 Ferenbacher, *Sectional Crisis and Southern Constitutionalism*, 121; *Columbian Courier*. 1, Issue 9. New Bedford, Massachusetts. February 2, 1799, *Oracle of Dauphin and Harrisburgh Advertiser*. 7, Issue 34. Harrisburg, Pennsylvania. June 6, 1799, *Political Repository*. 1, Issue 28. Brookfield, Massachusetts. February 19, 1799.
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- 28 Ibid, 73
- 29 Cornell, *The Other Founding Fathers*, 247.
- 30 Ibid, 272-275.
- 31 Rutland, *The Presidency of James Madison*, 5, 12.
- 32 Ibid, 175.
- 33 James M. Banner Jr., "A Shadow of Secession: The Hartford Convention," *History Today* 38, Issue 9 (September 1988): 25, 7, 9.
- 34 Excerpt from speech found in, Ethelbert Dudley Warfield LLD., *The Kentucky Resolutions of 1798: An Historical Study*. (New York: The Brickenboker Press, 1894), 173.
- 35 James M. Banner Jr., "A Shadow of Secession: The Hartford Convention," 25, 7, 9.
- 36 William K. Bolt, "Founding Father and Rebellious Son: James Madison, John C. Calhoun, and the Use of Precedents," *American Nineteenth Century History* 5, no. 3 (Fall 2004): 7; Daniel Walker Howe, *What Hath God Wrought: The Transformation of America 1815-1848*. (New York: Oxford University Press, 2007.) 273-275.
- 37 Ferenbacher, *Sectional Crisis and Southern Constitutionalism*, 126-128; Bolt, "Founding Father and Rebellious Son", 3-8, Cornell, *The Other Founding Fathers*, 294-296.
- 38 John C. Calhoun, *South Carolina Exposition and Protest*, December 19, 1828, 7.
- 39 Ferenbacher, *Sectional Crisis and Southern Constitutionalism*, 126-128; Bolt, "Founding Father and Rebellious Son", 3-8, Cornell, *The Other Founding Fathers*, 294-296.
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- 41 John C. Calhoun, *Fort Hill Address* of John C. Calhoun, July 26, 1831(Richmond: The Virginia Commission on Constitutional Government, Virginia, April, 1960), 16.
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- 50Ibid, 17.
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- 52 Ibid, 124.
- 53 Houston Jr., "Another Nullification Crisis: Vermont 1850 Habeas Corpus Law," *New England Quarterly* 77, no. 2 (June 2004), 255.
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