

A PERVERTED CONSTRUCTION:
JAMES MADISON, THE VIRGINIA RESOLUTIONS,
AND THE NULLIFICATION CRISIS

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Abstract: This study focuses on James Madison's Virginia Resolutions, and the justification that John C. Calhoun and others found in those Resolutions for the doctrine of nullification, established in response to the Tariff of 1828. Madison denied this connection as a misconstruction of his doctrines. This study finds that Madison's Resolutions called for cooperation among the states to put an end to unconstitutional assumptions of power by the national government, and that he never advocated nullification on the part of an individual state or absolute state sovereignty, but instead emphasized divided sovereignty and shared power between the states and the national government. Furthermore, Madison argued that the tariff itself was constitutional, as instituting protective tariffs was within the powers of Congress. Difficulty in interpreting the Resolutions has led some to contend that Madison changed his mind or tempered his doctrines later in life, but this study argues that Madison was consistent, and that charges of inconsistency are based on a misunderstanding of the principles established in his Virginia Resolutions.

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CHAPTER I

INTRODUCTION

Is there a “James Madison problem?” Historians have dealt with this question for years, struggling to reconcile the apparently dual nature of James Madison’s thought and actions as a politician and thinker. Throughout his career, Madison seemingly vacillated between nationalism and localism, appearing to disagree with himself on whether the national government or the states should have more power. This becomes most clear when one looks at the issue of interposition, or nullification. In 1798, James Madison drafted the Virginia Resolutions to protest the Adams administration’s Alien and Sedition Acts; in these resolutions, Madison—via the Virginia legislature—declared the acts to be unconstitutional, and put forth a decisively states’ rights interpretation of the Constitution. This, along with Thomas Jefferson’s more forcefully-worded Kentucky Resolutions, gave members of the following generation a foundation on which to establish a formal doctrine of nullification, drafted by John C. Calhoun and passed by the South Carolina legislature in response to the Tariff of Abominations in 1828. Madison, however, abhorred Calhoun’s doctrine as inherently divisive and injurious to the principle

of majority rule, even as the nullifiers looked to Madison's earlier statements as vindications for their own.¹

This apparent inconsistency has led to questions and problems for historians in interpreting Madison's ideas. Had he changed his mind, fearful of the implications of his earlier doctrines? Or, perhaps he was simply pivoting to adapt to the new threat represented by the nullifiers, as opposed to the threat of the 1790s, which had been increased consolidation of national power. Historians have suggested that Madison changed his mind, either as an inconsistent theorist, or as a pragmatic politician who sought to defend against the most dangerous threat of the moment.

However, Madison never believed in complete national sovereignty or absolute state sovereignty. His views on nullification, especially as they relate to his Virginia Resolutions of 1798, exemplify his belief in divided and shared sovereignty between the states and the national government; this emphasis is the key to understanding what Madison was trying to say in 1798 and what he disagreed with in the 1830s. Madison did not believe that a single state had the power to nullify federal laws unilaterally; instead, his wish in the Virginia Resolutions was to call other states to action in putting an end to the Alien and Sedition Acts.² Furthermore, Madison believed that the situation in 1798—in which the national government had assumed an undelegated power—was not comparable to the predicament of 1832—in which the government, at most, was abusing a legitimate power. A high tariff—even a protective tariff—was not a valid reason to

¹ "Virginia Resolutions," 21 December 1798, *The Papers of James Madison*, ed. David B. Mattern, et al., 17 vols. (Charlottesville: University Press of Virginia, 1977-1991), 17: 189-190.

² James Madison, "The Report of 1800," 7 January 1800, *Papers of James Madison*, 17: 348-349; James Madison to Edward Everett, 28 August 1830, *The Writings of James Madison, Comprising his Public Papers and Private Correspondence*, ed. Gaillard Hunt, 9 vols. (New York: G. P. Putnam's Sons, 1900-1910), 9: 401-402.

endanger the Union by subverting the will of the majority and threatening secession. Thus, Madison believed that Calhoun's doctrine of nullification was inherently flawed (as it was written in response to a legitimate power exercised by the federal government), that it subverted the principle of majority rule, and that the justification the nullifiers found in Madison's Virginia Resolutions was based on a misreading of the text—a perverted construction of the language and doctrines espoused in that declaration.

Though this topic is an important one, it has not been written about extensively; Madison's other political accomplishments tend to attract the attention of scholars, while this subject represents a mere footnote in a long and distinguished career. Still, proponents of the doctrine of nullification—and, ultimately, secession—claimed lineage from Madison and his Virginia Resolutions, a paternity that Madison denied in what became the last political battle of his life. Thus, Madison's confrontation with the nullifiers has garnered attention from some of his biographers.

Ralph Ketcham provides an overview of the episode in his biography of Madison in some detail, but does not offer much in terms of interpretation regarding Madison's consistency on the issue of interposition. Ketcham simply sums up Madison's claim that the intent of the Virginia Resolutions was “to call for concurring statements from other states and other modes of cooperation among them, as soon transpired in the political campaign that ousted the government responsible for the offending laws.”³ The Resolutions, Ketcham states, never intended to arrest the operation of a federal law within the borders of a state, but simply called for interstate cooperation to end the law. He implies, then, that there was no inconsistency on Madison's part, as the original

³ Ralph Ketcham, *James Madison: A Biography* (New York: Macmillan, 1971), 643.

Resolutions did not advocate nullification. Ketcham, in outlining the events of the Nullification Crisis, also argues that Madison was effective in using his influence, both in his public and private writings, to bring about the compromise that ended the crisis.⁴ Thus, fittingly, Madison expended “the last remnant of [his] strength...against an effort to deny to the nation the benefits of mutual accord that could only come in union.”⁵

Another of Madison’s biographers, Jack Rakove, covers the incident briefly. He argues that the misunderstanding regarding the Virginia Resolutions and nullification rested on attempts to reduce the complexities of “the American federal system...to the simplistic formulas of state sovereignty or unrestricted national supremacy.” It was Madison’s intention, Rakove argues, to “map a ‘middle ground’ between an effective national government and the residual powers of the states.”⁶ Rakove also emphasizes Madison’s belief that the “inevitable conflicts that would arise from the overlapping powers of the nation and the states” should be left to the Supreme Court, as the final arbiter of such matters.⁷ Though Rakove’s emphasis on federalism and the issue of sovereignty is important in this subject, he does not address the issue of consistency or what precisely it was that Madison said in 1798 that the nullifiers were misrepresenting in the 1820s and 1830s.

Other Madison biographers are more willing to entertain the idea that Madison changed his mind. Robert Rutland, in his biography of Madison, argues that Madison,

⁴ Ibid., 644-646.

⁵ Ibid., 646.

⁶ Jack N. Rakove, *James Madison and the Creation of the American Republic* (New York: Pearson/Longman, 2007), 214.

⁷ Ibid., 215.

after four decades of public life, “was being forced to eat his own words” during the Nullification Crisis, as he had argued in the Report of 1800 that the Constitution was a “compact to which the states are parties.” The states were “ ‘in duty bound to interpose’ when a federal act of questionable constitutionality denied states their rights.” When confronted with John C. Calhoun’s logic in defense of states’ rights, Rutland argues, “Madison recanted” his earlier sentiments.⁸ Though he does not say it outright, Rutland does seem to imply a change of heart—and slight inconsistency—on Madison’s part.

Another biographer, Gary Wills, argues more blatantly that Madison was indeed inconsistent. Wills states that Madison tried to “downplay his own terminology of ‘interposition’ ” in the Resolutions, and that, during the controversy over nullification, he “went obsessively over his old papers,” attempting to “impose an artificial consistency on them, or to tidy them up with regard to later views.”⁹ The inconsistencies of Madison’s career, Wills argues, represented the “inevitable reversals and contradictions of a life spent trying to accommodate principle to political reality.”¹⁰ In spite of this criticism, Wills contends that Madison’s “essential greatness” is not annulled by the fact that he contradicted himself. His merit need not rest on consistency, as changes of opinion are to be expected in a long public career; Madison’s opinions, Wills argues, changed over the course of his long career.¹¹

⁸ Robert Allen Rutland, *James Madison: The Founding Father* (Columbia: University of Missouri Press, 1987), 248.

⁹ Gary Wills, *James Madison* (New York: Henry Holt and Company, 2002), 162.

¹⁰ *Ibid.*, 163.

¹¹ *Ibid.*, 164.

A stronger critic of Madison can be found in Kevin R. Gutzman, who argues that Madison changed his mind throughout his career on various subjects, the most consequential being the issues of sovereignty and nullification. Gutzman asserts that Madison was “a creative politician whose very creativity came, at the end of his life, to threaten his foremost achievement.” Madison had formulated the theory of state sovereignty during the 1790s in response to the threat represented by the Federalists, Gutzman argues, and it was this theory that “his intellectual heirs” eventually used “to truncate the union.”¹² He argues that Madison’s condemnation of the nullifiers in the 1820s and 1830s represented a shift in his opinions—a rejection of former doctrines and “constitutional interpretations of which, on sober second thought, he disapproved.”¹³

Gutzman not only argues that Madison changed his mind on the issue of nullification, but also that he changed his mind on the nature of the federal Union. The Madison of the 1830s, Gutzman says, held to a “consolidationist view” of the Union, supposedly arguing, like Daniel Webster, that it was the product of the whole people of the United States, and not a “compact to which the states are parties,” as Madison had argued in 1798.¹⁴ Gutzman, no admirer of Madison, presents him as an inconsistent politician and, at least in the 1830s, a self-contradicting political theorist, who “contributed to the arsenals both of localists and of nationalists.”¹⁵

¹² Kevin Raeder Gutzman, “From Interposition to Nullification: Peripheries and Center in the Thought of James Madison,” *Essays in History* 36 (1994), 89.

¹³ *Ibid.*, 90.

¹⁴ *Ibid.*, 107, 110-113.

¹⁵ Kevin Raeder Gutzman, “A Troublesome Legacy: James Madison and the ‘Principles of ’98,’” *Journal of the Early Republic* 15 (Winter 1995), 589; Gutzman, “From Interposition to Nullification,” 107-113.

J. Arndt, on the other hand, asserts that Madison's views on sovereignty and nullification were always consistent. To Arndt, Madison's goal was to "use republicanism to achieve a balance of interests that would best preserve liberty."¹⁶ This was the case when he helped frame and ratify the Constitution in 1787-1788, when he wrote the Virginia Resolutions in 1798, and when he denounced Calhoun's doctrine of nullification in the 1830s. Arndt declares that it was the preservation of liberty that was always Madison's primary goal, and that the Constitution was the means to that end, not an end in itself.¹⁷ In effecting that end, Madison was willing to interpret the Constitution according to the times to best preserve liberty; however, it was always essential "to maintain a balance of power between national and state governments within limits prescribed in the Constitution."¹⁸ According to Arndt, this balance was what Madison was trying to maintain in 1798 when the national government overstepped its authority with the Alien and Sedition Acts, and again in the 1830s when Calhoun overreached with the Exposition and Protest.¹⁹ Arndt also emphasizes the fact that Madison never advocated unilateral nullification on the part of any state, instead asking for cooperation among the states to overturn unconstitutional laws.²⁰ In spite of this, and the fact that Arndt repeatedly argues for Madison's consistency, he does not give a detailed account of Madison's political or constitutional thought regarding this issue, or indicate where the

¹⁶ J. Chris Arndt, "Advice of the Father: James Madison, States' Rights, and the Nullification Crisis," *Northern Neck of Virginia Historical Magazine* 47 (1997), 5466.

¹⁷ *Ibid.*, 5473.

¹⁸ *Ibid.*, 5467.

¹⁹ *Ibid.*

²⁰ *Ibid.*, 5470-5471.

nullifiers went awry in their interpretation of the Virginia Resolutions and the question of sovereignty.

The best and most detailed account of Madison's role in the nullification crisis and its relation to his Virginia Resolutions can be found in Drew McCoy's biography of the fourth president. McCoy, first of all, emphasizes the fact that the nullification controversy of the 1830s arose in response to the tariff, a practice that Madison believed to be constitutional.²¹ Second of all, McCoy argues that much of Madison's issue with Calhoun's doctrine of nullification was that, in concerning itself solely with preserving the rights of minority interests, it inherently undermined the fundamental principle of majority rule. Though Madison had also been concerned with the rights of minorities and the dangers of majority rule, McCoy argues, "Madison's preoccupation with the perils of majority rule must not be confused with a rejection of the principle itself."²² McCoy then emphasizes Madison's own arguments that what he called for in 1798 was not unilateral nullification on the part of one state, but cooperation among the states to put an end to the Alien and Sedition Acts.²³

McCoy asserts that the nullifiers misrepresented Madison, and that there were serious distinctions between 1798 and 1832. In 1798, Madison and the Republicans were dealing with what they perceived to be a serious and unprecedented affront to the Constitution and the rights protected in its first ten amendments; in 1832, there was a high protective tariff, which benefited and burdened different sections of the country

²¹ Drew R. McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* (New York: Cambridge University Press, 1989), 123, 128.

²² *Ibid.*, 137.

²³ *Ibid.*, 140-142.

inequitably, but was nonetheless grounded in constitutionally-accepted practice.²⁴

McCoy, more than any other writer on this topic, also emphasizes Madison's concern for his reputation and legacy, and the degree to which he was disturbed by the nullifiers' attempts to discredit him as a senile old man, whose opinions could no longer be trusted.²⁵ McCoy makes a strong case for Madison's consistency, or, at least, places the blame for his perceived inconsistency on the distortions and misunderstandings of the second generation of American politicians.

McCoy and the other historians who suggest Madison's consistency have a stronger basis for their arguments, but no historian has yet explicitly demonstrated how exactly Madison was consistent in his writing of the Resolutions and his opposition to nullification. Understanding the different emphases and goals of the Virginia Resolutions and the doctrine of nullification is the key to establishing Madison's consistency. Madison did write the Virginia Resolutions, but those Resolutions did not assume the same authority or make the same claims of sovereignty that John C. Calhoun's doctrine of nullification made thirty years later. Madison did not claim that the states retained complete sovereignty, even if they were the parties to the constitutional compact; neither did he claim that the central government had absolute authority, even if the people formed the government of the United States. Madison's stance only seems odd in the context of the 1830s because, by that time, nationalists had assumed a consolidationist tone under the likes of Daniel Webster, and proponents of states' rights had reached an extremist tone under the leadership of John C. Calhoun. Madison's "middle ground," which was so confusing to both nationalists and nullifiers, represented what he believed

²⁴ Ibid., 142-143.

²⁵ Ibid., 152-156.

to be the intended constitutional relationship between the states and the national government—that of divided and shared sovereignty. One cannot discuss the Virginia Resolutions and nullification without understanding this concept. Furthermore, the differences between the two situations cannot be understated; the problems of 1798 were very different from those of 1828 and 1832. Whatever one may say about the Alien and Sedition Acts, there was precedent going back to the 1790s for protective tariffs. Most importantly, the nullifiers misunderstood just what Madison’s Virginia Resolutions attempted to do and what the act meant. Though the differences may be subtle, the doctrine of nullification and Madison’s Virginia Resolutions do not represent the same line of thought. It may be only a small step from the Resolutions to nullification, but it is a step nonetheless.

Throughout the 1790s, James Madison and Thomas Jefferson had become the leaders of the opposition party in the United States, while the Federalist administrations of George Washington and John Adams maintained political control. It was in this context that the Adams administration, already in an undeclared naval war with France and preparing for the possibility of all-out war, passed the Alien and Sedition Acts in 1798. The Acts were really four separate acts passed in the summer of 1798 that targeted European immigrants (namely French immigrants) and, more specifically, opponents of the Adams administration in the United States, of whom Thomas Jefferson and James Madison were the leaders.²⁶ The sections of these new laws that were most disturbing to Jefferson and Madison were found in the Sedition Act, which stated:

²⁶ “An Act to Establish an Uniform Rule of Naturalization,” 18 June 1798, *The Public Statutes at Large of the United States of America*, 5th Congress, 2nd sess., 566-569; “An Act Concerning Aliens,” 25 June 1798, *Statutes at Large*, 5th Congress, 2nd sess., 570-572; “An Act Respecting Alien Enemies,” 6 July 1798, *Statutes at Large*, 5th Congress, 2nd sess., 577-578; “An Act for the Punishment of Certain Crimes against

if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published...any false, scandalous and malicious writing or writings against the government of the United States...or the President of the United States, with intent to defame the said government...or the said President, or to bring them...into contempt or disrepute...or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States...then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.²⁷

To Jefferson and Madison, this act was a clear violation of the First Amendment to the Constitution, which guaranteed freedom of the press and freedom of speech.²⁸ Indeed, Jefferson wrote Madison, the Alien and Sedition Acts were “so palpably in the teeth of the Constitution as to show they [the Federalists] mean to pay no respect to it.”²⁹ As far as the two leaders of the opposition party were concerned, these acts were designed to silence them and eliminate their political influence; in effecting this end, the Federalists had violated the Constitution.

Distressed by what they perceived to be an unconstitutional assumption of power and violation of individual rights, Jefferson and Madison wasted no time penning rebukes to the offending acts. These rebukes took the form of the Virginia and Kentucky Resolutions, with Madison authoring the former and Jefferson the latter, though this was unknown at the time; their authorship of these declarations, after all, could have opened

the United States (Sedition Act),” 14 July 1798, *Statutes at Large*, 5th Congress, 2nd sess., 596-597; 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 Mary Quarterly* 5 (April 1948), 151.

²⁷ “An Act for the Punishment of Certain Crimes against the United States (Sedition Act),” 14 July 1798, *Statutes at Large*, 5th Congress, 2nd sess., 596-597.

²⁸ Thomas Jefferson to James Madison, 8 June 1798, *Papers of James Madison*, 17: 143; Madison, “The Report of 1800,” 7 January 1800, *ibid.*, 310-311. See also Madison to Jefferson, 20 May 1798, *ibid.*, 133-134.

²⁹ Jefferson to Madison, 8 June 1798, *ibid.*, 143.

them to prosecution under the very acts they were protesting. They prepared these statements during the summer and fall of 1798, and, through John C. Breckinridge in Kentucky and John Taylor in Virginia, presented them to the legislatures of those respective states for approval.³⁰ Jefferson's original draft of the Kentucky Resolutions was more strongly worded than both the eventual Resolutions as adopted by Kentucky and Madison's Virginia Resolutions, claiming that each state, as a party to the constitutional compact, had "an equal right to judge for itself, as well of infractions, as of the mode & measure of redress," and that the offending Sedition Act "is not law, but is altogether void & of no force."³¹

For Madison, this language was too strong and the doctrines too excessive. He thus prepared a more concise, temperate, and, perhaps, ambiguous statement for the legislature of Virginia, which, notably, did not contain the phrase "null, void, and of no force" in regard to the Alien and Sedition Acts. When Madison's draft was shown to Jefferson before its introduction into the Virginia legislature, however, Jefferson suggested that that very phrase should be added; thus, when introduced in the Virginia House of Delegates, the Resolutions did state that the Alien and Sedition Acts were "not law, but utterly null, void, and of no force or effect."³² It is significant, then, that during the course of debate in the Virginia legislature, that phrase was eventually struck out, and Madison's original wording restored; indeed, it is quite possible that this was done "at

³⁰ Koch and Ammon, "The Virginia and Kentucky Resolutions," 145-176; Ketcham, *James Madison*, 394-397; McCoy, *The Last of the Fathers*, 144-146.

³¹ Draft of the Kentucky Resolves, enclosure in Jefferson to Madison, 17 November 1798, *Papers of James Madison*, 17: 176, 177.

³² Koch and Ammon, "The Virginia and Kentucky Resolutions," 159-160; McCoy, *The Last of the Fathers*, 145; "Virginia Resolutions," Editorial Note, *Papers of James Madison*, 17: 187.

Madison's urging."³³ At any rate, Madison's original language was retained, and the acts as passed represented his original intent.

Madison's resolutions declared a firm affection for the Union, while simultaneously adhering to the compact theory of its creation. He opened the resolutions with a declaration "to maintain and defend the constitution of the United States," and stated also that Virginia "most solemnly declares a warm attachment to the Union of the States."³⁴ The Resolutions then went on to state that "this Assembly doth explicitly and peremptorily declare, that it views the powers of the federal government, as resulting from the compact to which the states are parties; as limited by the plain sense and intention of the instrument constituting that compact." In the case of a "deliberate, palpable and dangerous exercise of other powers not granted by the said compact, the states who are parties thereto 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."³⁵ Madison then expressed his regret that the federal government had sought "to enlarge its powers" through loose construction and interpretation of the Constitution, with the apparent intention being to "consolidate the states by degrees into one sovereignty," the end result of which would be to "transform the present republican system of the United States, into an absolute, or at best a mixed monarchy."³⁶

³³ Ketcham, *James Madison*, 396-397; Koch and Ammon, "The Virginia and Kentucky Resolutions," 160; Madison to James Monroe, 11 December 1798, *Papers of James Madison*, 17: 184-185.

³⁴ "Virginia Resolutions," 21 December 1798, *Papers of James Madison*, 17: 188-189.

³⁵ *Ibid.*, 189.

³⁶ *Ibid.*

Madison then attacked the Alien and Sedition Acts specifically, and declared his intentions and method of redress. He argued that the Alien Act exercised “a power nowhere delegated to the federal government,” and, in a more grievous offense, the Sedition Act exercised a power not simply not delegated by the Constitution, “but on the contrary expressly and positively forbidden by one of the amendments thereto; a power which more than any other ought to produce universal alarm, because it is levelled [sic] against that right of freely examining public characters and measures.”³⁷ Finally, with all of these facts considered, and after expressing “the most sincere affection for their bretheren [sic] of the other states, the truest anxiety for establishing and perpetuating the union of all, and the most scrupulous fidelity” to the Constitution, Madison and the Virginia legislature appealed

to the like dispositions of the other States, in confidence that they will concur with this Commonwealth in declaring, as it does hereby declare, that the acts aforesaid are unconstitutional, and that the necessary and proper measures will be taken by each, for cooperating with this State in maintaining unimpaired the authorities, rights, and liberties, reserved to the States respectively, or to the people.³⁸

Within these last phrases rested the essential declarations and doctrines espoused by Madison and the Virginia legislature in the Virginia Resolutions, which would become a point of contention thirty years later during the debate over the tariff and nullification.

The initial response to the Resolutions was not as positive as Madison had hoped it would be, as the coupling of the Virginia Resolutions with the more radical Kentucky Resolutions prompted an outright rejection from several states. The states that did not reject the doctrines of the Resolutions simply did not respond at all, and the Federalists

³⁷ Ibid., 189-190.

³⁸ Ibid., 190.

declared that the Resolutions bordered on treason.³⁹ Ultimately, however, with the election of Thomas Jefferson to the presidency and the expiration of the offending laws in 1801, the crisis abated, and the constitutional violation disappeared from the scene. For the moment, said Madison, all was as it should be.⁴⁰

With the triumph of the Democratic-Republicans in 1800 came two decades of Republican administrations and the disappearance of the Federalist Party. Whatever reasons there had been to espouse the “principles of ‘98” seemed like a distant memory by the 1820s. However, it was then, with Jefferson dead and Madison in retirement, that the Resolutions were called upon once again to undo supposed federal tyranny. This time, however, those adhering to those principles found themselves at odds with the author and innovator of them. This resulted in the battle over the legacy and meaning of the Virginia Resolutions during the Nullification Crisis of 1832.

³⁹ Koch and Ammon, “The Virginia and Kentucky Resolutions,” 162-163; “Virginia Resolutions,” Editorial Note, *Papers of James Madison*, 17: 188.

⁴⁰ Madison to Jefferson, 28 February 1801, *Papers of James Madison*, 17: 475.

CHAPTER II

PROTECTIVE TARIFFS AND THE DOCTRINE OF NULLIFICATION

Throughout the 1820s, growing dissatisfaction with protective tariffs—and increasing tariff rates—led to an anti-tariff movement in the South. It was from within this movement that Vice President John C. Calhoun, via the South Carolina legislature, formulated and applied his doctrine of nullification, through which he claimed a state could nullify an unconstitutional national law. James Madison, who had retired from public life after his second presidential term in 1817, was aware of this strong anti-tariff sentiment in the South—including in his native Virginia. Whatever sympathies he may have had for those who believed tariff rates were too high, the intensity of their response and their claim that protective tariffs were unconstitutional surprised and disturbed him. He expected opposition to the tariff, especially in those areas that imported a great quantity of goods and did not receive the immediate benefits of increased domestic manufacturing; but he did not expect that opposition to center on the question of constitutionality. When South Carolina put forth its “Exposition and Protest” in 1828, Madison was further alarmed, both by the argument that the tariff was unconstitutional and by the doctrine that a state could nullify a national law. Whatever the recent excesses of tariff laws in the United States, Madison argued that the constitutionality of protective

tariffs was undeniable, and that any arguments against tariff legislation could not rest on the grounds that protective tariffs were unconstitutional.¹

Opposition to protective tariffs was strong in the South due to the agricultural economy of the region and the quantity of goods imported. The Tariffs of 1816 and 1824 were designed to encourage domestic manufacturing—most of which took place in the North—by raising prices on certain foreign goods. Southern states had very little domestic industry, and thus did not experience the benefits of this economic protection, but simply had to endure the higher prices of the goods they imported. Naturally, because they had no manufacturing, southern states imported more goods than most northern states did, resulting in what the South perceived as an unfair burden in their relation to the tariff; they paid an unequal amount of the tax on foreign goods while experiencing none of the benefits of increased domestic manufacturing. Furthermore, the resulting reduction of foreign goods exported—particularly from Britain—to the United States resulted in a decrease in the amount of cotton those countries were able to import from the southern states. Thus, the South was inequitably burdened by protective tariffs, and as the 1820s went on, dissatisfaction with the tariff continued to grow.²

In 1824, during congressional debate on the tariff, Madison delineated his own views on the advisability and dangers of the tariff in a letter to Thomas Cooper—a political disciple and friend—before the argument against the tariff’s constitutionality had become widespread. Madison began by pointing out his advocacy of a general laissez-

¹ Madison to Richard Rush, 17 January 1829, *Letters and Other Writings of James Madison: Fourth President of the United States*, eds. William C. Rives and Philip R. Fendall, 4 vols. (Philadelphia: J. B. Lippincott & Co., 1865), 4: 6.

² Drew R. McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* (New York: Cambridge University Press, 1989), 120.

faire policy on the part of the government, arguing that the “industrious pursuits of individuals ought to be left to individuals, as most capable of choosing & managing them.”³ Economic freedom was the standard to protect, and thus the question was what the exceptions were to this rule. That there were indeed exceptions, Madison said, seemed “to be not sufficiently impressed on some of the opponents of the Tariff. Its votaries on the other hand, some of them at least, convert the exceptions into the rule, & would make the Government, a general supervisor of individual concerns.”⁴ These overzealous supporters, Madison believed, represented a danger in that they could carry the principles of economic protection too far, and apply them in situations to which they ought not be applied. Still, those who denied the necessity of some economic protection for certain times and industries were also unwise, as Madison believed that there were definitely necessary exceptions to the principle of free trade.⁵

As Madison saw it, there were four main exceptions to free trade and industry, “which as a general principle, has been so unanswerably established.”⁶ Protective duties should be employed, he argued, to those articles that were necessary for national defense, and articles “of a use too indispensable to be subjected to foreign contingencies.”⁷ The third case was when “a manufacture, once brought into activity, would support itself” and

³ Madison to Thomas Cooper, 23 March 1824, *The Writings of James Madison, Comprising his Public Papers and Private Correspondence*, ed. Gaillard Hunt, 9 vols. (New York: G. P. Putnam’s Sons, 1900-1910), 9: 178.

⁴ Ibid.

⁵ Ibid., 178-179.

⁶ Ibid., 179.

⁷ Madison to Henry Clay, 1 April 1824, *ibid.*, 184-185.

quickly profit the nation, without requiring maintenance of the protective duty indefinitely. Madison believed an example of this was the cotton industry, which would not have developed for some time if it had not been “stimulated by the effect of the late war [of 1812],” yet had already “reached a maturity, which not only supplies the home market, but faces its rivals in foreign ones.”⁸ The fourth case for exception was related to the effect that war had on imported goods. Madison argued that if “peace furnishes supplies from abroad, cheaper than they can be made at home, the cost in war, may exceed that at which they could be afforded at home.” Thus, he argued that those goods should be subject to a tax during peacetime, prescribing that the “war price should be compared with the peace price, and the war periods with the peace periods...and that from these data, should be deduced the tax, that could be afforded in peace, in order to avoid the tax imposed by war.”⁹

In spite of these exceptions, Madison still advised caution. He argued that the government should refrain from meddling too much in the economy, especially in cases of a dubious nature, and that domestic manufacturers and other proponents of the tariff should remember that intervention ought indeed to be the exception, not the rule. He advised that “particular caution should be observed, where one part of the community would be favored at the expense of another.”¹⁰

Turning to his own concern for minority protection from majority oppression, he reminded Cooper, “In Governments, independent of the people, the danger of oppression

⁸ Madison to Cooper, 23 March 1824, *ibid.*, 179.

⁹ *Ibid.*, 180.

¹⁰ *Ibid.*

is from the will of the former. In Governments, where the will of the people prevails, the danger of injustice arises from the interest, real or supposed, which a majority may have in trespassing on that of the minority.”¹¹ Going back to his arguments from *The Federalist* over three decades earlier, he argued that this danger had been more prominent in small republics throughout history, and believed that “the extent & peculiar structure of ours, are the safeguards on which we must rely, and altho’ they may occasionally somewhat disappoint us, we have a consolation always, in the greater abuses inseparable from Governments less free.”¹²

Writing to Henry Clay the following April, Madison expressed some concern about the proposed tariff. He stated that he could not “concur in the extent to which the pending Bill carries the Tariff, nor in some of the reasonings by which it is advocated.”¹³ He argued that the bill carried the principle of protection too far, and believed that many of the goals propounded by the bill could be achieved without legislative interference. He outlined his four exceptions to Clay, and argued that, if the government adhered closely to those exceptions, it would give way to “a moderate tariff that would at once answer the purpose of revenue, and foster domestic manufactures.” The tariff, as proposed, Madison said, would “disappoint the calculations both of its friends & of its adversaries,” as well as those “who expect it to put an end to an unfavorable balance of trade.”¹⁴ In spite of these concerns and his apparent disapproval of the Tariff of 1824,

¹¹ Ibid.

¹² Ibid., 180-181.

¹³ Madison to Clay, 1 April 1824, *ibid.*, 183.

¹⁴ Ibid., 186.

Madison did not express great alarm, and he certainly never questioned it on constitutional grounds—only on practical political and economic grounds. The thought that a protective tariff was unconstitutional never occurred to Madison; however, he would be forced to deal with the question in the following years.

The novel argument that the tariff was unconstitutional developed during the 1820s, maturing in the latter part of the decade, and it baffled to Madison. During congressional debate on the Tariff of 1824, representative Philip P. Barbour of Orange County, Virginia made the first systematic argument against the tariff on constitutional grounds.¹⁵ Shortly thereafter, in 1827, Governor William Giles of Virginia, in possession of a letter from the late Thomas Jefferson, “took the Virginia legislature with him in explicitly denying the constitutionality of federal tariff laws,” though the legislature did not claim to nullify those laws as South Carolina would in the following years.¹⁶ All of this caught Madison off guard, who believed that the constitutional vindication for protective tariffs went back at least to the congressional proceedings of the 1790s. In a letter to Joseph Cabell (who was against the state’s recent pronouncements regarding the tariff), Madison expressed his opinion that the “extreme to which the Resolution goes in declaring the protecting duty as it is called unconstitutional is deeply to be regretted. It is a ground which cannot be maintained, on which the State will probably stand alone.”¹⁷

Madison then outlined specific arguments defending the tariff on constitutional grounds. He argued that the power to regulate commerce, given to Congress in Article I,

¹⁵ Merrill D. Peterson, *Olive Branch and Sword: The Compromise of 1833* (Baton Rouge: Louisiana State University Press, 1982), 13-14.

¹⁶ McCoy, *The Last of the Fathers*, 124.

¹⁷ Madison to Cabell, 22 March 1827, *Writings of James Madison*, 9: 284.

Section 8 of the Constitution, “is to be sought in the general use of the phrase, in other words, in the objects generally understood to be embraced by the power, when it was inserted in the Constitution.”¹⁸ He argued that such a power had been applied in the form of a protective tariff by “every existing Commercial Nation,” including Great Britain, “whose commercial vocabulary is the Parent of ours.” Also, in response to the claim that protective duties could only be instituted by the individual states, Madison argued that the inefficacy of that very policy was “among the arguments & inducements for revising the Old Confederation,” and for transferring the power to regulate trade to the general government.¹⁹ He stated that the proceedings and debates of the First Congress under the Constitution indicated that the power “was generally, *perhaps* universally, regarded as indisputable” and that all the succeeding Congresses and every president from Washington to John Quincy Adams had recognized the legitimacy of a protective tariff designed to promote domestic manufacturing.²⁰ No state or individual during those first four decades under the Constitution, Madison argued, had ever denied the tariff’s constitutionality until Virginia in 1827. To overturn such a policy, derived from and sanctioned by the Constitution and approved by the nation consistently for forty years, would not only be foolish, but would create a precedent that every new Congress could “disregard a meaning of the [Constitution] uniformly sustained by their predecessors”; such a situation would lead to uncertainty and volatility in the nation’s political system.²¹

¹⁸ Ibid., 284-285.

¹⁹ Ibid., 285.

²⁰ Ibid., 286 (emphasis in original).

²¹ Ibid., 286-287.

Madison then addressed a key point in the debate, a point that he would come back to after the publication of South Carolina’s “Exposition and Protest” and during the Nullification Crisis. Madison commented that, in interpreting the Constitution, “it is as essential as it is obvious, that the distinction should be kept in view, between the usurpation, and the abuse of a power.”²² A protective tariff could certainly “be abused by its excess, by its partiality, or by a noxious selection of its objects.” This was the case with every legitimate constitutional power, including “that of imposing indirect taxes, though limited to the object of revenue.”²³ Intemperance in exercising constitutional powers could certainly be a problem, but those powers—even if abused—were still constitutional. If the government assumed a power not delegated to it—or worse yet, strictly prohibited—then there was cause for real alarm. But the abuse of legitimate powers could not “be regarded as a breach of the fundamental compact, till it reaches a degree of oppression, so iniquitous and intolerable as to justify civil war, or disunion pregnant with wars, then to be foreign ones.”²⁴ Perhaps, Madison believed that there was reason to be concerned with federal tariff policy; but no matter how unwise the new tariff was, it could not be called unconstitutional. He went on to ask, if mere inequality in imposing taxes or other acts was synonymous with unconstitutionality, “is there a State in the Union whose constitution would be safe?” Clearly, Madison said, those who sought

²² Ibid., 287.

²³ Ibid.

²⁴ Ibid.

to attack the tariff on constitutional grounds had no basis for their argument, even if they did have some reason for concern.²⁵

In spite of the constitutional inaccuracies circulating in Virginia and other parts of the nation, Madison was hesitant to involve himself publicly in the debate. The letters he had written on the topic up to this point were private, and known only to those who maintained close contact with him. He harbored a general fear that “the political atmosphere is too turbid every where for distinct views of any subject of a political complexion.”²⁶ The nation was preparing for the election of 1828, and partisanship was higher than ever before; thus, Madison was determined “to keep aloof from the political agitations of the period.”²⁷ Many people, including his friend Joseph Cabell, attempted to recruit Madison to campaign against Andrew Jackson, to “save the republic,” indicating to Madison just how extreme partisanship had become.²⁸ This caused him to conclude that “the extravagances produced by the Presidential contest,” had assumed “forms that cannot be too much deplored.” The debates over the tariff and internal improvements, which were already divisive on their own, “are blended with and greatly increase the flame kindled by the Electioneering zeal.”²⁹

It was for this reason—in addition to his general desire to remain politically neutral during his retirement from public life—that he refused to serve as an elector in the

²⁵ Ibid.

²⁶ Madison to Nicholas P. Trist, 7 February 1827, *Letters and Other Writings*, 3: 551.

²⁷ Madison to James Monroe, 18 December 1827, *ibid.*, 602.

²⁸ McCoy, *The Last of the Fathers*, 125.

²⁹ Madison to the Marquis de Lafayette, 20 February 1828, *Writings of James Madison*, 9: 308.

1828 contest, after being nominated by the Virginia legislature.³⁰ In his request that another elector be chosen in his stead, he indirectly involved himself the election by attempting to discourage “the violent manner in which the contest is carried on.”³¹ After expressing his wish to avoid “scenes of political agitation and excitement” and activities “of a party character” during his retirement, he expressed his firm desire that the debates of the presidential contest “be conducted in a spirit and manner, neither unfavorable to a dispassionate result, nor unworthy of the great & advancing cause of Representative Government.”³² A main participant in the partisan conflicts of the 1790s, Madison was well aware of the dangers that partisanship represented. When coupled with the contentious tariff debate, the passions inspired by the election represented a predicament that threatened to divide the nation; it was Madison’s wish that such an event never occur.

Though Madison wanted to avoid involving himself publicly in the tariff debate, the spread of anti-tariff sentiment to South Carolina inspired him to speak out against that constitutional misconstruction. He abhorred “the lengths into which some of our politicians are running” and “the erroneous constructions of the Constitution,” as signs of the madness brought on by partisanship.³³ But, he was hesitant to involve himself in the debate, for fear of appearing or being portrayed as partisan. He also wished to avoid having his name dragged into the presidential election, the dirtiest one in American

³⁰ Ibid., 309; Madison to Francis Brooke, 22 February 1828, *ibid.*, 309n-310n.

³¹ Madison to Lafayette, 20 February 1828, *ibid.*, 309.

³² Madison to Brooke, 22 February 1828, *ibid.*, 310n.

³³ Madison to Jonathan Roberts, 29 February 1828, *Letters and Other Writings*, 3: 625.

history up to that point. But, when Thomas Lehre wrote from South Carolina that in that state, “disunion is now publicly spoken of & advocated” due to hatred of the Tariff of 1828, Madison expressed great surprise and concern.³⁴ He realized that he had been wrong; Virginia would not stand alone in its denunciation of the tariff. He thus consented to the publication of two letters he wrote to Joseph Cabell in the autumn of 1828; however, Madison was emphatic that the letters not be published until after the election, when the public mind would be in a more reasonable state. The letters appeared in the Washington *National Intelligencer* on December 22, 23, and 25 of that year.³⁵

In the letters, Madison laid out what he believed to be an unequivocal defense of the constitutionality of protective tariffs in the United States. As in his letter to Cabell the previous year, Madison argued that the vindication for protective tariffs came from Congress’ enumerated power to lay and collect taxes, duties, imposts, and excises, and from its power to regulate trade.³⁶ The two powers were directly related, and gave Congress the power to institute tariffs not only for the purpose of raising revenue, but also for the purpose of protecting and encouraging domestic manufacturing.³⁷ That this was indeed the case was evidenced by the understanding among the delegates to the Constitutional Convention, by the example of other commercial nations—especially Great Britain—and by the expectations of the members of the state ratifying conventions. Madison pointed to the ratifying debate in Massachusetts, in which an advocate for the

³⁴ Thomas Lehre to Madison, July 1828, *Writings of James Madison*, 9: 314n; Madison to Lehre (not sent), 2 August 1828, *Writings of James Madison*, 9: 315-316.

³⁵ Madison to Cabell, 15 October 1828, *ibid.*, 316n-317n.

³⁶ Madison to Cabell, 18 September 1828, *ibid.*, 317.

³⁷ *Ibid.*, 328.

Constitution argued, “If we wish to *encourage our own manufactures*, to preserve our own commerce, to raise the value of our own lands, we must give Congress the powers in question.”³⁸ Both Federalists and Anti-Federalists, Madison argued, accepted the fact that encouraging manufacturing would be included in Congress’ powers to tax and regulate trade. During the Confederation period, that power had been vested in the individual states; the inefficacy of that method was a prime reason for the desire to give the power of regulating trade and encouraging domestic manufacturing to the new national government. It was clear, Madison argued, “that it must have been the intention of those who framed and ratified the Constitution, to vest the authority in question in the substituted Government.”³⁹

In addition, the members of the First Congress further affirmed the constitutional power to encourage domestic manufacturing via protective tariffs. Madison argued that the members of that body, which included individuals who had framed and ratified the Constitution—both Federalists and Anti-Federalists—all agreed that the “encouragement of Manufactures, was an object of the power to regulate trade.” Indeed, he noted, “It does not appear from the printed proceedings of Congress on that occasion that the power was denied by any of them.”⁴⁰ Madison remarked that congressmen from Virginia in particular “did not hesitate to propose duties, & to suggest even prohibitions, in favor of several articles of her production.”⁴¹ Furthermore, Madison argued, an evidence “that

³⁸ Ibid., 329 (emphasis in original).

³⁹ Madison to Cabell, 30 October 1828, *ibid.*, 323n.

⁴⁰ Madison to Cabell, 18 September 1828, *ibid.*, 332.

⁴¹ *Ibid.*, 332-333.

ought of itself to settle the question, is the uniform & practical sanction given to the power, by the Gen[eral] Gov[ernment] for nearly 40 years with a concurrence or acquiescence of every State Gov[ernment] throughout the same period” and every political party. No novel construction, “however ingeniously devised,” bore any credence or authority when weighed against “the unbroken current of so prolonged & universal a practice.” Such a break with tradition and precedent could only occur with “the intervention of the same authority which made the Constitution.”⁴² In other words, if those opposed to the tariff wanted to eliminate protective duties and economic protection, they could only do so with a constitutional amendment.

Madison argued that to deny Congress’ power to institute protective tariffs would introduce a dangerous precedent that would lead to instability. To reject the legitimacy of such a consistently affirmed power suddenly would bring “an end to that stability in Gov[ernment] and in Laws which is essential to good Gov[ernment] & good Laws.” Such volatility represented “the imputation which has at all times been levelled [*sic*] against Republicanism with most effect by its most dexterous adversaries.”⁴³ If the people of the United States allowed the standard for constitutionality to become “the opinion of every new Legislature,” then it would mean that “every new Legislative opinion might make a new Constitution.” Madison implored the people not to be taken in by the constitutional heresies that were spreading throughout Virginia and the South, and to rely instead on sound constitutional principles and the facts of history.⁴⁴

⁴² Ibid., 333.

⁴³ Ibid.

⁴⁴ Ibid., 334.

Unfortunately for Madison, the greatest challenge to the tariff—and the strongest declaration of state sovereignty yet—came three days before his letters appeared in the *National Intelligencer*, in the form of the South Carolina “Exposition and Protest.” Though passed by the South Carolina state legislature, the declarations’ anonymous author was John C. Calhoun, the Vice President of the United States. Actually two resolutions, the “Exposition” was not adopted by the South Carolina Legislature, but the “Protest” was. Additionally, four thousand copies of the “Exposition” were made and distributed to the public.⁴⁵ The “Exposition and Protest” rejected the constitutionality of protective tariffs, and claimed that each state, as a sovereign party to the constitutional compact, reserved the right to judge for itself the constitutionality of federal laws, and to nullify those that were unconstitutional.⁴⁶

The “Exposition” began with an indictment of the inequity and unconstitutionality of federal protective tariffs. Calhoun argued that the general government could “rightfully exercise only the powers expressly granted, and those that may be ‘necessary and proper’ to carry them into effect; all others being reserved expressly to the States, or to the people.” Thus, to exercise a power under the Constitution, proponents had to show that the power was expressly granted. “The advocates of the Tariff,” Calhoun argued, “have offered no such proof.”⁴⁷ Calhoun denied the validity of precedent in this matter, claiming that tariffs before the 1820s had only been designed to raise revenue, and any

⁴⁵ “South Carolina Exposition and Protest,” editorial note, *The Papers of John C. Calhoun*, eds., Clyde N. Wilson and W. Edwin Hemphill, 28 vols. (Columbia: University of South Carolina Press, 1959-2003), 10: 442-443.

⁴⁶ “South Carolina Exposition,” 19 December 1828, *ibid.*, 445, 499, 513.

⁴⁷ *Ibid.*, 445.

protection or encouragement of manufactures resulting from these duties had only been incidental. In this incidental way, Congress could encourage manufacturing only as a natural byproduct of import taxes; it was the deliberate way that the Tariff of 1828 encouraged domestic manufacturing that was unconstitutional, Calhoun claimed.⁴⁸ Because South Carolina was an agrarian state, Calhoun said, such a blatantly protective tariff affected them unequally; they bore a higher level of the cost—having to import many goods, as they had little to no manufacturing in the state—and received none of the benefits. Because of this inequity and the fact that protective tariffs were not expressly recognized in the Constitution, the Tariff of 1828, Calhoun claimed, was unconstitutional.⁴⁹

Calhoun then delineated his theory of the constitutional compact and state sovereignty. He claimed that the system of governance in the United States consisted “of two distinct and independent sovereignties,” the general government existing exclusively in its sphere, and the states existing exclusively in their particular and local spheres. Neither could “interpose their authority to check” the movements of the other, so long as each stayed in its proper sphere.⁵⁰ However, the states, in which “the actual sovereign power” of the United States resided, reserved the right to judge infractions of their sovereign rights by the general government.⁵¹ Calhoun claimed that “not the least portion of this high sovereign authority, resides in Congress or any of the departments of the

⁴⁸ Ibid., 447.

⁴⁹ Ibid., 459.

⁵⁰ Ibid., 497.

⁵¹ Ibid., 497, 507.

General Government. They are but the creatures of the Constitution,” while the Constitution itself had left the states “distinct and independent.”⁵² As distinct, independent, sovereign entities, the states could not be deprived of their right to judge infractions of their rights, for such a deprivation would result in the loss of their sovereignty. Thus, Calhoun claimed, each state reserved the right to interpose to arrest the execution of an unconstitutional law such as the tariff.⁵³

For vindication of these views and the right of interposition, Calhoun appealed repeatedly to James Madison, Thomas Jefferson, and their Virginia and Kentucky Resolutions. He pointed to Madison’s statement in the Report of 1800 that “the States then being parties to the constitutional compact, and in their sovereign capacity, it follows of necessity, that there can be no tribunal above their authority to decide in the last resort, whether the compact made by them be violated.”⁵⁴ Similarly, Calhoun pointed to Jefferson’s statement that “the government created by this compact was not made the exclusive, or final judge of the extent of the power delegated to itself...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.”⁵⁵ Calhoun used these statements as justification for his own belief that the states were to be the final judges of infractions against them. Additionally, he claimed to take the entire basis for nullification from the principles found in the Virginia and

⁵² Ibid., 499. For more on Calhoun’s political thought and his view of sovereignty, see William W. Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816-1836* (New York: Harper & Row, 1965), 154-173.

⁵³ Ibid., 507.

⁵⁴ Ibid., 509.

⁵⁵ Ibid., 509-510.

Kentucky Resolutions. Jefferson and Madison in 1798, he argued, were the first to espouse the idea that a state could nullify an unconstitutional national law, and to formulate an authoritative statement of state sovereignty. It was this claim that proved the most distressing to Madison in the following years.

Unlike Jefferson's and Madison's Resolutions, however, which were somewhat ambiguous in terms of execution, Calhoun's doctrine included a set of formal procedures for implementing nullification. Once a state chose to nullify a law, the offending law would be suspended throughout the nation until three-fourths of the states granted the disputed power to the federal government officially via a constitutional amendment. In this way, "if the decision is favourable to the General Government, a disputed constructive power, will be converted into a certain and express grant. On the other hand, if it be adverse, the refusing to grant will be tantamount to inhibiting its exercise; and thus in either case the controversy will be peaceably determined."⁵⁶

Though South Carolina declared its sentiment that the Tariff of 1828 was unconstitutional, it did not attempt to nullify the law immediately. The "Exposition" stated that there certainly "exists a case which would justify the interposition of the State, and thereby compel the General Government to abandon an unconstitutional power, or to make an appeal to the amending power to confer it by express grant." But because of "respect for the other members of the confederacy," South Carolina decided to "allow time for further consideration and reflection," in hopes that the national government would reconsider the law without forcing the state to resort to the right of interposition.⁵⁷

⁵⁶ Ibid., 521.

⁵⁷ Ibid., 529.

Thus, in the “Protest,” South Carolina stated that it was the state’s duty “to expose and to resist all encroachments upon the true spirit of the Constitution, lest an apparent acquiescence in the system of protecting duties should be drawn into precedent,” and thereby declared its protest that the tariff was “unconstitutional, oppressive, and unjust.”⁵⁸ With Andrew Jackson recently elected president, anti-tariff forces were optimistic that he would reduce or eliminate this “Tariff of Abominations.”⁵⁹ Thus, for now, South Carolina’s expression that the tariff was unconstitutional did not amount to a formal nullification of the law. But the state had outlined the justification and methods it would use four years later during the Nullification Crisis.

The South Carolina declaration disturbed Madison, who decried it as “a preposterous and anarchical pretension.”⁶⁰ Indeed, he asserted that Calhoun’s doctrine would “convert the Federal Government into a mere league, which would quickly throw the States back into a chaos, out of which, not order a second time, but lasting disorders of the worst kind, could not fail to grow.”⁶¹ In spite of his aggravation by this constitutional heresy, Madison was wary to involve himself publicly to denounce the doctrines. The negative public reaction to his published letters to Cabell had confirmed his doubts about getting involved in the debate on the issue. This encouraged him to avoid any more public statements on the topic, and to leave the defense of the

⁵⁸ “South Carolina Protest,” 19 December 1828, *ibid.*, 539.

⁵⁹ “South Carolina Exposition,” 19 December 1828, *ibid.*, 531.

⁶⁰ McCoy, *The Last of the Fathers*, 132.

⁶¹ Madison to Richard Rush, 17 January 1829, *Letters and Other Writings*, 4: 6.

Constitution to other men.⁶² He did not attempt to hide his “surprise and sorrow at the proceedings in S. Carolina,” but all the same, he was “unwilling to enter the political field” with the authority that he alone carried, as the last surviving member of that generation that brought independence and a more perfect union to the United States. He insisted, at the beginning of 1829, that “the task of combating such unhappy aberrations belongs to other hands.”⁶³ However, the spread of the doctrine’s popularity, the increasingly dire political situation, and—perhaps most importantly—the Exposition’s reliance on Madison’s Virginia Resolutions, prompted a public response from him, in which he attempted to deny his parentage of the doctrine and correct both the misinterpretation of the “principles of ’98” and the misunderstanding of the nature of the Union.

⁶² Madison to Cabell, 2 February 1829, *ibid.*, 11.

⁶³ Madison to Trist, 15 February 1829, *Writings of James Madison*, 9: 357n.

CHAPTER III

THE VIRGINIA RESOLUTIONS, NULLIFICATION, AND THE NATURE OF THE UNION

South Carolina's "Exposition and Protest," put forth in December 1828, troubled James Madison. In spite of the inaccuracies and constitutional heresies found in John C. Calhoun's declaration of state sovereignty and the right of interposition, the "Father of the Constitution" was hesitant to involve himself in such a partisan debate. Bruised from his public defense of the tariff that same year, Madison had decided to let the younger generation handle its own controversies, confident that able defenders of the Constitution would arise. However, by 1830, he realized that the debate over the tariff and nullification had not diminished, but was, in fact, intensifying.

In January of that year, a debate on the floor of the Senate between Daniel Webster of Massachusetts and Robert Hayne of South Carolina brought the issues of nullification and state sovereignty to the forefront of public consciousness. No longer localized to South Carolina radicals, the doctrine of nullification became a full-fledged national issue. In this debate, Hayne adhered to the constitutional theories advanced in his state's recent "Exposition and Protest," and looked to Jefferson and Madison's Kentucky and Virginia Resolutions to justify his position, as Calhoun had done in the

“Exposition.”¹ It then became apparent to Madison that he could not stay out of the debate; if he was not the innovator of nullification, he would have to prove it himself. He did just that in August 1830, writing a carefully argued letter for publication in the *North American Review* designed to correct the constitutional errors attributed to him and to combat the doctrine of nullification. In this and other writings, Madison asserted that the nullifiers misunderstood the formation of the Union and the nature of sovereignty in the United States, and that their appeal to the Virginia Resolutions as justification for their doctrines was based on a misconstruction of the text.²

In January 1830, a Senate debate over land sales in the West evolved into an oratorical contest between Senators Daniel Webster and Robert Hayne over the nature of the Union and the right of interposition. Both men put forth their respective views on the formation of the Union under the Constitution and debated the validity of nullification and the meaning of the Virginia and Kentucky Resolutions.³ These speeches, in many ways, exemplified the differences in essential principles and constitutional theories between nationalists—represented by Webster—and nullifiers—represented by Hayne—in the 1830s. Madison’s response to the principles delineated in these speeches, though written mostly in reply to Hayne and the claim that nullification derived from the Virginia Resolutions, also differed significantly from Webster’s presentation. Thus, Madison’s thinking on the matter represented a third interpretation on the subject of

¹ Robert Y. Hayne, “Speech of 27 January 1830,” *The Webster-Hayne Debate on the Nature of the Union*, ed. Herman Belz (Indianapolis: Liberty Fund, 2000), 177-180.

² James Madison to Edward Everett, 28 August 1830, *The Writings of James Madison, Comprising his Public Papers and Private Correspondence*, ed. Gaillard Hunt, 9 vols. (New York: G. P. Putnam’s Sons, 1900-1910), 9: 383.

³ Hayne, “Speech of 25 January 1830” and “Speech of 27 January 1830,” *The Webster-Hayne Debate*, 73-76, 168-170, 177-180; Daniel Webster, “Speech of January 26 and 27,” *ibid.*, 135-138, 151-153.

nationalism versus states' rights, which he considered to embody the intended relationship between the states and the national government, and the true nature of the Union.⁴

In the Senate debate, Hayne appealed directly to the Virginia and Kentucky Resolutions as the original nullifying doctrines. He declared that the so-called "South Carolina doctrine," as put forth in the "Exposition and Protest" of 1828, was really "the good old Republican doctrine of '98, the doctrine of the celebrated 'Virginia Resolutions,' of that year."⁵ Looking to Madison and his collaborator, the late Thomas Jefferson, Hayne defended nullification as being—not descended from or related to—but the very same doctrine and principle established in the Virginia and Kentucky Resolutions. He referred to passages from the Resolutions and from Madison's "Report of 1800" to justify this claim, and to give authority and validity to nullification.⁶ Hayne quoted the passage from the Virginia Resolutions that stated, in the case of a "deliberate, palpable, and dangerous exercise of other powers not granted by the said compact, the States, who are parties thereto, 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."⁷ Then, quoting from Madison's

⁴ Madison to Robert Hayne, [3 or 4] April 1830, *Writings of James Madison*, 9: 383n; Madison to Everett, 28 August 1830, *Writings of James Madison*, 9: 385-392; Madison to Daniel Webster, 15 March 1833, *Letters and Other Writings of James Madison: Fourth President of the United States*, eds. William C. Rives and Philip R. Fendall, 4 vols. (Philadelphia: J. B. Lippincott & Co., 1865), 4: 293-294. For a full discussion of the differences between nationalists, nullifiers, and traditional proponents of states' rights, and how these three groups interacted during the Nullification Crisis, see Richard E. Ellis, *The Union at Risk: Jacksonian Democracy, States' Rights, and the Nullification Crisis* (New York: Oxford University Press, 1987).

⁵ Hayne, "Speech of 25 January 1830," *The Webster-Hayne Debate*, 73.

⁶ *Ibid.*, 73-76.

⁷ *Ibid.*, 74.

“Report of 1800,” Hayne argued that “there can be no tribunal above [the states’] authority, to decide, in the last resort, whether the compact made by them be violated; and, consequently, that, as the parties to it, they must themselves decide, in the last resort, such questions as may be of sufficient magnitude to require their interposition.” These passages proved, according to Hayne, that Jefferson and Madison established nullification as a legitimate constitutional process in 1798.⁸

In addition to looking to Jefferson and Madison to vindicate South Carolina’s nullifying doctrine, Hayne appealed to his theory of the formation of the Union and the sovereignty of the states. Like Madison, Hayne viewed the Constitution as a compact to which the states were parties. However, Hayne contended that the parties to the compact—which were sovereign and independent before the creation of that compact—maintained their sovereignty even after they created the new government under the Constitution.⁹ The Constitution was thus “a compact by which each State, acting in its sovereign capacity, has entered into an agreement with the other States, by which they have consented that certain designated powers shall be exercised by the United States, in the manner prescribed in the instrument.” Thus, working from the Tenth Amendment to the Constitution, Hayne argued that the federal government could not exercise any powers not delegated to it, and that “all such acts are void.” A state, on the other hand, which retained “all powers not expressly given away, may lawfully act in all cases where she has not voluntarily imposed restrictions on herself.”¹⁰ As all parties to the compact

⁸ Ibid., 75.

⁹ Hayne, “Speech of 27 January 1830,” *ibid.*, 165.

¹⁰ *Ibid.*

were equally sovereign and had no superior, “the parties to the compact must, themselves, be the rightful judges whether the bargain has been pursued or violated.” If it had been, it was the states’ duty to nullify the offending law, because it was a violation of the Constitution and, therefore, not legal.¹¹

To Hayne, each state remained a sovereign and independent entity unto itself. The idea that each state was an equal judge of violations to the compact, was the case “where treaties are formed between independent nations,” and was surely also the case with regard to the Constitution, unless “the Federal is superior to the State Government” or “the States have surrendered their sovereignty.” Hayne argued that the national government could not be superior to the states, because the states had created it through their compact with each other.¹² Thus, he turned to the question of whether the states had “surrendered their sovereignty, and consented to reduce themselves to mere corporations.” He asserted that the entire structure of the federal government, “the opinions of the framers of the Constitution, and the organization of the State Governments, demonstrate that though the States have surrendered certain specific powers, they have not surrendered their sovereignty.”¹³ Though they had restrained themselves “from doing certain acts,” they were, in all other respects, “as omnipotent as any independent nation whatever.”¹⁴

¹¹ Ibid., 166.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid., 166-167.

Daniel Webster answered Hayne by proposing a strikingly different theory of the creation of the Union under the Constitution. Webster scoffed at Hayne's idea that the Constitution was the creature of the states, indeed "of the States severally; so that each may assert the power, for itself, of determining whether it acts within the limits of its authority," for this would make the federal government "the servant of four-and-twenty masters, of different wills and different purposes, and yet bound to obey all." The error arose, Webster argued, from Hayne's failure to recognize that the Constitution was "the People's Constitution, the People's Government; made for the People; made by the People; and answerable to the People."¹⁵ It was not a compact between the state governments, but as the Constitution itself stated in its preamble, was created and "established *by the People of the United States*. So far from saying that it is established by the Governments of the several States, it does not even say that it is established by the *People of the several States*; but it pronounces that it is established by the People of the United States, in the aggregate."¹⁶ Because the whole people formed the Union, no single state could choose to disobey laws created by the people's agent—the national government.¹⁷

Webster declared that it was the Supreme Court that was to be the final judge on questions of constitutionality. He argued that because the people erected the government and enumerated its powers, if there remained any question as to what the powers of the government were, the answer would come from the people's agent—the government

¹⁵ Webster, "Speech of 26 and 27 January 1830," *ibid.*, 126.

¹⁶ *Ibid.*, 153 (emphasis in original).

¹⁷ *Ibid.*, 137-138.

itself and its appropriate branches, in this case the Supreme Court.¹⁸ Webster justified this claim by pointing to the fact that the Constitution and the laws made under it were to be the “supreme law of the land”; as the judicial power of the United States extended “to all cases arising under the Constitution and Laws of the United States,” the question of constitutional interpretation resided with the judicial branch, via the Supreme Court.¹⁹ The ability to defend and enforce its own laws, Webster argued, was what made the government of the United States a government. To him, the system Hayne suggested would return the United States to their condition under the Articles of Confederation and, with time, the Union would cease to exist. If this was truly the state of things, Webster argued, then there was no point in attempting to maintain the Constitution at all.²⁰

Regarding the Virginia Resolutions, Webster was uncertain of what precisely they meant. He argued that their language was ambiguous and “susceptible of more than one interpretation.” They could have simply intended to interfere with an objectionable law through “complaint and remonstrance; or by proposing to the People an alteration of the Federal Constitution.” Webster had no objections to this view. The other possibility was that the Resolutions only intended “to assert the general right of revolution, as against all Governments, in cases of intolerable oppression.”²¹ This, Webster argued, was the most that Madison could have meant in the Resolutions, for Webster could not “readily believe, that [Madison] was ever of the opinion that a State, under the Constitution, and in conformity with it, could, upon the ground of her own opinion of its

¹⁸ Ibid., 136-137.

¹⁹ Ibid., 137.

²⁰ Ibid.

²¹ Ibid., 135.

unconstitutionality... annul a law of Congress, so far as it should operate on herself, by her own legislative power.”²² Thus, Webster denied that Madison’s Virginia Resolutions ever attempted to nullify, or justify nullification of, federal laws.

Hayne, responding to Webster, denied the idea that the Supreme Court or any other branch of the national government could be the judge of infractions to the constitutional compact. He argued that questions of sovereignty were not the proper subjects of judicial investigation because they were “much too large, and of too delicate a nature,” to be brought under the jurisdiction of the Supreme Court or any other court of justice.²³ Courts were the “mere creatures of the sovereign power” and existed only to “expound and carry into effect its sovereign will. No independent state ever yet submitted to a Judge on the bench the true construction of a compact between itself and another sovereign.”²⁴ The Supreme Court had no jurisdiction over questions arising between sovereigns who were parties to a treaty, and, therefore, the Court had no jurisdiction over “questions arising between the individual States and the United States.”²⁵ Furthermore, the Supreme Court, as part of the national government, could not be trusted to be impartial in conflicts between the national government and the states, and was itself—as an instrument of the government created by the compact—subject to rebuke by the states if it violated or concurred in violations of the Constitution.²⁶ For

²² Ibid.

²³ Hayne, “Speech of 27 January 1830,” *ibid.*, 169.

²⁴ Ibid.

²⁵ Ibid., 170.

²⁶ Ibid., 171-172.

similar reasons, stemming from the fact that it was a branch of the government created by the compact, Hayne denied Congress' authority to be the final judge of its own powers or of breaches of the constitutional compact.²⁷ If no branch or agent of the federal government could be the final judge of infractions to the compact, then, Hayne contended, the power in question was one of those that had been "reserved to the states" via the Tenth Amendment; the ability to arrest and nullify offending laws was inherent in such a power.²⁸

Far from simply using Madison's authority for his own advantage, Hayne was sincere in his belief that he was presenting Madison's views accurately. Shortly after the debate in the Senate, Hayne sent copies of his speeches to Madison, apparently expecting that he would support Hayne's interpretation. He wrote to Madison, "the Virginia Resolutions of '98 and your admirable Report have almost passed away from the memory of the politicians of the present day." This forgetfulness on their part had "led to the alarming assumptions of power on the part of the federal government, and I feel an entire conviction that nothing can save us from consolidation and its inevitable consequence, the separation of the States, but the restoration of the principles of '98."²⁹

Madison, however, did not affirm Hayne's conviction that he understood the proper nature of the Union and the correct interpretation of the Virginia Resolutions. Though Madison praised "the ability and eloquence" of the speeches, he informed Hayne that there were "doctrines espoused in them from which I am constrained to dissent."

²⁷ Ibid., 172-174.

²⁸ Ibid., 174-175.

²⁹ Hayne to Madison, 5 March 1830, The James Madison Papers, Library of Congress, Washington, DC (microfilm).

Madison made it clear that the particular doctrine he was referring to was the one that asserted that a state had, “singly, a constitutional right to resist & by force annul within itself acts of the Government of the U. S. which it deems unauthorized by the Constitution...although such acts be not within the extreme cases of oppression, which justly absolve the State from the Constitutional compact to which it is a party.”³⁰

Madison then laid out a carefully argued exposition on the true nature of the Union and the meaning of the Virginia Resolutions. When Hayne wrote back months later that he still believed his interpretation was correct, Madison realized that private reproach would not sway the nullifiers or prevent them from misrepresenting his Resolutions.³¹ Thus, he consented to enter the public arena once again to correct the record and provide his explanation of the Virginia Resolutions and the formation of the Union; to this effect, he edited and perfected his letter to Hayne, and sent it to Edward Everett for publication in the *North American Review*.³²

In his letter, Madison explained that most of the nullifiers’ errors stemmed from a fundamental misunderstanding of the creation of the Union and a failure to recognize the unique nature of the United States. He argued that, to understand the “true character of the Constitution...the error, not uncommon, must be avoided, of viewing it through the medium either of a consolidated Government or of a confederated Government whilst it is neither the one nor the other, but a mixture of both.”³³ Because of the uniqueness of

³⁰ Madison to Hayne, [3 or 4] April 1830, *Writings of James Madison*, 9: 383n.

³¹ Hayne to Madison, 22 July 1830, Madison Papers, Library of Congress (microfilm).

³² Madison to Everett, 28 August 1830, *Writings of James Madison*, 9: 383 and note.

³³ *Ibid.*, 384.

the government of the United States, no other governments or foreign precedents could “furnish a key to its true character.” While other governments presented “an individual & indivisible sovereignty,” the Constitution divided sovereignty between the state and national governments, each holding specified powers within their respective spheres.³⁴ This being the case, the peculiar system of the United States had to “be its own interpreter, according to its text & *the facts of the case*.”³⁵ From those, Madison argued, it was apparent that the characteristic peculiarities of the Constitution were “the mode of its formation” and the division “of the supreme powers of Gov[ernment] between the States in their united capacity and the States in their individual capacities.”³⁶

Madison then presented his view of how the Union was formed under the Constitution. The Constitution was not created, he argued, “by the Governments of the component States,” as the Articles of Confederation had been; nor was it “formed by a majority of the people of the U. S. as a single community in the manner of a consolidated Government.”³⁷ Instead, the Union had been formed “by the States—that is by the people in each of the States, acting in their highest sovereign capacity; and formed, consequently by the same authority which formed the State Constitutions.”³⁸ This was why state ratifying conventions had ratified the Constitution, instead of the state legislatures; it had to be created by the people of the states, acting in their “highest

³⁴ Madison to Nicholas P. Trist, 15 February 1830, *ibid.*, 354n.

³⁵ Madison to Everett, 28 August 1830, *ibid.*, 385 (emphasis in original).

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*, 386. See also Madison, “Outline,” September 1829, *ibid.*, 352.

sovereign capacity” as members of a political community. Because the Constitution derived from the same source as the state constitutions (the people of the several states), it had “within each State, the same authority as the Constitution of the State,” and was “as much a Constitution, in the strict sense of the term, within its prescribed sphere, as the Constitutions of the States are within their respective spheres.”³⁹ There was, however, one essential difference between the Constitution and the state constitutions: “being a compact among the States in their highest sovereign capacity, and constituting the people thereof one people for certain purposes, it cannot be altered or annulled at the will of the states individually, as the Constitution of a State may be at its individual will.”⁴⁰ Thus, Madison used the argument of compact among the states to deny the authority of a state to nullify a law that affected all the parties to the compact, whereas Calhoun and Hayne had used the idea of compact to justify each state’s individual authority to veto national laws.⁴¹

After establishing the fact that the people of the states created the Constitution, Madison emphasized the importance of divided sovereignty and shared power in the United States. When the people of the states formed the Constitution, he argued, they enumerated certain powers to the national government and reserved others to the states. In as much as the individual states gave up their sovereign authority in certain spheres—

³⁹ Madison to Everett, 28 August 1830, *ibid.*, 386.

⁴⁰ *Ibid.*, 386-387.

⁴¹ Kevin R. Gutzman contends that Madison shifted to a nationalistic, consolidationist view of the Union in the 1830s and abandoned his earlier stance that had favored states’ rights. This statement from Madison, however, illustrates that he adhered to a third view of the Union, distinct from nullifiers and nationalists, declaring that the Union was formed by the people of the states. Because he was combating the nullifiers primarily, he emphasized the sovereignty of the national government in the 1830s. To call him a nationalist, however, ignores the nuances of Madison’s position, grounded in the unique system of the United States. Kevin Raeder Gutzman, “From Interposition to Nullification: Peripheries and Center in the Thought of James Madison,” *Essays in History* 36 (1994), 107, 110-113.

waging war, raising armies, regulating commerce, and signing treaties, among others—they gave up a certain amount of their total sovereignty to the general government—to the union of the states—while retaining sovereignty within their individual spheres. In this way, sovereignty was divided, and neither the individual state governments nor the national government was completely sovereign or subordinate to the other—but each had authority in their respective spheres.⁴²

Disagreements regarding boundaries of jurisdiction were sure to arise, Madison argued, but the proper judge in such cases was not and could not be the individual states. If such a power were left to the states, the Constitution and laws of the United States would be different in each state; such a diversity of decisions and interpretations would “altogether distract the Gov[ernment] of the Union & speedily put an end to the Union itself.” Some of the most important laws “could not be partially executed. They must be executed in all the States or they could be duly executed in none.”⁴³ This was especially the case with regard to imposts and excise taxes. If not enforced uniformly throughout all the states, they would cease to be expedient at all. The need for such uniformity was “among the lessons of experience which had a primary influence in bringing about the existing Constitution” and abandoning the Articles of Confederation.⁴⁴ Allowing the states, separately, to judge disputes over sovereignty and jurisdiction would “unavoidably produce collisions incompatible with the peace of society, & with that regular & efficient

⁴² Ibid., 387-388. See also Madison, “Outline,” September 1829, *ibid.*, 352-353.

⁴³ Madison to Everett, 28 August 1830, *ibid.*, 390.

⁴⁴ *Ibid.*

administration which is the essence of free Governments.”⁴⁵ Similarly, negotiation between the national government and the state governments would not work for resolving disputes, as each possessed “all the Departments of an organized Government” and a “physical force to support its pretensions.” Surely, “an unaccommodating spirit in some” would force matters to the most dangerous extreme in nearly every case.⁴⁶

To guard against unconstitutional usurpations of authority, Madison looked to the structure of the government of the United States. On the one hand, he pointed to the Constitution’s provisions that it and laws made under its authority were to be the “supreme law of the land,” that the judges of every state were bound by those laws, and that the judicial power of the United States extended “to all cases in law & equity arising under the Constitution.” These provisions, he argued, ensured the authority of the national government.⁴⁷ But, on the other hand, he pointed to several provisions that protected the rights of the states against encroachment by the federal government. These included the responsibility of senators and representatives to the legislatures and people of the states, the responsibility of the president to the people, and the process of impeachment.⁴⁸ Finally, if all of these constitutional structures failed to secure the “rights of the States against usurpations & abuses on the part” of the national

⁴⁵ Ibid., 391.

⁴⁶ Ibid., 394.

⁴⁷ Ibid., 395.

⁴⁸ Ibid., 396.

government, then the answer was to amend the Constitution through the prescribed method.⁴⁹

Madison argued that questions over the proper boundaries of state and federal power fell under the authority of the Supreme Court. The judicial branch and the justices who composed the Court were sufficiently independent and capable of impartiality, and though “there have been occasional decisions from the Bench which have incurred serious & extensive disapprobation,” for the most part the decisions and authority of the Court had been “hitherto sustained by the predominant sense of the nation.”⁵⁰ Madison appealed to his *Federalist* 39 to suggest that this had always been an expected power of the judicial branch, and that the Constitution was ratified with this in mind.⁵¹ However, if the Supreme Court did not seem independent or impartial enough, the states could look to or form a different tribunal to decide the question. Madison emphasized, though, that whatever form this took, “it must necessarily derive its authority from the whole not from the parts, from the States in some collective not individual capacity.” Until such a body was created, the existing tribunal—the Supreme Court—had to suffice, and the nullifiers could not simply disregard its authority.⁵²

If all of these legal, constitutional methods and structures failed to protect the rights of the states, then, Madison argued, there remained an appeal to natural rights. When there continued to be “an accumulation of usurpations & abuses, rendering passive

⁴⁹ Ibid., 398.

⁵⁰ Ibid., 397; Madison, “Outline,” September 1829, *ibid.*, 353; Madison to Trist, 15 February 1830, *ibid.*, 355n.

⁵¹ Madison to Everett, 28 August 1830, *ibid.*, 397.

⁵² Madison to Trist, 15 February 1830, *ibid.*, 355n.

obedience & non-resistance [*sic*] a greater evil, than resistance [*sic*] and revolution, there can remain but one resort, the last of all, an appeal from the cancelled obligations of the constitutional compact, to original rights & the law of self-preservation.” Such an act, however, would not be a *constitutional* right, but an “extra & ultra constitutional right,” an appeal to the *natural* right of revolution, retained by the parties to all governments.⁵³ Far from operating within the Constitution and keeping it intact, such an act would dissolve the Constitution entirely.⁵⁴

This being the case, Madison denied the legality and practicality of the doctrine of nullification, in which a single state could annul a national law. In particular, he found fault with the doctrine’s execution, in which the nullified law ceased to be in effect until three-fourths of the states overturned the decision through constitutional amendment. The doctrine’s absurdity was self-evident, Madison asserted, as it gave power to “the smallest fraction over $\frac{1}{4}$ of the U. S.—that is, of 7 States out of 24—to give the law and even the Constitution to 17 States.”⁵⁵ Additionally, Madison argued, in a compact like that of the United States, “each of the parties has an equal right to decide whether [the compact] has or has not been violated and made void.” If one of the parties contended that a particular law was unconstitutional and therefore void, each of the other parties had an equal right to insist that the law was valid.⁵⁶ But even if, in particular instances, the minority was right and the majority was wrong, to “establish a positive & permanent rule

⁵³ Madison to Everett, 28 August 1830, *ibid.*, 398.

⁵⁴ Madison, “Notes on Nullification,” 1835, *ibid.*, 589-590; Madison to Trist, 15 February 1830, *ibid.*, 355n-356n.

⁵⁵ Madison to Everett, 28 August 1830, *ibid.*, 399.

⁵⁶ Madison to C. E. Haynes, 27 August 1832, *ibid.*, 483.

giving such a power to such a minority over such a majority, would overturn the first principle of free Gov[ernment] and in practice necessarily overturn the Gov[ernment] itself.”⁵⁷

The advocates of nullification, Madison argued, disregarded the importance of majority rule and sought protection in an inferior system. To Madison, the quintessential characteristic of republican governments was that “the major will is the ruling will.” To recognize the legitimacy of nullification and declare “that a single State may arrest the operation of a law of the United States,” against the will of the majority, would undo the entire system.⁵⁸ Madison wondered if those who would “rush at once into disunion as an Asylum from offensive measures of the General Government” had properly considered whether “minorities” at the state level would be any more secure against “wrongful proceedings of majorities” within the state.⁵⁹ Indeed, he argued, “a recurrence to the period anterior to the adoption of the existing Constitution, and to some of the causes which led to it, will suggest salutary reflections on this subject.”⁶⁰ The “abuses committed within the individual States” under the Articles of Confederation—which had left the states sovereign—“by interested or misguided majorities, were among the prominent causes” of the adoption of the Constitution. Because the framers of the Constitution believed that majorities would be less able to abuse power in “larger than in the smaller communities,” they decided that, “by dividing the powers of Government and

⁵⁷ Madison to Everett, 28 August 1830, *ibid.*, 399.

⁵⁸ Madison, “Notes on Nullification,” 1835, *ibid.*, 588-589.

⁵⁹ Madison to Thomas Lehre [not sent], 2 August 1828, *ibid.*, 315-316.

⁶⁰ *Ibid.*, 316.

thereby enlarging the practicable sphere of government, unjust majorities would be formed with still more difficulty,” and were, therefore, less of a threat in large than in small republics.⁶¹ Thus, whatever complaints the nullifiers had about the inequity of laws and “sectional partialities” under the majority system of the United States, “it may be confidently observed that the abuses have been less frequent and less palpable than those which disfigured the administrations of the State Governments while the effective powers of sovereignty were separately exercised by them.” Yet this was apparently the very type of system that the nullifiers preferred.⁶²

In essence, Madison contended, the nullifiers attacked the fundamental principles of popular government. “Every friend to Republican Government,” he said, “ought to raise his voice against” the heresies of the nullifiers, and their “sweeping denunciation of majority Governments as the most tyrannical and intolerable of all Governments.” The nullifiers attempted to mask their “anti-republicanism” by arguing only against national majorities, and not majorities within the states—which contained a “sameness of interests” among their citizens.⁶³ Madison, however, having shown that oppressive majorities were more likely to form in small republics, argued that the nullifiers essentially claimed that any “majority Government is of all other Governments the most oppressive.” If followed to its logical conclusion, this doctrine “must terminate in absolute monarchy...such alone being impartial between its subjects, and alone capable

⁶¹ Madison to _____, [Majority Governments], [1833], *ibid.*, 522.

⁶² *Ibid.*, 523.

⁶³ *Ibid.*, 521.

of overpowering majorities as well as minorities.”⁶⁴ Republican government—characterized by majority rule—had proven to be the “least imperfect” form of government, and therefore the best. If, however, majority rule could not be trusted in an extended sphere, “where there are diversified and conflicting interests, it can be trusted nowhere, because such interests exist everywhere.” This meant that majority rule was “as intolerable within the States as it is represented to be in the United States,” and the only answer was to seek refuge in some version of authoritarian government, in which the ruling powers governed independently of the will of the people. Such a solution was not a solution at all, but represented a giant step backward for the United States.⁶⁵

Finally, Madison turned to the justification the nullifiers found in his Virginia Resolutions. He argued that the nullifiers misinterpreted—and thus misrepresented—the language and intent of the Resolutions. It was perhaps possible, he admitted, that the language used had not guarded sufficiently against “erroneous constructions, not anticipated.” Thus, though the meaning of the Resolutions was “well comprehended at the time,” Madison confessed that their interpretation “may not now be obvious to those unacquainted with the contemporary indications and impressions.”⁶⁶ He stressed that, when expounding the text of the Resolutions, it was important to distinguish between “the Government of the States” and the “States in the sense in which they were parties to the Constitution.” It was also important to distinguish between the “rights of the parties, in their concurrent” capacity and in their individual capacities, and, finally, between

⁶⁴ Ibid., 520.

⁶⁵ Ibid., 528.

⁶⁶ Madison to Everett, 28 August 1830, *ibid.*, 401.

interpositions “within the purview of the Constitution” and those “appealing from the Constitution to the rights of nature paramount to all Constitutions.” Keeping these distinctions in mind, and remaining attentive to “the views & arguments” that the Resolutions combated, Madison maintained that they demonstrated “a consistency in their parts and an inconsistency of the whole” with the doctrine of nullification.⁶⁷

Madison declared that the Resolutions did not advocate the power of a single state to nullify national laws, but that they instead called for cooperation among the states. The Resolutions themselves and the debates over them in the Virginia legislature disclosed “no reference whatever to a constitutional right in an individual State to arrest by force the operation of a law of the U. S.”⁶⁸ The confusion had arisen “from a failure to distinguish between what is declaratory of opinion and what is *ipso facto* executory.”⁶⁹ Though the Resolutions declared that the Alien and Sedition Acts were unconstitutional, they did not claim that the acts were no longer in effect within Virginia, nor did they attempt to arrest the execution of the laws. Instead, “concert among the States for redress against the alien & sedition laws, as acts of usurped power, was a leading sentiment, and the attainment of a concert the immediate object” of the legislature.⁷⁰ This was made explicit in the seventh article of the Resolutions, which, Madison stated, invited the other states “to *concur* in declaring the acts to be unconstitutional, and to *co-operate* by the necessary & proper measures in maintaining unimpaired the authorities, rights & liberties

⁶⁷ Ibid.

⁶⁸ Ibid., 402.

⁶⁹ Madison to Edward Livingston, 8 May 1830, *Letters and Other Writings*, 4: 80.

⁷⁰ Madison to Everett, 28 August 1830, *Writings of James Madison*, 9: 402.

reserved to the States respectively & to the people.” The necessary and proper measures, “to be *concurrently* and co-operatively taken,” were those within the scope of the Constitution—namely an appeal to popular opinion, and the control of the people of the states over the national government through the electoral process.⁷¹ This “interposition” on the part of the states proved “equal to the occasion,” as the Federalist Party was voted out of office, and their offending policies ended, through the election of 1800.⁷²

That the Resolutions did not intend to effect an actual nullification of federal law was further evident from the legislature’s debates and the other states’ responses to the declarations. It was important, Madison noted, that the legislature had removed the words “not law, but utterly null, void, and of no force or effect,” which had followed the word “unconstitutional” in an earlier draft of the Resolutions. Though, Madison claimed, these words were “but synonymous with ‘unconstitutional,’” the legislature still decided to strike them out, “to guard against a misunderstanding of this phrase as more than declaratory of opinion.”⁷³ Furthermore, the states that subsequently objected to the Resolutions only denounced their “inflammatory tendency” and denied the authority of a state legislature to declare a federal law unconstitutional. They rejected this right on the grounds that it was within “the exclusive jurisdiction of the Supreme Court.” Had the other states regarded the Resolutions as avowing a right “in an individual State, to arrest by force the execution of a law of the U. S.,” Madison argued, “it must be presumed that

⁷¹ Ibid. (emphasis in original).

⁷² Ibid., 402, 397.

⁷³ Ibid., 402.

it would have been a conspicuous object of their denunciation.”⁷⁴ Indeed, he asserted, it was “not probable that such an idea as the South Carolina nullification had ever entered the thoughts of a single member [of the Virginia legislature], or even those of a citizen of South Carolina herself.”⁷⁵

Later, Madison expounded further on the text of the Resolutions. In these letters, he emphasized the fact that the Resolutions always used the plural term “states,” and never the singular “state,” when referring to the right of the states, as the parties to the constitutional compact, to interpose. This was intentional, he claimed, to distinguish “between the rights belonging to them in their collective” and “those belonging to them in their individual capacities.”⁷⁶ Again he noted, “the *plural* term *States* was invariably used in reference to their interpositions.”⁷⁷ The nullifiers particularly emphasized the phrase in the Resolutions which declared that the states had the right to interpose “for maintaining within their *respective* limits, the authorities, rights and liberties appertaining to them” as evidence that the power belonged to each state, respectively, to nullify national laws.⁷⁸ Madison rejected this as a perversion of his Resolutions, claiming that the phrase intended “that the *States* should co-operate *all* for attaining the objects of *each*.” Again, he pointed to the Resolutions’ call for cooperation among the states as

⁷⁴ Ibid., 403.

⁷⁵ Madison to Joseph C. Cabell, 28 December 1832, *Letters and Other Writings*, 4: 232.

⁷⁶ Madison to James Robertson, 27 March 1831, *Writings of James Madison*, 9: 444.

⁷⁷ Madison to C. E. Haynes, 27 August 1832, *ibid.*, 483 (emphasis in original).

⁷⁸ “Virginia Resolutions,” 21 December 1798, *The Papers of James Madison*, ed. David B. Mattern, et al., 17 vols. (Charlottesville: University Press of Virginia, 1977-1991), 17: 189 (emphasis added); Madison to Haynes, 27 August 1832, *Writings of James Madison*, 9: 483.

proof that neither he nor the Virginia legislature had ever espoused an individual state's right to nullify federal law.⁷⁹ If he had not provided a "more explicit guard against misconstruction," it was simply because of "the entire absence of apprehension that it could be necessary. Who could, at that day, have foreseen some of the comments on the Constitution advanced at the present?"⁸⁰

To put an end to the nullifiers' reliance on the Virginia Resolutions as justification for their doctrine, Madison wrote a detailed exposition in 1835 explaining their meaning and denying the legality of nullification. He argued that Virginia, in 1798, asserted that the Alien and Sedition Acts were unconstitutional and "offered her proofs that the States had a right in such cases, to interpose, first in their constituent character to which the government of the U. S. was responsible, and otherwise as specially provided by the Constitution." Furthermore, the legislature had argued that the states "had an ulterior right to interpose, notwithstanding any decision of a constituted authority... as the parties which made the Constitution and, as such, possessed an authority paramount to it."⁸¹ In spite of this, it did not follow that "a nullification of a law of the U. S. can as is now contended, belong rightfully to a single State, as one of the parties to the Constitution; the State not ceasing to avow its adherence to the Constitution."⁸² The Resolutions had not contended that a single state possessed the right "to arrest or annul an act of the General Government which it may deem unconstitutional." Rather, "the

⁷⁹ Madison to Cabell, 28 December 1832, *Letters and Other Writings*, 4: 232 (emphasis in original). See also Madison to Haynes, 27 August 1832, *Writings of James Madison*, 9: 483.

⁸⁰ Madison to Robertson, 27 March 1831, *Writings of James Madison*, 9: 444.

⁸¹ Madison, "Notes on Nullification," 1835, *ibid.*, 575.

⁸² *Ibid.*

obvious and proper inference precludes such a right on the part of a single State; *plural* number being used in every application of the term.” Thus, the authority to interpose did not refer to “the authority of the States *singly & separately*,” but to their “authority as the *parties* to the Constitution.” Any interposition, then, was to be a concurrent interposition on the part of the states, in cooperation with one another.⁸³

Madison turned once again to the need for the uniformity of laws in the United States. He argued that the effect intended by the interposition espoused in the Resolutions was that of “maintaining within the respective limits of the States the authorities rights & liberties appertaining to them.” As the authority and laws of the United States had to be uniform throughout the states, the intended effect could not, Madison argued, have been for one state to annul a law within its border, or to speak for the rest of the parties to the compact and nullify it everywhere. On the contrary, “a concurrence & co-operation of the States in favor of each, would have the effect of preserving the necessary uniformity in all, which the Constitution so carefully & so specifically provided for.”⁸⁴ Madison’s assumption, then, was that any interposition would be on the part of the majority of the parties to the compact, in opposition to a law made by a minority within the federal government. He believed this had been the case in 1798; the fact that the first election held after the passage of the Alien and Sedition Acts had ousted the Federalists was proof that the laws were passed “in contravention to the opinions and feelings of the community.” This was not the case with the tariff, which

⁸³ Ibid., 576 (emphasis in original).

⁸⁴ Ibid., 577.

had the sanction of “a majority of the States and of the people.”⁸⁵ Calhoun developed nullification in response to a widely approved law; this was what separated the present crisis from the situation in 1798 and necessitated the formation of a doctrine that rested solely on the protection of minority rights against the will of the majority.

This disparity in the situations was a key aspect to the debate over nullification and the Virginia Resolutions, and Madison knew it. “In explaining the proceedings of Virginia in 98-99,” he wrote, “the state of things at that time... has been too much overlooked. The doctrines combated are always a key to the arguments employed.”⁸⁶ Indeed, the laws protested in 1798 were, as Madison saw it, explicit violations of the Constitution. In response to those unconstitutional usurpations, the Virginia legislature passed its Resolutions, which declared the states’ solemn duty to cooperate in interposing to eliminate the offending laws. On the other hand, the doctrine of South Carolina asserted “that in a case of not greater magnitude than the degree of inequality in the operation of a tariff in favor of manufactures, she may of herself finally decide, by virtue of her sovereignty, that the Constitution has been violated,” and if the national government did not yield, even if all the other states supported the law, “she may rightfully resist it and withdraw herself from the Union.” The doctrine itself was absurd, and the situation was not comparable to the actual unconstitutional assumption of power that had occurred in 1798.⁸⁷

⁸⁵ Madison to Everett, 28 August 1830, *ibid.*, 397.

⁸⁶ Madison to William Cabell Rives, 12 March 1833, *ibid.*, 513-514.

⁸⁷ Madison to Cabell, 16 August 1829, *ibid.*, 343-344.

Historians who have dealt with this episode of Madison's life have often missed the central importance of this difference. Focusing purely on the apparent similarities between nullification and the principles of the Virginia Resolutions, these historians do not emphasize the fact that the situations were astoundingly different. Though a close reading of the Resolutions vindicates Madison's interpretation of them in the 1830s, even if that were not the case, Madison's rejection of nullification would still be understandable based solely on the fact that nullification was formulated in response to protective tariffs, and the Virginia Resolutions were drafted in response to a violation of the First Amendment. To Madison, there was no comparison.

There is another point that historians have missed though. The goal of the Virginia Resolutions was to call for cooperation with the other states in putting an end to unconstitutional laws—presumably laws passed by a minority party that did not represent the will of the people. Madison's reason for calling on the other states was to appeal to the majority of the nation to overturn unconstitutional laws. His goal was never to impose the will of one state on the rest of the country. Calhoun's doctrine of nullification attempted to do precisely that, and was founded on the principle of protecting a minority from the majority. In this way—the basic intent of the doctrine—nullification was diametrically opposed to the intention of the Virginia Resolutions. Thus, those who argue that Madison changed his mind or tempered his opinions fail to grasp this basic difference in the respective goals of nullification and the Virginia Resolutions.

Though Madison's primary concern during this time was to combat the heresies of the nullifiers, he maintained a secondary emphasis on correcting the inaccuracies of nationalists like Daniel Webster, who presented the United States as a consolidated

government. Though supportive of Webster's speech that had "crushed" the nullifiers, Madison reprimanded Webster for refusing to acknowledge that the Constitution was a compact between the people of the states. The "undisputed fact" of the matter was that "the Constitution was made by the people, but as imbodyed [*sic*] into several States who were parties to it, and, therefore, made by the States in their highest authoritative capacity."⁸⁸ Through the same method, they could have "converted the Confederacy into a mere league or treaty...or have imbodyed [*sic*] the people of their respective States into one people, nation, or sovereignty." Instead, through a mixed form, they became "one people, nation, or sovereignty for certain purposes, and not so for others."⁸⁹ Again, Madison emphasized divided sovereignty between the states and the national government, and expressed his opinion that the Constitution "rests on a middle ground between a form wholly national and one merely federal," thus stressing the errors of both nationalists and nullifiers.⁹⁰ He stated that, while the Constitution remained in force, its operation and laws had to be uniform and its authority unquestioned. But, he reminded Webster not to forget that "compact, express or implied, is the vital principle of free governments as contradistinguished from governments not free; and that a revolt against this principle leaves no choice but between anarchy and despotism."⁹¹

Madison, mindful of the misinterpretations on both sides, warned both nationalists and nullifiers not to abandon or misconstrue the uniqueness of the United States. Those,

⁸⁸ Madison to Webster, 15 March 1833, *Letters and Other Writings*, 4: 293.

⁸⁹ *Ibid.*

⁹⁰ Madison to Andrew Stevenson, 27 November 1830, *ibid.*, 131.

⁹¹ Madison to Webster, 15 March 1833, *ibid.*, 294.

on either side, who denied “the possibility of a political system, with a divided sovereignty like that of the U. S., must choose between a government purely consolidated, & an association of Governments purely federal.”⁹² The United States, acknowledging the lessons of history and the failures of both types of governments, had adopted a unique political system, which sought to “avoid as well the evils of consolidation as the defects of federation, and obtain the advantages of both.” Thus far, Madison argued, the new, compound system of the United States had been “successful beyond any of the forms of Government, ancient or modern, with which it may be compared.”⁹³ He appealed to all friends of free government—and reminded nationalists and nullifiers alike—“that by denying the possibility of a system partly federal and partly consolidated,” and attempting to convert the United States into “one either wholly federal or wholly consolidated, in neither of which forms have individual rights, public order, and external safety, been all duly maintained, they aim a deadly blow at the last hope of true liberty on the face of the Earth.”⁹⁴

Madison thus expressed his concern that the novel system of the United States would be undone by the indiscretions of the younger generation of American politicians. Failing to understand the lessons of the past, the shortcomings of the Articles of Confederation, and the nature of the formation of the Union, this generation misrepresented the unique government and form of the United States.⁹⁵ The debate over

⁹² Madison, “Notes on Nullification,” 1835, *Writings of James Madison*, 9: 605.

⁹³ *Ibid.*, 606.

⁹⁴ *Ibid.*

⁹⁵ Madison to James Robertson, 20 April 1831, *Letters and Other Writings*, 4: 171; Madison to Trist, 4 December 1832, *ibid.*, 227; Madison to Everett, 22 August 1833, *ibid.*, 307.

nullification and the Virginia Resolutions had demonstrated this, as both nationalists and nullifiers adhered to erroneous interpretations of the Virginia Resolutions and the nature of the Union. Nullification—and the doctrine of total state sovereignty that accompanied it—had led to adamant reproaches by nationalists; their overreaching claims of national supremacy, however, threatened to drive moderate supporters of states' rights into the nullifiers' camp.⁹⁶ Madison had done his best to correct these errors, and to remove his name from the nullifiers' doctrines while tempering the excessive dogmas of the nationalists. But, while Madison could speak for himself and defend both his legacy and the nature of the Union, his friend Thomas Jefferson could not. If the nullifiers disagreed with Madison's interpretation of his Resolutions, they could turn to Jefferson, who could not defend or explain himself from beyond the grave. Thus, Madison attempted to defend not only his own legacy, but also that of the Sage of Monticello, a task that proved more difficult.

⁹⁶ Madison to Stevenson, 27 November 1830, *ibid.*, 128.

CHAPTER IV

DEFENDING JEFFERSON'S LEGACY

Through his letters in the *National Intelligencer* and the *North American Review*, James Madison attempted to lend his reputation and authority to the defense of protective tariffs and the fight against nullification. Having been a member of the founding generation of American politicians, he (and his political friends and protégés) believed that his word would sway the public and their representatives in government. Also, especially with regard to nullification, Madison wanted to distance himself and his doctrines from those whom he believed were endangering the Union. His unequivocal denunciation of nullification and his defense of the tariff's constitutionality made his opinions on the issues unmistakable, preventing the nullifiers from using his name to justify their opinions any longer.

However, Madison was only one half of the duo who led the protest against the Alien and Sedition Acts in the 1790s. He had penned the Virginia Resolutions, and his expositions on those Resolutions in the 1830s made his intentions clear; his friend and political collaborator Thomas Jefferson, however, had penned the more strongly-worded Kentucky Resolutions. Discoveries of early drafts of those Resolutions, along with certain statements made by Jefferson near the end of his life, gave the nullifiers the

vindication that Madison refused to give.¹ Most importantly, Jefferson, who had died in 1826, was unable to refute (or endorse) the doctrine of nullification, the argument against the tariff, or the nullifiers' claim that their ideas were part of the Jeffersonian tradition. Therefore, in addition to defending his own ideas and legacy, Madison attempted to defend Jefferson's as well, arguing, against mounting evidence, that the Sage of Monticello supported the constitutionality of the tariff and that he had never advocated nullification or secession as legal rights under the Constitution.²

During the debate over the tariff in Virginia in 1827 and 1828, Governor William Giles used a recent letter from Jefferson to justify the attack on federal power in general and the tariff in particular. Jefferson wrote the letter in December 1825—only six months before his death—and remarked that its contents were “not intended for the public eye,” but this did not stop Giles from using it to vindicate the claim that the tariff was unconstitutional.³ In that letter, Jefferson expressed concern over the “rapid strides with which the federal branch of our government is advancing towards the usurpation of all the rights reserved to the States, and the consolidation in itself of all powers, foreign and domestic.”⁴ The specific section that Giles used against the legitimacy of the tariff was Jefferson's admonishment that, “under the power to regulate commerce,” the federal

¹ “Draft of the Kentucky Resolves,” enclosure in Thomas Jefferson to James Madison, 17 November 1798, *The Papers of James Madison*, ed. David B. Mattern, et al., 17 vols. (Charlottesville: University Press of Virginia, 1977-1991), 17: 176-177; Jefferson to William Branch Giles, 26 December 1825, *Thomas Jefferson: Writings*, ed. Merrill D. Peterson (New York: The Library of America, 1984), 1510.

² Madison to William Cabell Rives, 23 January 1829, *Letters and Other Writings of James Madison: Fourth President of the United States*, eds. William C. Rives and Philip R. Fendall, 4 vols. (Philadelphia: J. B. Lippincott & Co., 1865), 4: 7-8; Madison to Joseph C. Cabell, 2 February 1829, Madison to Nicholas P. Trist, May 1832, *ibid.*, 11, 217-218.

³ Jefferson to Giles, 26 December 1825, *Jefferson: Writings*, 1509.

⁴ *Ibid.*

government had assumed “indefinitely that also over agriculture and manufactures,” and used the term “regulation” as an excuse to “take the earnings of one of these branches of industry, and that too the most depressed, and put them into the pockets of the other, the most flourishing of all.”⁵ As this was at least a disapproval of the magnitude and application of the tariff, Giles saw fit to use the letter in his condemnation of the tariff and to justify his claim that it was unconstitutional.⁶

Madison believed that the use of this letter misrepresented Jefferson’s beliefs and blatantly disregarded his public career. Madison criticized those who, while professing to venerate Jefferson’s name and memory, attempted “to make him avow opinions in the most pointed opposition to those maintained by him in his more deliberate correspondence with others, and acted on through his whole official life.”⁷ It was true that the letter to Giles contained “unstudied and unguarded language,” but, Madison contended, this was due to the fact that Jefferson had written “confidentially, and probably in haste.”⁸ When consulting Jefferson’s public record and opinions while secretary of state and president, Madison found “the most explicit and reiterated sanctions given to the power to regulate *trade* or commerce in favour of manufactures, by recommending the expediency of exercising the power for that purpose, as well as for others distinct or derogating from the object of revenue.”⁹ Madison also referred to other

⁵ Ibid., 1510.

⁶ Irving Brant, *James Madison: Commander in Chief, 1812-1836* (New York: Bobbs-Merrill, 1961), 468-470.

⁷ Madison to Rives, 23 January 1829, *Letters and Other Writings*, 4: 7.

⁸ Ibid., 8; Madison to Cabell, 5 December 1828, *ibid.*, 3: 659.

⁹ Madison to Rives, 23 January 1829, *ibid.*, 4: 7 (emphasis in original).

Jefferson writings on the topic of manufactures, specifically a letter written in 1816, which was so strong in its defense of protective tariffs, “that it alone ought to crush every attempt to put the weight of his opinion in the wrong scale.”¹⁰ It was “as unreasonable as it must be disrespectful and unfriendly” to make the December 1825 letter, written hastily and confidentially, the basis of a charge that Jefferson had supported an unconstitutional power for most of his life, only to realize the truth of the matter at the end. Every “rule of fair construction” and “friendly respect,” Madison argued, should instead favor “a meaning in the letter that would reconcile it with the overwhelming evidence of opinions elsewhere avowed, instead of displaying a self-contradiction by turning the letter against those opinions.”¹¹

Madison asserted that Jefferson’s criticism of the tariff referred to the abuse of a power, not the usurpation of one. The phrase, “indefinitely that also over agriculture and manufactures,” Madison argued, was likely intended to indicate an excess and abuse of a power, not an unconstitutional assumption of a power, as the word “indefinite” implied “a *definite*, or reasonable use of the power to regulate trade for the encouragement of manufacturing and agricultural products.”¹² Jefferson, Madison contended, had not explicitly made such a distinction because of the confidential nature of the letter;

¹⁰ Madison to Cabell, 2 February 1829, *ibid.*, 11. See also Jefferson to Benjamin Austin, 9 January 1816, *Jefferson: Writings*, 1371-1372, in which Jefferson stated, “We must now place the manufacturer by the side of the agriculturist.... Shall we make our own comforts, or go without them, at the will of a foreign nation? He, therefore, who is now against domestic manufacture, must be for reducing us either to dependence on that foreign nation, or to be clothed in skins, and to live like wild beasts in dens and caverns. I am not one of these; experience has taught me that manufactures are now as necessary to our independence as to our comfort; and if those who quote me as of a different opinion, will keep pace with me in purchasing nothing foreign where an equivalent of domestic fabric can be obtained, without regard to difference of price, it will not be our fault if we do not soon have a supply at home equal to our demand, and wrest that weapon of distress from the hand which has wielded it.”

¹¹ Madison to Rives, 23 January 1829, *Letters and Other Writings*, 4: 8.

¹² Madison to Cabell, 5 December 1828, *ibid.*, 3: 659 (emphasis in original).

additionally, Jefferson's language "was influenced by the great injustice, impressed on his mind, of a measure charged with the effect of taking the earnings of one...and putting them into the pockets of another."¹³ Certainly, Madison said, Jefferson disagreed with the scope and excessiveness of more recent tariff legislation, so much so that he perhaps thought an unlimited abuse of the power could eventually be "equivalent to a usurpation of it."¹⁴ But to claim that he believed protective tariffs were, by their very nature, unconstitutional, was inconsistent with the rest of Jefferson's thoughts on the issue.¹⁵

Jefferson's opinions on the tariff, however, were only the beginning of Madison's concern; once South Carolina delineated its doctrine of nullification, Madison had to dispel claims that Jefferson had advocated nullification in his Kentucky Resolutions of 1798. John C. Calhoun's "Exposition" and Robert Hayne's speech in the Senate had both made use of Jefferson's Kentucky Resolutions to justify a state's right to nullify unconstitutional national laws.¹⁶ The Kentucky Resolutions, Madison noted, did contain language that was "less guarded," and "more easily perverted" by those who wished to bring Jefferson's authority to nullification.¹⁷ In particular, the Resolutions declared that the Alien and Sedition Acts were "not law but utterly void and of no force," thus giving some credence to the nullifiers' claim that the Resolutions did, indeed, intend to arrest the

¹³ Ibid.

¹⁴ Madison to Rives, 23 January 1829, *ibid.*, 4: 8.

¹⁵ *Ibid.*, 8-9.

¹⁶ "South Carolina Exposition," *The Papers of John C. Calhoun*, eds. Clyde N. Wilson and W. Edwin Hemphill, 28 vols. (Columbia: University of South Carolina Press, 1959-2003), 10: 509-510; Robert Y. Hayne, "Speech of 25 January 1830," *The Webster-Hayne Debate on the Nature of the Union*, ed. Herman Belz (Indianapolis: Liberty Fund, 2000), 76-77.

¹⁷ Madison to Nicholas P. Trist, 23 December 1832, *The Writings of James Madison, Comprising his Public Papers and Private Correspondence*, ed. Gaillard Hunt, 9 vols. (New York: G. P. Putnam's Sons, 1900-1910), 9: 491.

execution of the laws within the borders of the state.¹⁸ In spite of this—as with the claim that Jefferson opposed the tariff—Madison argued that Jefferson’s opinions over the course of his life and career generally opposed nullification. The nullifiers, however, who made the name of Jefferson “the pedestal for their colossal heresy, shut their eyes and lips, whenever his authority is ever so clearly and emphatically against them.”¹⁹ Madison also advised his friend and protégé Nicholas Trist, that when deciphering Jefferson’s legacy and ideas it was important to make “allowances...for a habit in Mr. Jefferson as in others of great genius of expressing in strong and round terms, impressions of the moment.”²⁰

When Madison discovered the original draft of the Kentucky Resolutions of 1798, he had difficulty explaining some of Jefferson’s “strong and round terms.” Particularly troublesome was a passage in Jefferson’s original draft which stated that, in cases of an abuse of delegated powers by the national government, the proper constitutional remedy was for the people to vote the members of that government out of office, but in cases “where powers are assumed which have not been delegated, a nullification of the act is the rightful remedy: that every State has a natural right in cases not within the compact...to nullify of their own authority all assumptions of power by others within their limits,” and furthermore that “without this right, they would be under the dominion,

¹⁸ “The Kentucky Resolutions of 1798,” 10 November 1798, *The Papers of Thomas Jefferson*, eds. Julian P. Boyd, et al., 39 vols. (Princeton: Princeton University Press, 1950-2011), 30: 552.

¹⁹ Madison to Trist, 23 December 1832, *Writings of James Madison*, 9: 491.

²⁰ Madison to Trist, May 1832, *ibid.*, 479.

absolute and unlimited, of whosoever might exercise this right of judgment for them.”²¹ Not only did this passage actually use the terms “nullification” and “nullify,” but it also used Calhoun-like arguments to justify why this right resided with the states alone. Finally, the fact that Jefferson claimed that “*every* State has a natural right...to nullify of their own authority all assumptions of power” gave the impression that he did believe that each state held this power individually.²² Madison had previously denied that Jefferson had ever used the word “nullification” in his draft of the Resolutions, and upon discovery of the term, suggested that it would be better, if the draft were published, “to leave out particular parts,” rather than risk “a misconstruction or misapplication of them.”²³ Unfortunately for Madison, he did not hold the only copy of Jefferson’s original draft. Others published it in its entirety, encouraging the nullifiers that Jefferson did, indeed, support them.²⁴

Madison seized upon Jefferson’s use of the term “natural right” to try to explain what he had meant in his draft Resolutions, desperately trying to disassociate Jefferson’s memory from nullification and secession. Madison argued that because Jefferson stated that “every state has a natural right in cases not within the compact...to nullify...all assumptions of power,” he intended to imply “not a right derived from the Constitution,” but indeed a *natural* right arising “from abuses or usurpations,” which released “the

²¹ “Draft of the Kentucky Resolves,” enclosure in Jefferson to Madison, 17 November 1798, *Papers of James Madison*, 17: 179.

²² *Ibid.* (emphasis added).

²³ Madison to Trist, 23 September 1830, *Letters and Other Writings*, 4: 110. See also Madison to Edward Everett, 20 August, 10 September 1830, *ibid.*, 106-107, 109-110.

²⁴ Drew R. McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* (New York: Cambridge University Press, 1989), 144.

parties to [the Constitution] from their obligation,” thus dissolving the compact and appealing once again to the right of revolution.²⁵ Far from supporting South Carolina’s doctrine of nullification, Madison argued that Jefferson would “revolt at the doctrine...that a single state could constitutionally resist a law of the Union while remaining within it,” claiming instead that, whatever Jefferson meant by “nullification,” it was an extra-constitutional right, not a constitutional one.²⁶

For additional vindication of the fact that Jefferson did not advocate a legal, constitutional nullifying power within a state, Madison looked—of all places—to the Jefferson letter of December 1825. In that letter, Jefferson mentioned that the rightful remedy to extreme and unbearable cases of usurpation was for a state to separate itself from the Union. Such an act would result in the “dissolution of our Union,” and did not represent resistance to national authority while remaining within that Union.²⁷ This had not yet been necessary, Jefferson argued, at the time of his writing, and could only be advocated if, after a long period of usurpation of the rights of the states, it was worse to remain in the Union than to separate from it.²⁸ Madison emphasized the fact that this was in reference to the natural right of revolution—which would end the Union—and not a constitutional right to nullify a law while remaining a part of the Union, or even a legal right to leave the Union peaceably.²⁹ This all pointed to the fact, Madison argued, that “the authority of Mr. Jefferson...belongs not, but is directly opposed to, the nullifying

²⁵ Madison, “Notes on Nullification,” 1835, *Writings of James Madison*, 9: 589.

²⁶ *Ibid.*, 589n-590n.

²⁷ Jefferson to Giles, 26 December 1825, *Jefferson: Writings*, 1510.

²⁸ *Ibid.*, 1510-1511.

²⁹ Madison, “Notes on Nullification,” 1835, *Writings of James Madison*, 9: 589-590.

party who have so unwarrantably availed themselves of it.”³⁰ Though he did not necessarily succeed in preventing the nullifiers from using Jefferson to justify their views, Madison nevertheless attempted to preserve what he believed to be his friend’s views on the subject of nullification, and to fulfill Jefferson’s request to take care of him after his death.³¹

As the conflict over the tariff worsened and it seemed as though a constitutional crisis would erupt between South Carolina and the national government, Madison used what influence he had to encourage compromise. Responding to a letter from Henry Clay in March 1832, Madison noted that “the Tariff in its present amount & form, is a source of deep & extensive discontent, and I fear that without alleviations separating the more moderate from the more violent opponents, very serious effects are threatened.”³² One such effect that Madison anticipated was a “Southern Convention,” out of which disunion in some form would be a probable result. In opposition to such fears, Madison expressed the hope that, in spite of the sharp divisions between pro-tariff and anti-tariff forces, “some accommodating arrangements may be devised that will prove an immediate anodyne, and involve a lasting remedy to the Tariff discords.”³³

Perhaps the most important factor in Madison’s ability to influence the situation was that his friend and constant correspondent Nicholas P. Trist was President Andrew Jackson’s personal secretary. This gave Madison “frequent but indirect contact” with the

³⁰ Ibid., 590n.

³¹ Madison to Trist, 23 December 1832, *ibid.*, 491-492; Jefferson to Madison, 17 February 1826, *Jefferson: Writings*, 1515.

³² Madison to Henry Clay, 22 March 1832, *Writings of James Madison*, 9: 477-478.

³³ Ibid., 478.

president and his cabinet “on the theoretical questions involved in nullification.”³⁴

Indeed, Jackson’s secretary of state, Edward Livingston, had expressed an opinion on states’ rights, the nature of the Union, and the meaning of the Virginia Resolutions during the Webster-Hayne debate that was similar to Madison’s.³⁵ Writing to Livingston shortly after the debate, Madison remarked, “you have succeeded better in your interpretation of the proceedings of the Virginia Legislature in 1798 and 1799 than those who have seen in them a coincidence with the nullifying doctrine, so called.”³⁶ If Jackson and Livingston sought to maintain a common principle with Madison, they had ample opportunity to hear his thoughts through Trist.

Madison apparently made use of this situation and suggested ways to alleviate the situation to Trist. Writing him in 1832, Madison commented, “I heartily wish that something may be done with the tariff that will be admissible on both sides and arrest the headlong course in South Carolina.”³⁷ A short while later, he communicated some ideas to Trist that had “become particularly impressive at the present” regarding the crisis over the tariff and nullification. Madison noted that, if they happened to “accord with your own view of the subject, they may be suggested where it is most likely they will be well received.”³⁸ In these suggestions, Madison proposed that duties be raised on unprotected articles (such as tea) in the manufacturing states, where they were consumed at a higher

³⁴ Richard E. Ellis, *The Union at Risk: Jacksonian Democracy, States’ Rights, and the Nullification Crisis* (New York: Oxford University Press, 1989), 86.

³⁵ Edward Livingston, “Speech of 9 March 1830,” *The Webster-Hayne Debate*, 461-462.

³⁶ Madison to Livingston, 8 May 1830, *Letters and Other Writings*, 4: 80.

³⁷ Madison to Trist, May 1832, *Writings of James Madison*, 9: 479-480.

³⁸ Madison to Trist, 29 May 1832, *ibid.*, 480-481.

rate, thus “balancing the disproportionate consumption of the protected article of coarse woolens in the South.”³⁹ Some equalizing arrangement was necessary, Madison argued, and “a compound tariff” could perhaps provide the solution to the current predicament. This plan was not without its flaws, but the point, Madison said, was that a compromise had to be reached.⁴⁰

After South Carolina issued its Nullification Ordinance, officially nullifying the Tariff of 1832 effective February 1833, Andrew Jackson issued his Nullification Proclamation, denouncing the doctrine as unconstitutional and treasonous. Jackson’s proclamation also seemed to adhere to nationalist doctrines regarding the creation of the Union and the superiority of the national government, which concerned Madison (and his friend Trist).⁴¹ Indeed, the proclamation created new problems, Madison asserted, writing to Trist, “you were right in your foresight of the effect of the passages of the late Proclamation. They have proved a leaven for much fermentation there, and created an alarm against the danger of consolidation, balancing that of disunion.”⁴² Thus, Madison’s “frequent but indirect contact” with the president had not prevented the formulation of a proclamation that threatened to send more traditional proponents of states’ rights into the nullifiers’ camp. Thankfully, passage of a compromise tariff in February 1833 and South Carolina’s subsequent retraction of its nullification ordinance

³⁹ Enclosure in Madison to Trist, 29 May 1832, *ibid.*, 481.

⁴⁰ *Ibid.*, 482.

⁴¹ Ellis, *The Union at Risk*, 84-85.

⁴² Madison to Trist, 23 December 1832, *Writings of James Madison*, 9: 491-492.

eliminated the immediate threat of armed conflict and disunion that had lingered since 1828.⁴³

Though the crisis had ended, Madison expressed concern about the doctrine of nullification until the end of his life. Indeed, the actions of South Carolina had brought attention not only to the question of nullification, but also secession. South Carolina had contended that a state, “by resuming the sovereign form in which it entered the Union,” could “withdraw from it at will.”⁴⁴ Madison denied that the states maintained this right as a peaceable action. The government of the United States, Madison argued, was founded on a compact between the states, and thus, each party being equal, “neither can have more right to say that the compact has been violated and dissolved than every other has to deny the fact and to insist on the execution of the bargain.” An inference from the doctrine that “a single state has a right to secede at will from the rest,” Madison insisted, “is that the rest would have an equal right to secede from it...to turn it, against its will, out of its union with them. Such a doctrine would not, till of late, have been palatable anywhere.”⁴⁵ It was clear that while a state remained within the Union, “it cannot withdraw its citizens from the operation of the Constitution & laws of the Union.” If a state chose to secede from the Union alone, without the consent of the other states, however, “the course to be pursued” would involve questions “painful in the discussion

⁴³ McCoy, *The Last of the Fathers*, 155.

⁴⁴ Madison to William Cabell Rives, 12 March 1833, *Writings of James Madison*, 9: 513.

⁴⁵ Madison to Alexander Rives, January 1833, *ibid.*, 497.

of them. God grant that the menacing appearances, which obtruded it may not be followed by positive occurrences requiring the more painful task of deciding them!”⁴⁶

Madison knew precisely where South Carolina’s doctrine of nullification would lead, and he dreaded the thought of the end of the Union and Constitution he had done so much to create. The specter of nullification and disunion troubled Madison so much that the last thing he ever wrote, his “Advice to My Country,” dealt exclusively with these issues. He declared in this last will and testament that “the advice nearest to my heart and deepest in my convictions is, that the Union of the States be cherished and perpetuated. Let the open enemy to it be regarded as a Pandora with her box opened, and the disguised one as the Serpent creeping with his deadly wiles into Paradise.”⁴⁷ Unfortunately, Madison’s countrymen did not heed his advice; the arguments and precedents established during the battle over nullification—and the disappearance of adherents to Madison’s “middle ground”—led to extremism and justifications that would be used, three decades later, to tear down that Union that Madison had labored so arduously to erect.

⁴⁶ Madison to William Rives, 12 March 1833, *ibid.*, 513.

⁴⁷ Madison, “Advice to My Country,” 1836, *James Madison: Writings*, ed. Jack N. Rakove (New York: The Library of America, 1999), 866.

CHAPTER V

CONCLUSION: ON MADISON'S CONSISTENCY

Was Madison consistent? When the national government overstepped its bounds, did an individual state have the right to interpose on behalf of its citizens and arrest the execution of the law, or had Madison only called for cooperation among the states in 1798? Did the Virginia Resolutions seek to nullify the Alien and Sedition Acts, or to declare an opinion that they were unconstitutional? And, whatever Madison meant in 1798, was he adhering to those same principles in the 1830s, or was he reinterpreting his words after the fact? It is quite possible that, seeing the effect and ultimate end of his doctrines, he retreated from them in his old age and sought to temper the theories he espoused in his youth. However, upon close inspection of both his words in the 1790s and his interpretation of them in the 1830s—along with his legitimate shock and confusion at the doctrine of nullification—it becomes clear that Madison was consistent. He never advocated the right of an individual state to nullify a national law; on the contrary, his Virginia Resolutions called for interstate cooperation to repeal the Alien and Sedition Acts, and the compact theory of the creation of the Union that he had espoused in the Resolutions and the Report of 1800 was meant to emphasize divided sovereignty

and the unique nature of the government of the United States, not to declare the ultimate sovereignty of the states.

Some historians and biographers of Madison's have argued that consistency is not something that any politician can expect to achieve, especially one with as long and distinguished a career as James Madison. Gary Wills has argued that inconsistencies and changes of opinion are to be expected in any politician, and Madison was no exception. The fact that he changed his mind, Wills claimed, need not detract from Madison's achievements or his status as one of the great statesmen of American history.¹ Likewise, Marvin Myers has argued that Madison always "thought as a working statesmen," shifting his opinions according to what he perceived to be the most dangerous threat of the moment; in this way, he adapted to situations as necessary.² Even Gordon Wood, though arguing in favor of Madison's consistency, posited that trying "to discover consistency in a politician who lived a long life in a rapidly changing society may be a foolish and unnecessary project."³

Madison, however, did believe that consistency was an important attribute, and he maintained that he had been consistent over the course of his career. "I am far from regarding a change of opinions," he wrote in 1831, "under the lights of experience and the results of improved reflection, as exposed to censure." Still, he wrote, "I had indulged the belief that there were few, if any, of my contemporaries, through the long period and varied scenes of my political life, to whom a mutability of opinion was less

¹ Gary Wills, *James Madison* (New York: Henry Holt and Company, 2002), 164.

² Marvin Myers, *The Mind of the Founder: Sources of the Political Thought of James Madison* (Indianapolis: Bobbs-Merrill, 1970), xlv.

³ Gordon Wood, *Revolutionary Characters: What Made the Founders Different* (New York: Penguin Books, 2006), 155.

applicable, on the great constitutional questions which have agitated the public mind.”⁴ In a later letter, Madison again addressed the issue, stating that “I had flattered myself, in vain it seems, that whatever my political errors may have been, I was as little chargeable with inconsistencies, as any of my fellow laborers thro’ so long a period of political life.”⁵ On still another occasion, Madison outlined all of the attempts to stamp his political career “with discrediting inconsistencies,” extending to his opinions “on almost every important question which has divided the public into parties.”⁶ In all of these instances (including especially the issue of nullification and the rights of the states), Madison insisted that he had remained consistent, and that his critics misrepresented or misunderstood his ideas.⁷

That Madison was consistent—and that he did not advocate nullification in his Virginia Resolutions—is evident upon examination of his Report of 1800, which he drafted in the Virginia legislature in defense of his Resolutions of 1798. In this report, Madison reiterated his contention that the Alien and Sedition Acts were unconstitutional, based on the fact that they violated both the First and Tenth Amendments to the Constitution, and that the parties to the constitutional compact—the states—had the responsibility to interpose to put an end to such unconstitutional laws.⁸ As he would

⁴ James Madison to C. E. Haynes, 25 February 1831, *The Writings of James Madison, Comprising His Public Papers and Private Correspondence*, ed. Gaillard Hunt, 9 vols. (New York: G. P. Putnam’s Sons, 1900-1910), 9: 442.

⁵ Madison to Joseph C. Cabell, 27 December 1832, *ibid.*, 494.

⁶ Madison to Nicholas P. Trist, December 1831, *ibid.*, 471, 473.

⁷ *Ibid.*, 472-476.

⁸ Madison, “Report of 1800,” 7 January 1800, *The Papers of James Madison*, ed. David B. Mattern, et al., 17 vols. (Charlottesville: University Press of Virginia, 1977-1991), 17: 308-311.

mention again in 1830, Madison made note in this report that the term “States” in the Resolutions did not refer to the particular governments established by those respective political societies, but to “the people composing those political societies, in their highest sovereign capacity.”⁹ It was, after all, in that sense in which “the Constitution was submitted to the ‘States’: In that sense the ‘States’ ratified it; and in that sense of the term ‘States,’ they are consequently parties to the compact from which the powers of the Federal Government result.”¹⁰ Thus, because the Constitution “was formed by the sanction of the states, given by each in its sovereign capacity,” making the states the parties to the constitutional compact, “it follows of necessity, that there can be no tribunal above their authority, to decide in the last resort, whether the compact made by them be violated; and consequently that as the parties to it, they must themselves decide, in the last resort, such questions as may be of sufficient magnitude to require their interposition.”¹¹

Madison cautioned, however, against frivolous appeals to this right. It did not follow that, because the states could ultimately decide whether the compact had been violated, “such a decision ought to be interposed either in a hasty manner, or on doubtful and inferior occasions.” On the contrary, the interposition of the parties could only be necessary in situations “deeply and essentially affecting the vital principles of their political system.”¹² The Resolutions had made this expressly clear by declaring that such

⁹ Ibid., 308-309.

¹⁰ Ibid., 309.

¹¹ Ibid., 309-310.

¹² Ibid., 310.

an interposition was only necessary in cases of “a deliberate, palpable and dangerous exercise of other powers not granted” by the Constitution.¹³ Madison noted that he had chosen each of those words intentionally, to designate the type of usurped power to which he was referring and the circumstances that would demand an interposition.¹⁴

Madison responded in this report to the claim that the Supreme Court alone maintained the power of deciding in matters of questionable constitutionality. He admitted, as he would later in life, that the judicial branch of the federal government had the power to decide in the last resort, “all questions submitted to it by the forms of the constitution,” and that this resort “must necessarily be deemed the last in relation to the authorities of the other departments of the government.” However, the Virginia Resolutions did not refer to an ordinary situation in which a case came before the Court, but to “those great and extraordinary cases, in which all the forms of the constitution may prove ineffectual against infractions dangerous to the essential rights of the parties to it.”¹⁵ Indeed, such situations could include those in which “the Judicial Department also may exercise or sanction dangerous powers beyond the grant of the constitution.” This being the case, “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 another,” including the judicial branch of the government.¹⁶

¹³ “Virginia Resolutions,” 21 December 1798, *ibid.*, 189.

¹⁴ Madison, “Report of 1800,” 7 January 1800, *ibid.*, 310.

¹⁵ *Ibid.*, 311.

¹⁶ *Ibid.*

Madison noted years later that this distinction between differing kinds of last resorts was important. The last resort, in the first case, was “the last within the purview & forms of the Constitution,” and, in the second case, “the last resort of all, from the Constitution itself, to the parties who made it.” This distinction also existed within the separate states, as the state judiciaries were the last resort within the “provisions & forms” of the state constitutions, “and the people, the parties to” those constitutions, “the last in cases ultra-constitutional, and therefore requiring their interposition.”¹⁷ Thus, it becomes clear that Madison’s comments in 1800 referred to a last resort in which “all the forms of the constitution” had proven ineffectual at preventing usurpations of power by the national government, and the original parties themselves had to cooperate to put an end to the laws.¹⁸

Madison also noted that the state courts were subject to the authority of the Supreme Court and that this was not a violation of the rights of the states. One could assume that if he intended to propose the superiority and ultimate sovereignty of the states in 1798 and 1800, he would not have adhered to this principle. Madison commented that when the Supreme Court overruled a state court, it did not, as some complained, subject “a Sovereign State, with all its rights & duties, to the will of a Court composed of not more than seven individuals,” but, on the contrary, subjected “a single State” to “the authority of a tribunal representing as many States as compose the Union.”¹⁹ This distinction is important, as it brings Madison’s emphasis on majority rule

¹⁷ Madison to Trist, December 1831, *Writings of James Madison*, 9: 471.

¹⁸ Madison, “Report of 1800,” 7 January 1800, *Papers of James Madison*, 17: 311.

¹⁹ Madison to Trist, December 1831, *Writings of James Madison*, 9: 471.

to the forefront of the discussion. The Supreme Court did not only represent the central government, or the will of the individual justices, but was a tribunal representing all the states that formed the Constitution. It was only in cases when this tribunal, along with the rest of the government, palpably and dangerously violated that Constitution, that the states maintained the right to interpose concurrently and eliminate the violation.²⁰

It was the nullifiers' claim that a single state could act unilaterally to nullify a national law that most disturbed Madison, and violated the principles of his Virginia Resolutions and the basic tenets of representative government. In his Report of 1800, Madison did not address the phrase, "for maintaining within their respective limits, the authorities, rights and liberties appertaining to them," except to note that the goal of interposition was to arrest "the progress of the *evil* of usurpation" and to maintain "the authorities, rights and liberties appertaining to the states, as parties to the constitution."²¹ Thus, there is reason to believe the sincerity of Madison's surprise and confusion at the nullifiers' emphasis on the term "within their respective limits," as justification for the right within each individual state to decide, alone, to "resist by force encroachments within its limits." Madison insisted that "the plural number (*States*) is used" intentionally in the Resolutions, to emphasize that "a concurrence and co-operation of all" the states

²⁰ Ibid., 471-472; Madison, "Report of 1800," 7 January 1800, *Papers of James Madison*, 17: 311-312. It is worth noting that *Marbury v. Madison* did not occur until 1803, and thus the Supreme Court had not yet exercised its power of judicial review when Madison wrote his report in January 1800. It is certainly possible that, upon witnessing an effective use of that power, Madison came to rely on it more than the states' right of interposition as the best way to maintain the proper balance of power between the states and the national government, and to protect individual liberties. Thus, he emphasized the Court's authority more in his dealings with the nullifiers in the 1830s. For more on this line of thought, see Jack N. Rakove, *James Madison and the Creation of the American Republic* (New York: Pearson/Longman, 2007), 210-211, 214-215, 232-234; Gordon Wood, *Revolutionary Characters*, 143-172, especially 160-164.

²¹ Madison, "Report of 1800," 7 January 1800, *Papers of James Madison*, 17: 310 (emphasis in original).

was intended “in interpositions for effecting the objects within each.”²² Individual state interposition was not the intent. More importantly, Madison argued that, although the states—or rather the people of the states—had, “as parties to the constitutional compact, no tribunal above them,” it did not follow that, “in controverted meanings of the compact, a minority of the parties can rightfully decide against the majority, still less that a single party can decide against the rest, and as little that it can at will withdraw itself altogether from its compact with the rest.”²³ This was the heart of the nullifiers’ perversion of Madison’s Resolutions. In 1798, he appealed to cooperation among the states so a majority would overturn the usurpations of a minority party—which he perceived the Federalists to be. Calhoun and his followers, conversely, used nullification as a protection of a minority party from the will of the majority.

The final pages of Madison’s Report of 1800 made explicitly clear what the Resolutions intended, and illustrate that a nullification of the Alien and Sedition Acts was never Madison’s intent. When expounding on the seventh resolution, which appealed to the other states to join with Virginia in declaring the Alien and Sedition Acts to be unconstitutional, Madison noted that said declaration did not attempt to assume the office of a judge or the role of the judiciary. Instead, such declarations “are expressions of opinion, unaccompanied with any other effect, than what they may produce on opinion, by exciting reflection.”²⁴ This was not the case with opinions of the judiciary, which “are carried into immediate effect by force. The former may lead to a change in the legislative

²² Madison to Alexander Rives, January 1833, *Writings of James Madison*, 9: 496.

²³ *Ibid.*, 496-497.

²⁴ Madison, “Report of 1800,” 7 January 1800, *Papers of James Madison*, 17: 348.

expression of the general will; possibly to a change in the opinion of the judiciary: the latter enforces the general will, whilst that will and that opinion continue unchanged.” Thus, Madison argued in 1800 that the Virginia Resolutions did not intend to arrest or nullify a law, but only to express that state’s opinion that the Alien and Sedition Acts were unconstitutional, and to communicate this to the other states and “invite their concurrence in a like declaration” to rally support to overturn the acts.²⁵ As if to protect against any misinterpretation, the end of the Report declared the precise intention of the Virginia legislature, which was to “renew, as they do hereby renew, their protest against ‘the alien and sedition acts,’ as palpable and alarming infractions of the constitution.”²⁶ The Resolutions did not nullify the laws within Virginia or anywhere else in the Union, but only represented a “protest” against laws considered to be unconstitutional.

Thus, Madison was consistent, and it was the nullifiers who misrepresented his Resolutions in the 1820s and 1830s. They inferred from the “principles of ‘98” the doctrine that a single state could nullify unconstitutional national laws, when in actuality the Resolutions of 1798 only expressed an opinion that the Alien and Sedition Acts were unconstitutional, and called on other states to cooperate in putting an end to those laws. Furthermore, the situation in 1828 and 1832 was decisively different from that of 1798. The Virginia Resolutions were passed in response to an unconstitutional assumption of power by the national government; the doctrine of nullification was devised in response to a high protective tariff. As Madison saw it, instituting protective tariffs was undeniably within the constitutional powers of Congress; if Congress was abusing that power, it still did not amount to an unconstitutional usurpation of powers not delegated,

²⁵ Ibid.

²⁶ Ibid., 350.

and this was an important difference. Finally, the nullifiers misunderstood the nature of the Union and the importance of divided sovereignty in the United States. Madison emphasized the importance of shared power between the states and the national government as a defining characteristic of the American political system; the nullifiers' claim that the individual states retained all their sovereignty ignored history and threatened to undo the Union of the states.

Indeed, the nullifiers' fundamental failure to understand history was the primary reason for their misconceptions regarding the Virginia Resolutions and the nature of the Union. Only a proper understanding of the events of the 1780s could provide the context necessary to understand the formation of the Union and the "novel and complex" government of the United States.²⁷ Similarly, only accurate comprehension of the events of the 1790s and the nature of the Alien and Sedition Acts could provide the meaning of the Virginia Resolutions. The nullifiers, Madison argued, lacked this essential knowledge, and therefore misinterpreted his ideas regarding the compact that created the Union and the right of interposition.²⁸ When Madison tried to correct them, however, the nullifiers chose to believe that Madison had erred in his old age and that their interpretation was correct, and that it was he who was mistaken or had changed his mind.²⁹ Thus, what started as misinterpretation of complex arguments evolved into blatant disregard and misrepresentation of Madison's ideas by the nullifiers.

²⁷ Madison to James Robertson, 20 April 1831, Madison to Edward Everett, 22 August 1833, *Letters and Other Writings of James Madison: Fourth President of the United States*, eds. William C. Rives and Philip R. Fendall, 4 vols. (Philadelphia: J. B. Lippincott & Co., 1865), 4: 171, 307.

²⁸ Madison to William Cabell Rives, 12 March 1833, *Writings of James Madison*, 9: 513-514.

²⁹ Robert Hayne to Madison, 22 July 1830, The James Madison Papers, Library of Congress, Washington, DC (microfilm); Madison to Trist, December 1831, *Writings of James Madison*, 9: 472.

Does it matter if Madison was consistent? If, as historians like Gary Wills suggest, Madison did alter his positions over the course of his lifetime, would it change anything or affect Madison's reputation as one of the great American political thinkers? Perhaps consistency as a general concept is less important than consistency on this specific issue. No one would argue—not even Madison himself—that changing one's mind is an error on its own; but, if Madison changed his mind on this particular subject, then it proposes difficult questions about the origins of sectionalism, theories of secession, and the extreme states' rights and localism that contributed to the outbreak of civil war. If Madison's "principles of '98" meant what the nullifiers believed they meant, then, ultimately, Madison bears part of the blame for justifications of secession.

John C. Calhoun's doctrine of nullification was based on a theory of complete state sovereignty, which also advocated a state's right to secede from the Union; in other words, as Madison noted, nullification inherently threatened disunion.³⁰ It is important that Madison never advocated secession and that his Virginia Resolutions did not advocate an individual state's right to arrest the execution of a national law. If Madison changed his mind, then it means that at one point in his life, he supported doctrines that inherently led to secession and disunion; but, he did not support such doctrines, as the preservation of the Union was always his highest priority. He called for interstate cooperation to put an end to laws that represented a deliberate, palpable, and dangerous usurpation of power on the part of the national government, and believed that the Constitution was a compact between the states, in which sovereignty was divided and shared between the states and the national government.

³⁰ Madison to Everett, *Writings of James Madison*, 9: 399.

Calhoun and his allies who advocated nullification, in their reading of the Virginia Resolutions and the Report of 1800, failed to comprehend the historical context and the “particular doctrines and arguments to which they were opposed.” Without this focus and an appropriate understanding of the text, the proceedings of Virginia in 1798-1800 were “insecure against a perverted construction” by the nullifiers.³¹ This “perverted construction” of Madison’s doctrines made it seem as though he was changing his mind and displaying inconsistencies in his old age. However, it was the nullifiers who failed to grasp his principles, and from their misunderstandings formulated a “preposterous & anarchical pretension” that had no basis in the Constitution or the “principles of ’98.”³²

³¹ Madison, “Notes on Nullification,” 1835, *ibid.*, 574.

³² Madison to Trist, December 1831, *ibid.*, 472.

REFERENCES

Primary Sources

Manuscripts

The James Madison Papers. Library of Congress. Washington, DC.

Government Documents

Peters, Richard A., ed. *The Public Statutes at Large of the United States of America*. 18 vols. Boston: Little, Brown and Company, 1874.

Other Published Documents

Belz, Herman, ed. *The Webster-Hayne Debate on the Nature of the Union*. Indianapolis: Liberty Fund, 2000.

Boyd, Julian P. et al., eds. *The Papers of Thomas Jefferson*. 39 vols. Princeton: Princeton University Press, 1950-2011.

Hunt, Gaillard, ed. *The Writings of James Madison, Comprising His Public Papers and Private Correspondence*. 9 vols. New York: G. P. Putnam's Sons, 1900-1910.

Mattern, David B. et al., eds. *The Papers of James Madison*. 17 vols. Charlottesville: University Press of Virginia, 1977-1991.

Peterson, Merrill D., ed. *Thomas Jefferson: Writings*. New York: The Library of America, 1984.

Rakove, Jack N., ed. *James Madison: Writings*. New York: The Library of America, 1999.

Rives, William C., and Philip R. Fendall, eds. *Letters and Other Writings of James Madison: Fourth President of the United States*. 4 vols. Philadelphia: J. B. Lippincott & Co., 1865.

Wilson, Clyde N., and W. Edwin Hemphill, eds. *The Papers of John C. Calhoun*. 28 vols. Columbia: University of South Carolina Press, 1959-2003.

Secondary Sources

Books

Brant, Irving. *James Madison: Commander in Chief, 1812-1836*. New York: Bobbs-Merrill, 1961.

Ellis, Richard E. *The Union at Risk: Jacksonian Democracy, States' Rights, and the Nullification Crisis*. New York: Oxford University Press, 1987.

Freehling, William W. *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816-1836*. New York: Harper & Row, 1965.

Ketcham, Ralph Louis. *James Madison: A Biography*. New York: Macmillan, 1971.

McCoy, Drew R. *The Last of the Fathers: James Madison and the Republican Legacy*. New York: Cambridge University Press, 1989.

Myers, Marvin, ed. *The Mind of the Founder: Sources of the Political Thought of James Madison*. Indianapolis: Bobbs-Merrill, 1970.

Peterson, Merrill D. *Olive Branch and Sword: The Compromise of 1833*. Baton Rouge: Louisiana State University Press, 1982.

Rakove, Jack N. *James Madison and the Creation of the American Republic*. New York: Pearson/Longman, 2007.

Rutland, Robert Allen. *James Madison: The Founding Father*. Columbia: University of Missouri Press, 1987.

Wills, Gary. *James Madison*. New York: Henry Holt and Company, 2002.

Wood, Gordon. *Revolutionary Characters: What Made the Founders Different*. New York: Penguin Books, 2006.

Articles

Arndt, J. Chris. "Advice of the Father: James Madison, States' Rights, and the Nullification Crisis." *Northern Neck of Virginia Historical Magazine* 47 (1997), 5464-5473.

Gutzman, Kevin Raeder. "A Troublesome Legacy: James Madison and 'The Principles of '98.'" *Journal of the Early Republic* 15 (Winter 1995), 569-589.

_____. "From Interposition to Nullification: Peripheries and Center in the Thought of James Madison." *Essays in History* 36 (1994), 89-113.

Koch, Adrienne, and Harry Ammon. "The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties." *The William and Mary Quarterly* 5 (April 1948), 145-176.

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