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The Spirit of '98: A Defense of Civil or States' Rights?

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The Kentucky and Virginia Resolutions of 1798 and the subsequent Virginia Report of 1800 have created a great deal of controversy since their adoption. Passed in response to the recently enacted Alien and Sedition Acts which collectively extended the naturalization period, gave the president power to expel immigrants, and criminalized criticism of the government, the Resolutions and Report denounced the Acts as unconstitutional. No other states issued concurring statements and there was widespread critique of the arguments espoused therein. However, in the election of 1800, Jefferson was elected thus giving a certain amount of affirmation to the republican doctrines espoused in the Virginia and Kentucky Resolutions. Thirty years later John C. Calhoun and other South Carolina nullifiers cited Madison and Jefferson as the sources of their theory and relied heavily on the Kentucky and Virginia Resolutions. Madison however, denounced the nullifiers and argued that neither he, nor Jefferson, nor the resolutions they authored had ever supported such things as the nullifiers argued. Within the last century scholarship has also been divided upon the issue. Some scholars have emphasized the defense of civic rights inherent to Jefferson and Madison's arguments. More recently some scholarship has emphasized the articulation of a compact theory and the constitutional arguments made in these documents. Such scholarship lends support to the similar interpretations made by nullifiers and draws heavily upon the broader historical context of the documents. The first of these approaches is inferior to the second in removing the defense of certain civil rights from the overall constitutional argument. Despite the ambiguity of a few specific points of the documents' implications and regardless of immediate political intentions, the Kentucky and Virginia Resolutions expressed long held concepts of the nature of the American Union that were validly drawn upon by subsequent States' Rights proponents.

In order to understand the constitutional implications of these documents, the conceptions

of political order competing within the young United States must be understood. Donald Livingston, Professor Emeritus at Emory University, identified “two ideal conceptions of legitimate political order,” from the early modern era.¹ The first and pre-dominant one he refers to as “Hobbesian” or the “modern unitary state,” and the other he calls the “Althusian” or the “modern federated polity.” The first model is “composed of egotistically motivated individuals who contract to form a sovereign office to rule for the sake of peace and stability.” Though, Livingston refers to the first model as “Hobbesian” after Thomas Hobbs’ exposition of such a theory in *Leviathan* (1651), he intends the term as a broad label. For example, Livingston includes Locke’s political theory under this label as well because, despite the libertarian flavor, Locke propounded the same basic system Hobbs did. For Livingston any system that supposes man began in a state of nature and contracted to create society, government, and sovereignty falls into this broad category. “Hobbesian” serves as a convenient label for consolidated, centralized, unitary systems, not merely the version of it propounded by Hobbes. The second model, named for Johannes Althusius, author of a treatise on political theory entitled *Politica* “root[s] political order... in social bonds and duties.” It conceives of sovereignty as a “symbiotic relation among... independent social orders.” This system believes society to exist independent of and prior to government. Sovereignty then is vested in the societies that create government.² These two positions are drastically different in both presuppositions and implications. The Hobbesian model consolidates power in a sovereign center, while the Althusian model disperses power throughout the component parts of a polity or system of polities. These two fundamental positions manifested themselves in the disparate constitutional positions that plagued America

1. Donald W. Livingston, “The very Idea of Secession,” *Society* 35, no. 5 (July 1998), 38.

2. *Ibid.*, 38.

throughout at least its first century of existence.

A trend setting work in the historiography of the Resolutions from the late 1940s argues that the Virginia and Kentucky Resolutions were above all else defenses of civil liberties. While the article provides a good chronology of the events surrounding the resolutions and especially well documents Jefferson and Madison's interaction on the matter, the arguments for a compact theory of union are downplayed. Rather than being perceived as a serious articulation of a theory of state sovereignty, they are interpreted as a practical response to the current overreach of the central government: "However interesting these famous Resolutions may be for the constitutional doctrine they contain, they were intended primarily as a defense, practical and spirited, of civil liberties."³ In the authors' opinions this situation is an example of state and central government being used as checks and balances upon each other to protect the civil liberties of individuals. They emphasize that "The Resolutions were measures of 'solemn protest' meant to limit the scope of the illiberal laws and to guard against their serving in the future as precedent for Congressional legislation."⁴ While a common and not entirely incorrect interpretation of the intended function and relation of the state and central government, this misses much of the point.

The introduction to Madison and Jefferson's correspondence at this time also takes this sort of tack. Editor James Morton Smith provides an informative overview of the events surrounding the adoption of the Resolutions of 1798 and even acknowledges the formulation of the compact theory of the union within Jefferson's resolution. However, he accepts that they

3. Adrienne Koch and Harry Ammon, "The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties," *The William and Marry Quarterly*, Third Series, 5, no. 2 (Apr. 1948), 174.

4. *Ibid.*, 174.

were primarily defenses of civil liberties: “Both men used states’ rights arguments as sticks to beat off what they considered federal violations of individual rights and civil liberties.”⁵ That Smith titled the chapter covering the Resolutions “The Kentucky and Virginia Resolutions and American Civil Liberties, 1798-1799” is also indicative of the editor’s interpretation of the Resolutions as primarily defenses of individual rights rather than primarily defenses of states’ rights.

Perhaps the narrow view of the Resolutions as simple defenses of particular violated liberties indicates a failure to understand the long struggle in American politics spanning the colonial and national periods between centralized and decentralized conceptions of political order. Jack Greene has excellently tracked this struggle in the years leading to the American War for Independence. However, this struggle did not end with American independence, and to be thoroughly understood, the Kentucky and Virginia Resolutions must be recognized as episodes in this larger and ongoing struggle.⁶

Some of the first to understand the Virginia and Kentucky Resolutions as arguments for decentralized power were the South Carolina Nullifiers. The nullifiers sought to nullify Federal Tariffs they believed unconstitutional, and mechanism by which they undertook this action was a state convention.⁷ In brief, the justification they offered for their theory was that the several states were sovereign political communities that had never surrendered their identity as

5. James Morton Smith, “The Kentucky and Virginia Resolutions and American Civil Liberties, 1798-1799,” in *The Republic of Letters: The Correspondence between Thomas Jefferson and James Madison 1776-1826*, vol. 2 1790-1804 (New York: W.W. Norton and Company, 1995), 1072.

6. Jack P. Greene, *Peripheries and Center: Constitutional Development in the Extended Polities of the British Empire and the United States, 1607-1788* (New York: W.W. Norton and Company, 1986), 182, 198.

7. John C. Calhoun, “Exposition and Protest” in *Union and Liberty: The Political Philosophy of John C. Calhoun*, ed. Ross M. Lence, (Indianapolis, IN: Liberty Fund, 1992), 351.

autonomous communities by joining the union.⁸ Though they drew on historical arguments reaching far into colonial history, the South Carolina Nullifiers including John C. Calhoun, the greatest articulator of nullification and states' rights theory of his day, drew upon the precedent of the Kentucky and Virginia Resolutions and Report, or as they oft referred to them, "The Spirit of '98."

Chancellor William Harper, a prominent South Carolinian political figure and leader in the Nullification movement, appealed to Madison's Report of 1799 in defense of nullification theory and esteemed Jefferson even higher than Madison. Harper referred to Jefferson as the "master" of "a true and thorough comprehension of the genius and working of our confederate system."⁹ Calhoun believed the source of the constitutional crisis faced in 1832 was "to be found in our departure from the great republican principles of [17]98; [which] practically convert[ed] our confederative system into a great consolidated government, without limitation of powers or constitutional check."¹⁰ The Nullifiers believed that the Virginia and Kentucky Resolutions use of terms such as "interposition" and "null and void" were akin to the nullification they proposed.

Madison was repulsed and disturbed however, to see his name brandished as an authoritative propounder of the nullifiers' position. His positions on political issues in the 1790s as a Democratic Republican party leader and especially his statements in the Virginia Resolutions of 1798 seemed to indicate that he was a supporter of the same positions as the

8. John. C. Calhoun, "Speech Introducing Resolutions Declaratory of the Nature and Power of the Federal Government in the Senate." January 22, 1833, 21.

9. William Harper, *The Remedy by State Interposition or Nullification Explained and Advocated: in His Speech at Columbia, S.C. on the Twentieth of September 1830* (Charlestown, SC: The State Rights and Free Trade Association, E.J. Van Brust, 1832), 16. The Online Books Page. Penn State, accessed November 16, 2015, <http://onlinebooks.library.upenn.edu/webbin/book/lookupid?key=ha009580803>.

10. Calhoun to S[amuel] D. Ingham, Washington, January 13, 1833, *The Papers of John C. Calhoun*, ed. Clyde Wilson, (Columbia, SC: University of South Carolina Press, 1979), 8.

Nullifiers. However, Madison is a sort of enigma. Contrasting with some of his incredibly states' rights positions, he was ardently nationalist during the creation and adoption of the Constitution of 1787 and again in the 1830s in response to Nullification doctrine. This apparent undulation on Constitutional issues is a dominant theme in Madisonian historiography. Many have found Madison to be at least fundamentally consistent in his stance on these issues, but the historical community has yet to reach consensus on this point.¹¹

It is even harder to judge whether Jefferson would have actually supported such policies because, unlike Madison, he had died before his name was invoked by the nullifiers and thus was unable to weigh in himself. Madison attempted to save his friend from accusations of supporting such policies, but John Quincy Adams did indeed see him as responsible for the nullification doctrine.¹² He explicitly wrote to Edward Everett, "Jefferson was the father of South Carolina Nullification, which points directly to the dissolution of the union."¹³ Not only did Jefferson appear to support strong states' rights doctrines in the Kentucky Resolution, but also late in life he had written letters to Governor Giles of Virginia in which he spoke of secession from the union as a viable option in cases of extreme need. In fairness to Jefferson he also stated within the same letter that "the States should be watchful to note every material usurpation on their rights ... to protest against them as wrongs to which our present submission shall be considered,

11. For an overview of Madisonian historiography dealing with his consistency and nationalism see, Alan Gibson, "The Madisonian Madison and the Question of Consistency: The Significance and Challenge of Recent Research," *The Review of Politics* 64, no. 2 (Spring 2002): 311. Kevin Gutzman's *James Madison and the Making of America* (New York: St. Martin's Press, 2012) is the strongest recent representation of scholarship asserting contradictions in Madison's positions.

12. Drew McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* (New York: Cambridge University Press, 1989), 143-147.

13. John Quincy Adams to Edward Everett, Charlestown, October 10, 1836, in Ralph L. Ketcham and John Quincy Adams, "Jefferson and Madison and the Doctrines of Interposition and Nullification: A Letter of John Quincy Adams," *The Virginia Magazine of History and Biography* 66, no. 2 (Apr. 1958): 182.

not as acknowledgments or precedents of right, but as a temporary yielding to the lesser evil, until their accumulation shall outweigh that of separation.”¹⁴ This suggests that perhaps such a protest is what he envisioned the Kentucky and Virginia Resolutions to be. However, this is not certain, especially considering the strong language of those documents. Jefferson’s statements in this letter, while leaving no doubt that he thought secession legitimate in extreme circumstances, leave open the possibility that he thought of secession not as a constitutional right, but as an undeniable natural right integrally related to the natural right to rebellion. If the latter was his intention, Jefferson was in essential agreement with Madison on this topic.¹⁵ His talk of enduring usurpation with peaceful protest seems to weaken claims the nullifiers have on him as a supporter of their doctrine and to support the interpretation of the Resolutions and Report as defenses of civil liberties.

Some light can be shed on this controversy by considering the historical context in which the Resolutions and Report were created. Looking at the broader picture of history rather than the immediate political events that prompted the adoption of the Resolutions and Report, demonstrates a continued struggle between Hobbesian and Althusian conceptions of political order. In the decade-long constitutional debate that preceded the War for Independence, England early on articulated a Hobbesian stance in a book authored by a Parliamentary deputy of Minister Grenville, *The Regulations Lately Made Concerning the Colonies and Taxes Imposed upon Them, Considered* (1765). Whateley argued that the Empire was a unitary state and therefore claimed the Parliament of England was able to legitimately represent the colonies.¹⁶

14. Jefferson to William Branch Guiles, Monticello, December 26, 1825, in *Thomas Jefferson: Writings*, ed. Merrill D. Peterson, (New York: The Library of America, 1984), 1,511.

15. Drew McCoy, *The Last of the Fathers*, 136.

16. Thomas Whateley, *The Regulations Lately Made Concerning the Colonies and Taxes Imposed upon Them, Considered* (London, J. Wilkie, 1765), 39-40, 107-109, *Revolutionary War and Beyond*, accessed November

In response to such arguments, colonials developed an Althusian argument that was finally expressed, among other places, in Thomas Jefferson's *Summary View of the Rights of British America* (1774). He argues that the original settlers of the American colonies had acted upon the basic human right to emigration and had established new societies in the wilds of North America separate from England.¹⁷ These societies, presumed Jefferson, were under no obligation to maintain associations with England:

[but] the emigrants thought proper to adopt that system of laws under which they had hitherto lived in the mother country, and to continue their union with her by submitting themselves to the same common sovereign, who was thereby made the central link connecting the several parts of the empire thus newly multiplied.¹⁸

Elsewhere in his pamphlet, Jefferson referred to both Parliament and colonial legislatures as “free and independent legislature[s].”¹⁹ He also spoke of “the addition of new states to the British Empire [producing] an addition of new, and sometimes opposite interests;” he saw it as the King's duty to act as a mediator between these interests.²⁰ More significantly the assertion of separate interests further supports the distinct nature of the multiple polities constituting the British Empire. Building on the concept of multiple communities existing within the British Empire, he asserted that, “from the nature of things, every society must at all times possess

16, 2015, <http://www.revolutionary-war-and-beyond.com/the-regulations-lately-made-concerning-the-colonies-by-thomas-whately.html>.

17. Thomas Jefferson, *A Summary View of the Rights of British America* (Williamsburg, VA, 1774), 5-7. *Google Books*, accessed November 16, 2015, <https://books.google.com/books?id=5ntbAAAQAAJ&printsec=frontcover&dq=A+Summary+View+of+the+Rights+of+British+America&hl=en&sa=X&ved=0CCUQ6AEwAGoVChMIh4br-fmVvYQIVhO8mCh1UDwXi#v=onepage&q=A%20Summary%20View%20of%20the%20Rights%20of%20British%20America&f=false>.

18. *Ibid.*, 7.

19. *Ibid.*, 12.

20. *Ibid.*, 16.

within itself the sovereign powers of legislation.”²¹ Jefferson concluded by arguing that the King was in fact the servant of the people in whom real sovereignty actually resided and calling upon the King to act as a fair mediator between the different peoples of the empire.²²

The argument articulated by Jefferson in the *Summary View* is consistent with the Virginia and especially the Kentucky Resolutions in articulating an Althusian conception of union. In his “Fair Draft of the Kentucky Resolution” Jefferson spoke of the states as sovereign, distinct communities. He argued that

they alone [were] parties to the compact, and solely authorized to judge in the last resort of the powers exercised under it, Congress being not a party, but merely the creature of the compact, and subject, as to its assumptions of power, to the final judgment of those by whom, and for whose use, itself, and it’s powers were all created an modified.²³

It referred to the Constitution as a “federal compact” among the states. It explicitly articulates a fear of “a general and consolidated government, without regard to the special delegations and reservations solemnly agreed to in that compact.”²⁴ Such language betrays that Althusian conception of political order Jefferson held in both the 1770s and 1790s. He nowhere spoke of the constitution as being formed by individuals. Rather the organic, pre-existent societies of each state compacted together to create a union “for specified national purposes, and particularly for those specified in the late federal compact.”²⁵

21. Ibid., 19.

22. Ibid., 22-23.

23. Thomas Jefferson, “Thomas Jefferson’s Draft of the Kentucky Resolutions of 1798” in *The Republic of Letters: The Correspondence between Thomas Jefferson and James Madison 1776-1826*, vol. 2 1790-1804 (New York: W.W. Norton and Company, 1995),1083.

24. Ibid., 1082.

25. Ibid., 1082.

Madison expressed a fundamentally identical view of the union. Somewhat more reserved in the application of theory than Jefferson was, Madison thought Jefferson's choice of language at some points of the Kentucky Resolution potentially dangerous and counseled him:

have you ever considered thoroughly the distinction between the power of the state and that of the Legislature, on questions relating to the federal pact. On the supposition that the former is clearly the ultimate Judge of infractions, it does not follow that the latter is the legitimate organ especially as a Convention was the organ by which the compact was made.²⁶

Though he was concerned by Jefferson's assertions that a state legislature could authoritatively judge a federal law, he acknowledges implicitly the sovereignty of the people of the state who by convention adopted the constitution and entered the union. Also, in the Virginia Resolution of 1798, Madison used the same sort of language Jefferson did, declaring "the powers of the federal government as resulting from the compact to which the states are parties."²⁷ Also like Jefferson, he was afraid of a shift from a decentralized political order to a centralized one: "the General Assembly doth also express its deep regret, that a spirit has, in sundry instances, been manifested by the federal government to enlarge its powers by forced constructions of the constitutional charter which defines them ... so as to consolidate the states, by degrees, into one sovereignty."²⁸

Recent scholarship by Kevin Gutzman, Professor of History at Western Connecticut University, has recognized this historical context and rejected the long held opinion that the Resolutions were primarily defenses of civil liberties. He traces in immense detail the development of Republican theory in Virginia and that state's political elite's interactions with the constitution of 1787. He argues that the Resolutions were primarily attempts to bring the

26. *Ibid.*, 1085.

27. *Virginia Resolution of 1798, Pronouncing the Alien and Sedition Laws to Be Unconstitutional, and Defining the Rights of the States*, Virginia House of Delegates, (December 21, 1798).

28. *Ibid.*

national government into alignment with what Federalists promised it would be during ratification.²⁹ While historical context demonstrates that the Resolutions were indeed part of a long-term struggle between opposing conceptions of political order, the fact that the Resolutions did indeed deal with civil liberties need not be downplayed. There was a practical side as well as a constitutional side to the states' rights argument. During the struggle between the colonies and Britain, the protection of individual rights and community rights was sought simultaneously. Colonists believed that the only way their rights as individuals could be protected was if their corporate rights remained inviolate.³⁰ Considering that the compact theory of the constitution developed out of the arguments adopted during this pre-revolutionary debated, it seems sensible that there was still an assumption that local community rights had to be protected if individual rights were to remain.

Clearly, the interpretation of the Kentucky and Virginia Resolutions and Virginia Report as mere defenses of civil liberties leaves much to be desired. They were in fact equally defending civil liberties and state sovereignty. Examining them in the context of the historical struggle between Hobbesian and Althusian conceptions of order makes this point clear. Thus, Calhoun and his compatriots were correct to see the "Principles of '98" as supportive of their cause, even if Madison and Jefferson's support of the exact mechanism of nullification is lacking. The fundamental principles expressed in the Resolves and Report, that The United States is composed of several independent, sovereign political societies is identical to the foundation of

29. Kevin R. C. Gutzman, "The Virginia and Kentucky Resolutions Reconsidered: "An Appeal to the Real Laws of Our Country," *The Journal of Southern History* 66, no. 3 (Aug., 2000), 474-476. Also, an even more detailed account of these topics can be found in his book, *Virginia's American Revolution*. Kevin Gutzman, *Virginia's American Revolution* (Lanham, MD: Lexington Books, 2007).

30. Robert W. Tucker and David C. Hendrickson, *The Fall of the First British Empire: Origins of the War of American Independence* (Baltimore: The John Hopkins University Press, 1982), 161-163.

the nullifiers' arguments. Thus, as Gutzman has argued, the Kentucky and Virginia Resolutions and Report articulate a Republican theory of union distinct from nationalistic interpretations.

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