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# The Kentucky and Virginia Resolutions

## *Guideposts of Limited Government*

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WILLIAM J. WATKINS, JR.

In 1885 Woodrow Wilson noted that criticism of the Constitution had ceased upon its adoption and “an indiscriminating and almost blind worship of its principles” had developed (Wilson 1885, 4). A survey of American political discourse after the Constitution’s ratification reveals that its provisions were often quoted in such a manner as a minister would quote the Gospel. Considering that the history of Anglo-American liberty is, in many respects, a history of great charters and the events leading to their adoption, American reverence for the Constitution is not surprising (see Brooks 1993). Of course, the Constitution is not the only document in the pantheon. For most Americans the Declaration of Independence is also a sacred document, and some scholars place it above the Constitution (Jaffa 1994, 22–23). However, conspicuously absent from the list of universally revered charters are Thomas Jefferson’s and James Madison’s Kentucky and Virginia resolutions. For their lucid reasoning and peerless prose, they merit inclusion as much as the Constitution itself. Unfortunately, the Resolves of 1798, as they are also known, have been given short shrift as the nation has become more consolidated. Though the centralizers can twist the language of the Constitution to confer plenary powers on the national government, the language of the Resolves cannot be so manipulated. So Americans are kept in the dark about the principles of ’98, lest they be tempted to reclaim the decentralized republic of the Constitution’s framers.

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Hoary and forgotten by most, the Resolves mark the path to limited government. Though much has changed since Jefferson and Madison penned the Kentucky and Virginia resolutions, the nature of power remains the same—power can be checked only by power. The Resolves point to the states as the natural depository of the power to check the national government. Madison came to that realization long before he wrote the Virginia resolution. In *Federalist 51*, he described the horizontal and vertical checks and balances established by the Constitution and plainly stated that the state and national governments “will controul each other; at the same time each will be controuled by itself” (Madison, Hamilton, and Jay [1788] 1982, 264). If the American people are once again to gain control of the national government, it will be through the states. No new theories are needed; the intellectual giants of the founding era have done the work for us.

### **Threat of French Invasion**

As the year 1798 began, the prospect of war with France loomed. How the “special relationship” between France and the United States had deteriorated after the American Revolution is a complicated story. Hostilities between the two former allies were probably likely insofar as the French had supported the American Revolution not because of beliefs in self-determination or republicanism but because of Louis XVI’s desire to punish Great Britain for the defeat of France in the Seven Years’ War. Many Americans were thankful for French aid in the Revolution, but others realized early on that although France had helped the United States to break from George III, the French would never acquiesce in its becoming a great nation (Ketcham 1963, 204–5). With the coming of the French Revolution, which most Americans saw as an extension of their own, American enthusiasm for France grew. Hindsight now shows that the two revolutions had little in common, the American Revolution being an orderly “lawyer’s revolution” whereas the French version was, to paraphrase Simon Schama, the incarnation of violence (1989, xv). Nonetheless, in the 1790s loyal Americans were divided into pro-French and pro-British camps, with the former led by Jefferson and Madison and the latter by Alexander Hamilton.

Hamilton and the Federalists, great admirers of Great Britain and its constitution, had a vested interest in peace with Britain. The entire Hamiltonian financial system depended on tariff revenue derived from imports of British goods. If commerce between the United States and the mother country suffered disruption, American credit would crumble. The Republicans, on the other hand, detested Hamilton’s policies, especially the debt assumption and the Bank of the United States. Recognizing that the Federalist fiscal program sought to bind men of wealth and status to the central government in an effort to weaken state influence, the Republicans automatically suspected the “Anglo-men” and Britain itself. Moreover, the farmers and planters of the South, who were predominantly Republican, owed enormous sums of money to

British creditors, and hence they naturally favored the French (Elkins and McKittrick 1993, 90).

Key to the rupture with France was President George Washington's Neutrality Proclamation of 1793 and the Neutrality Act of 1794. Because the United States was bound by treaty to defend the French West Indies and prohibited from aiding the enemies of France, Washington's actions raised the ire of the French as they warred with Great Britain. Though neutrality was the practical course for a young, weak nation, such treatment of France shocked Madison and other Republicans who, unlike the Federalists, sympathized with the cause of revolutionary France and believed that the United States should fulfill its obligations (Brant 1950, 374–75).

While Washington and his cabinet debated neutrality, the embodiment of the French Revolution arrived in Charleston, South Carolina. Charles Edmund Genet, the new minister of the French Republic, was welcomed by enthusiastic crowds and local dignitaries. Long before presenting his credentials in Philadelphia, Genet began to outfit privateers and schemed to incite rebellion in Florida, New Orleans, and Canada. As Genet learned that the Americans' definition of neutrality and their interpretations of the existing treaties with France differed markedly from his own, his conduct grew more outrageous. Just as the mob ruled in France, so Genet thought the mob ruled in America. Taking that logic to an extreme, Genet threatened to go over the head of President Washington and appeal directly to the American people. Republicans and Federalists quickly realized that Genet was intractable, and Washington's cabinet voted unanimously to demand his recall. Genet's conduct was an embarrassment to French sympathizers in America, and, as Harry Ammon writes, it "exposed, as no other previous episode, the extent and fury of the disagreement between the two groups which had been seeking to control national policy since the bitter controversy generated by the Hamiltonian fiscal program" (1973, 32).

Furthermore, the ratification in 1795 of Jay's Treaty, which attempted to settle sundry differences between Great Britain and the United States,<sup>1</sup> struck the French as yet another betrayal. Specifically, the Directory was outraged by the provisions requiring the United States to order French privateers out of American ports and permitting the British to capture ships bound for France bearing needed supplies. Madison, in a letter of 12 February 1798 to Thomas Jefferson, called the infamous treaty an "insidious instrument" (Madison 1991, 78).

Consequently, the French minister was withdrawn from Philadelphia, and in Paris the French government refused to receive the new American minister, Charles

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1. At issue were (1) British troops still on American soil in the Northwest, despite the 1783 Treaty of Paris; (2) restrictions on American commerce more onerous than those borne by the colonies before the Revolution; and (3) the British Order in Council of 6 November 1793, which led to widespread depredations on American commerce and to the confiscation of anything coming to or going from the French West Indies. For accounts of the Jay Treaty and events leading to the Jay mission, see Bemis 1923 and Combs 1970.

Cotesworth Pinckney. The Directory, in violation of the commercial treaty of 1778, declared that it would no longer adhere to the principle that free ships carried free goods and would consider all neutral vessels carrying British goods as fair game. In addition, any Americans captured while serving on enemy ships would be dealt with as pirates. Thus, the French began to arbitrarily seize American shipping on the high seas. Within a year after the ratification of Jay's Treaty, France had captured or destroyed more than three hundred American vessels. Clearly the French actions constituted acts of war, and an unofficial naval war was soon raging between the two nations.

The situation took a turn for the worse when President Adams sent John Marshall, Elbridge Gerry, and Charles Cotesworth Pinckney to Paris to negotiate a peaceful settlement.<sup>2</sup> The emissaries were denied access to the Directory and insulted by French agents supposedly acting on behalf of the French foreign minister, Talleyrand.<sup>3</sup> Talleyrand's agents, known in the dispatches simply as X, Y, and Z,<sup>4</sup> demanded a bribe, a loan to France, and an apology for anti-French statements made by President Adams as prerequisites for negotiations. Though bribes were common in France, permitting high officials to live in luxury,<sup>5</sup> Americans considered their honor insulted when accounts of the XYZ affair were published at home. "Millions for defense, not one cent for tribute," was the national cry.

The United States certainly did not need a war with France. If such a war broke out, the United States would face the French alone. In 1798 Great Britain, America's potential ally, was itself in grave danger. Many believed a French invasion of the British Isles to be imminent. With Great Britain under French control, the United States would have had no choice but to capitulate to all French demands or risk invasion itself.

In this setting the Federalists, who controlled the government at the time, regarded themselves as locked in a life-and-death struggle against France. They considered opposition to their policies to be the result of faction and dangerous to the survival of the republic. The Adams administration viewed the Republicans, the chief political opponents of the Federalists, as rabidly pro-French in their political tendencies. President Adams believed that the "French Jacobinal faction" would link up with French armies if an invasion were to occur.

As the war frenzy grew, President Adams occasionally appeared in public in military uniform with a sword at his side. Fearing that supporters of Jefferson were little

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2. Evincing a spirit of reconciliation, Adams originally wanted Madison to join the others, but the cabinet threatened to resign if Madison were chosen (Sharp 1993, 164–65).

3. Pro-French factions in the United States were not convinced that X, Y, and Z were indeed acting on behalf of the French government or officials. Jefferson in his letter of 29 January 1799 described the event as "cooked up" with "the swindlers...made to appear as the French Government" (1854a, 274).

4. There was a W (Nicholas Hubbard), but he made only a brief appearance and therefore is often left out of accounts of the incident. The identities of X, Y, and Z were Jean Conrad Hottinguer, Pierre Bellamy, and Lucien Hauteval (Stinchcombe 1980, 115).

5. Historians estimate that in two years, Talleyrand received bribes totaling 14 million francs for such actions as expediting treaties and guaranteeing immunity for neutrals (Elkins and McKittrick 1993, 568).

better than the mobs of France, Adams ordered a cache of weapons delivered to his home for protection. Alexander Hamilton happily fanned the flames of war as he urged that an army of twenty thousand men be raised immediately. Fearing he had underestimated the danger, Hamilton later raised the figure to fifty thousand. George Washington, in retirement at Mount Vernon, let the administration know he would be willing to take charge of the army in this time of national crisis. Washington did assume command, but he was only a titular commander. Hamilton held the real power.

Of all the Federalists, Hamilton greeted war with the most excitement. Not only did he long to meet the forces of regicide on the field of battle, but he saw the crisis as an opportunity to quell resistance to national power in the southern states. When Virginia began to upgrade its neglected defenses, primarily in response to increased Indian attacks on its western border, Hamilton took that action as a sign that Virginia was preparing the question the authority of the Union. Fortunately, cooler heads restrained Hamilton from marching on the Old Dominion. Hamilton also hoped to use his army to take Louisiana and Florida for the United States. Ever ambitious, he entertained dreams of pushing into South America as well.

Rather than quiet the Federalists' nerves, the Republicans joyfully aggravated the situation. Republicans often addressed each other in the French fashion as "citizen" and celebrated French military victories with grand feasts.<sup>6</sup> Jefferson made it known that he would welcome a French victory over Great Britain. Because of his support of the French Revolution despite his knowledge of the terror, Jefferson had earlier lost the confidence of George Washington and was no longer trusted by his old friend John Adams.<sup>7</sup> Rather than see the French Revolution fail, Jefferson was prepared to see "half of the earth desolated; were there but an Adam and an Eve left in every country, and left free, it would be better than as it now is" (Jefferson 1853, 502).<sup>8</sup>

Because of the real threats posed by France in the war at sea and the perceived threats of an unabashedly pro-French opposition, the Federalists believed they had to

6. The Democratic-Republican societies, which sprang up in the wake of the French Revolution, especially worried the Federalists. Washington attributed the Whiskey Rebellion to them. Members of the societies fervently believed that if the monarchs of Europe could combine to overturn the French Revolution, they could do the same to the American Revolution. Several societies helped to arm French privateers, and most of them encouraged American statesmen to emulate the virtues of the governing bodies of France (see Foner 1976).

7. The decisive event in precipitating the rupture was the American publication of Thomas Paine's *Rights of Man*. Jefferson, sending the book to the printer, enclosed a note expressing pleasure "that something was at length to be publicly said against the political heresies which had of late sprung up among us." He intended the note to remain private, but the printer published the remarks as a preface to the book. Adams rightly took "heresies" to refer to his *Discourses on Davila*, in which he condemned the French Revolution (Peterson 1976, 57).

8. Though Jefferson continually expressed his wishes for the success of the French Revolution, as in the letter of 3 January 1793 to William Short (just quoted), Jefferson's only live exposure to that revolution occurred during its least violent and most moderate phase. With an ocean separating him from the events, Jefferson (and many other Republicans) formed an idealized picture of the French Revolution that did not correspond to reality. Conor Cruise O'Brien's observation is appropriate: "The only safe way of maintaining American enthusiasm for the French Revolution was to keep the French Revolution at a distance, seen through a warm haze. Any whiff of the real thing was fatal" (1996, 178).

act to save the nation. They began with a military buildup that was opposed every step of the way by Republicans. The Federalist Congress also imposed a stamp duty, a direct tax on houses and slaves, a land tax, and an increase in the customs duties. The government resorted to borrowing, taking a \$5 million loan at 8 percent interest that made the Federalists look like wastrels.

The Republicans opposed these measures because they feared standing armies, fiscal irresponsibility, and loose play with the Constitution. Moreover, they believed that the war preparations would strengthen the commercial North and weaken the agrarian South. Though Jefferson loathed the Federalists' taxes, he also found hope in them. He realized that only strong medicine would cure the people of war fever, and in a 26 November 1798 letter to Madison, he expressed his belief that with the levying of taxes "the Doctor is now on his way to cure [war hysteria], in the guise of a tax gatherer" (Jefferson 1854a, 274).

Jacobin fever afflicted most prominent Federalists, and they began to formulate legislation to deal with the perceived danger. The leaders in Congress already had an excellent model to follow. In 1794, in response to the French Revolution, William Pitt had pushed through Parliament the Law against Treasonable Practices and the Law against Seditious Meetings. Pitt silenced calls for reform, broke up democratic societies, and sent several newspaper editors to Botany Bay. As in Great Britain, the measures taken in the United States against the dangers posed by revolutionary France served the dual purposes of defending the country and conveniently silencing political opponents.

## The Hated Acts

The first act passed in the United States because of the French threat, the Naturalization Act of 18 June 1798, was aimed at European immigrants.<sup>9</sup> It increased the period that immigrants had to wait before they could be naturalized from five years to fourteen years. Primarily aimed at "wild Irishmen" and the thirty thousand Frenchmen who resided in the United States, the act was intended to reduce the ranks of the Jeffersonian Republicans, who had a large constituency of recent immigrants.

Federalist Harrison Otis, however, attempted to go much farther. He proposed a constitutional amendment to exclude all foreign-born who were not citizens at the time from all offices in the government of the United States. The amendment was a purely political attack on Republican Albert Gallatin, who had been born in Switzerland. Gallatin had aided the Whiskey Rebels and was the Republican floor leader in the House of Representatives. Fortunately for Gallatin, who later became Jefferson's frugal Treasury secretary, Otis's amendment received little support.

The Alien Friends Act of 25 June 1798 gave the president the power to deport any alien he thought dangerous to the tranquility or safety of the United States, without a trial or a reason given for the suspicion. Only upon receiving notice to leave the

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9. For the full text of the acts, see Smith 1956, 435–42.

country was the alien allowed to present evidence of his blamelessness and to apply for a license to remain. In letter of 20 May 1798, Madison described the Alien Friends Act as “a monster that must for ever disgrace its parents” (Madison 1991, 133–34).

Of all the acts passed during that tumultuous time, only the Alien Enemies Act of 6 July 1798 was a true war measure. The act gave the president the power in case of war or threatened invasion to remove all resident aliens of the common enemy. As the Alien Acts were under discussion by the House and Senate in Philadelphia, Jefferson in a letter of 3 May 1798 to Madison noted that many Frenchmen residing in the City of Brotherly Love had chartered a ship to sail “with as many as she can carry” (Jefferson 1854a, 239). Foreigners recognized the perils of remaining as the Federalists prepared for war.

The Sedition Act of 14 July 1798 brought up the rear in the parade of horrors. The act, which reads like an Orwellian proclamation from an omnipotent government, provided for the punishment of those who published or uttered false or scandalous statements and information about the government of the United States, Congress, or the president. Stirring up sedition could be punished by a fine of not more than \$2,000 and imprisonment not exceeding two years. Though the truth could be used as a defense, no one using that defense was ever acquitted. Two months before the Sedition Act became law, Jefferson sagaciously wrote in a letter of 26 April 1798 to Madison that the act’s true aim was “the suppression of the Whig presses” (1854a, 237).

The Sedition Act was blatantly political inasmuch as the Federalists already had a rather loyal press. Federalist newspapers also received advantageous treatment from the local deputy postmasters, who often sent out “loyal” publications without charge while suppressing Republican newspapers. During that period, the correspondence between Jefferson and Madison contains sundry complaints of missing newspapers and mail tampering.<sup>10</sup> Clearly, no press measure was needed; the Federalists already dominated the press. In view of that dominance, the Sedition Act seemed to many to be a final move to silence all opposition and secure permanent Federalist rule.

## Republican Newspapers Persecuted

Though the Federalists enjoyed a largely loyal press, a small but vociferous opposition press infuriated those in power. Of all the Republican newspapers, the Philadelphia *Aurora* was the one most hated by the Federalists. The *Aurora* was published by Benjamin Franklin’s grandson, Benjamin Bache, who was a master of political invective and unrelenting in his attacks.

Bache incurred Federalist wrath by publishing a conciliatory letter from Talleyrand to President Adams before Adams had passed it on to the Congress. Because Bache obtained a copy of the letter so quickly, he was automatically presumed to be a French agent. Although his arrest took place two weeks before the passage of the Sedition

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10. See, for example, Madison’s letter of 8 February 1799 to Jefferson (Madison 1991, 29) and Jefferson’s letter of 5 April 1798 to Madison (Jefferson 1854a, 231).



Act, the Federalists still sought to punish him. The federal government intended to prosecute him for libel under the common law, but Justice Samuel Chase provided an obstacle: only a few months earlier he had held that in the absence of a statute the federal government could not prosecute, because there was no federal common law. Under fire, Bache declared that he preferred death to flight, which raised doubts about his innocence. Unfortunately for the Federalists, Bache got his wish: he died of yellow fever before they could renew their attack on him.

Though death delivered Bache from the Federalists, other Republican newspapers found no solace. The Federalists brought suits against the most influential Republican papers, including the Boston *Independent Chronicle*, the New York *Argus*, the Richmond *Examiner*, and the Baltimore *American*. As if harassment by the authorities were not enough, many newspapermen were attacked by Federalist mobs wearing black cockades and had their shops burglarized and ransacked.

Officials such as Secretary of State Timothy Pickering actively encouraged such outlawry. Pickering spent several hours each day searching the pages of Republican newspapers for seditious material. Earlier in his career he had been sympathetic to the French Revolution, but with the passage of the Sedition Act he atoned for his youthful indiscretion. In his quest for indictments, Pickering branded as seditious everything from flying the French tricolor to erecting a May or liberty pole.

## The Trial of Thomas Cooper

To understand the vehemence with which the Federalists attacked the opposition, one need only examine the accounts of the show trials conducted under the Sedition Act. Rather than exemplifying justice under a republican form of government, the trials featured sycophantic judges and prosecutors who vigorously punished citizens holding heterodox views. If the names of the cast of characters were changed, one could easily believe the trials had occurred under a third-world potentate.

Thomas Cooper, who later became the president of the South Carolina College, was a multitalented English lawyer and radical who had moved to the United States in 1794. Cooper was arrested on 9 April 1800 for a handbill written five months earlier, and his trial attracted national attention. The secretaries of war, state, and the navy all attended the trial. Congressman Robert Goodloe Harper was also there to observe the application of section 2 of the Sedition Act, which he had drafted. Timothy Pickering went so far as to sit on the bench with the two judges, Justice Samuel Chase and District Judge Richard Peters.

Attorney General William Rawle, prosecutor of the Whiskey Rebels and the tax rebel John Fries, handled the case for the government. Cooper was indicted for “being a person of wicked and turbulent disposition, designing and intending to defame the President...and to bring him into contempt and disrepute, and excite against him the hatred of the good people of the United States” (Cooper 1800, 7).

Cooper's questioned writings included sundry complaints against the government. Those stressed by Rawle were the assertions that the country had been saddled with the expense of a permanent navy and a standing army; that the government had foolishly borrowed money at 8 percent in time of peace; that Adams's statements about the French "might justly have provoked war"; and that Adams had interfered with the proceedings of a court of law. Cooper described the last point as "a stretch of authority which the Monarch of Great Britain would have shrunk from" (1800, 7). Cooper pleaded not guilty and used the truth as a defense. As he mounted his defense it was clear he was not speaking merely to the court. Cooper's defense was even more an indictment of Adams and a message to the people to support the Jeffersonians in the election that was only months away.

Cooper questioned how the people could rationally use their franchise if "perfect freedom of discussion of public characters be not allowed" (1800, 19). He said he knew the king of England could do no wrong, "but I did not know till now that the President of the United States had the same attribute" (1800, 20). At remarks such as these, vexation surely showed on the faces of the Federalists in the courtroom. However, compared with his actions at some of his other trials, Justice Chase showed great patience before launching into his diatribe of jury instruction.

In his charge to the jury, Justice Chase took on the air of a prosecutor rather than a judge. He even pointed out to the jury several things that Attorney General Rawle had left out of the prosecution's case. Chase then declared that Cooper's "conduct shewed that he intended to dare and defy the government, and to provoke them, and his subsequent conduct [defense presented at trial] satisfies in my mind, that such was his disposition" (Cooper 1800, 46). Chase regarded Cooper's publication as the boldest attempt he had seen to poison the minds of the people. And if the jury was not satisfied that Cooper had proved his innocence regarding *all* points of the indictment, they must find him guilty.

So charged, the jury could reasonably have feared that a verdict of not guilty would earn *them* arrest for sedition. Chase—never impartial—got the verdict he desired; Cooper was fined \$400 and imprisoned for six months. "I do not want to oppress," Chase said as he sentenced Cooper, "but I will restrain, as far as I can, all such licentious attacks on the government of the country" (Cooper 1800, 46).

One wonders what sort of statements by the political opposition could avoid being characterized as "licentious attacks on the government." Clearly, under the Federalists' Sedition Act, all less-than-favorable discussion of government policies was prohibited.

## The Opposition Takes Action

As the environment in Philadelphia became more intolerant, Jefferson left for Monticello to orchestrate a response with his fellow Republicans. As he entered Virginia, Jefferson

was welcomed as a hero. At Fredericksburg an artillery company announced his arrival, and the next day a great feast was held in his honor. Virginia and the South as a whole took a different view of Jefferson and the policies of the Adams administration. For example, the Sedition Act garnered only two votes in the House of Representatives from representatives from south of the Potomac.<sup>11</sup> Rather than the chief Jacobin in the United States, Jefferson was seen as “the virtuous and patriotic” vice president (Malone 1962, 380).

In crafting a response, Jefferson never lost sight of the true purposes of the hated acts. In a letter of 11 October 1798 to Stephen Thompson Mason, Jefferson correctly described the acts as “merely an experiment on the American mind, to see how far it will bear an avowed violation of the Constitution” (1854a, 258). Thus, the resolutions were not simply protests against despotic legislation but protests against an interpretation of the Constitution that was bound to lead to consolidation.

Furthermore, the Alien and Sedition Acts directly assaulted all three facets of Jefferson’s constitutional thought: Whig, federalist, and republican. According to David Mayer (1994),

These three essential aspects of his thought may be summarized simply. Jefferson viewed constitutions primarily as devices by which government power would be limited and checked, to prevent its abuse through encroachment on individual rights (the Whig aspect of his thought). His preferred system for doing this was one in which governmental power was divided into distinct spheres (the federal aspect), each of which was in turn subdivided into distinct branches (legislative, executive, and judicial) equally accountable to the “rightful” majority will of the people (the republican aspect). The interrelationships—and, at times tensions—between these three essential aspects of Jefferson’s constitutional thought explain his response to the particular constitutional issues and problems of his time. (xi)

In the response to the acts, the three elements of Jefferson’s thought were in harmony.<sup>12</sup> The acts assaulted the individual’s right to criticize the conduct of government officials, ignored the basic principles of federalism as the national government assumed more power, and evinced the High Federalists’ contempt for the people, who in the Federalists’ view had no business meddling in the affairs of government.

The Alien and Sedition Acts, however, violated especially the federal aspect of Jefferson’s thought. As the United States came of age, Jefferson saw the dangers of

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11. Sectional voting patterns developed long before the Sedition Act controversy, with New England showing the greatest cohesion (Bell 1973, 17–31).

12. The best evidence of Jefferson’s political principles during the Sedition Act crisis can be found in his letter of 26 January 1799 to Elbridge Gerry, in which he professes his belief in the Constitution as ratified by the states, the necessity of preserving state powers, the evil of debt and standing armies, the benefits of free trade, the avoidance of entangling alliances, freedom of religion, and the success of the French Revolution (Jefferson 1854a, 266–74).

consolidation as perhaps the greatest peril of all. In his letter of 26 December 1825 to William B. Giles, Jefferson expressed his conviction that “it is but too evident, that the three ruling branches of [the national government] are in combination to strip their colleagues, the State authorities, of all powers reserved by them, and to exercise themselves all functions foreign and domestic” (1854b, 426–27). Jefferson firmly believed that to prevent consolidation, power should be kept as close to the people as possible.<sup>13</sup> Though some states might abuse power, Jefferson reasoned that not all would fall under the spell of tyranny. But with a consolidated and abusive national government, all would suffer the same tyranny; there would be no islands of peace. As Dumas Malone points out, Jefferson never supported states’ rights for their own sake, “but to safeguard the freedom of individuals,” which would undoubtedly suffer in a consolidated nation (1962, 396). Hence, in drafting the Kentucky Resolves, Jefferson identified the states as the proper entities of resistance.

Of course, Jefferson did not invent the idea of the states as bulwarks against encroachments by the national government. Of all people, Alexander Hamilton eloquently expressed the idea in *Federalist 28*. According to Hamilton, it was an “axiom” of the American system of government “that the state governments will in all possible contingencies afford complete security against invasions of the public liberty by the national authority.” He continued by postulating that should the national government pose a danger, the states could “at once adopt a regular plan of opposition, in which they can combine all the resources of the community. They can readily communicate with each other in the different states; and unite their common forces for the protection of their common liberty” (Madison [1788] 1982, 137).

In a little-known episode just before the Sedition Act crisis, Jefferson, responding to the actions of the grand jury of the federal circuit court in Richmond, followed Hamilton’s wisdom of *Federalist 28* and laid much of the foundation on the which the Kentucky resolution would be built.<sup>14</sup> In the spring of 1797 the grand jury formally accused Samuel Jordan Cabell, who was the congressional representative from Jefferson’s district, of seditious libel. Cabell had sent a circular letter to his constituents denouncing the Adams administration and hence was accused of “endeavoring, at a time of real public danger, to disseminate unfounded calumnies against the happy government of the United States, and thereby to separate the people therefrom; and to increase or produce a foreign influence, ruinous to the peace, happiness, and independence of these United States” (Jefferson 1943, 315). Jefferson drafted an anonymous petition to the Virginia House of Delegates, in which he called for the punishment of the offending

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13. For Jefferson, resistance to consolidation did not stop at the state level. In a letter of 12 June 1816 to Samuel Kerchival, Jefferson wrote: “We should thus marshal our government into, 1, the general federal republic for all concerns foreign and federal; 2, that of the State, for what relates to our own citizens exclusively; 3, the county republics, for the duties and concerns of the county; and 4, the ward republics, for the small, and yet numerous and interesting concerns of the neighborhood” (1854b, 13).

14. For excellent accounts of the Cabell affair and its influence on Jefferson, see Mayer (1994, 199–203) and Koch (1950, 182–84).

jurors. In the petition, Jefferson viewed the federal grand jury's actions as violating the "natural right" of free correspondence, interfering with the affairs of Congress, and putting "the legislative department under the feet of the Judiciary" (1943, 315).

Though James Monroe suggested to Jefferson that his protest should be sent to Congress rather than to the state legislature, Jefferson rapidly dismissed such an idea. In rejecting Monroe's advice in a letter of 7 September 1797, Jefferson explained that the national government was claiming powers not delegated by the Constitution and thus "seiz[ing] all doubtful ground. We must join in the scramble, or get nothing." Moreover, Jefferson understood that the federal character of the Union was at stake. He continued in his letter to Monroe by observing that "it is of immense consequence that the States retain as complete authority as possible over their own citizens," rather than bowing to a "foreign jurisdiction" (1854a, 200). Clearly, one year before he penned the Kentucky Resolves, Jefferson understood the very real threat of consolidation and believed that the proper place to rally Republican forces was at the state level.

## The Kentucky and Virginia Resolutions

Working in complete secrecy, Jefferson drafted the Kentucky resolution of 1798 between 21 July and 26 October 1798.<sup>15</sup> His original plan was for W. C. Nicholas to introduce the Resolves in North Carolina, but because of political setbacks there, Nicholas instead gave the Resolves to John Breckinridge for introduction in Kentucky. As an independent-minded frontier state, Kentucky was the perfect forum for Jefferson's resolution. Across the state, without much prompting, citizens gathered to protest the Alien and Sedition Acts. In Lexington, five thousand people—a crowd three times the town's population—gathered.<sup>16</sup> On 7 November 1798, Governor James Garrard announced the need for "a protest against all unconstitutional laws of Congress" (Koch and Ammon 1948, 156.) A committee led by John Breckinridge was appointed, and the Kentucky resolution was quickly introduced. On 10 November 1798 the Resolves, with modifications, passed the house with only three dissenting votes; three days later the Senate concurred.

The Resolves began with the Tenth Amendment, which Jefferson described in 1791 as "the foundation of the Constitution" (1943, 342). The states were not "united on the principles of unlimited submission to their General Government"; they had delegated only certain definite powers (Virginia Commission 1964, 143). Thus, "whenever the General Government assumes undelegated powers, its acts are unauthoritative, void, and of no force" (143).

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15. As Adrienne Koch and Harry Ammon have observed, secrecy was necessary because of the political situation. Had Adams learned that Jefferson was the author of the Kentucky Resolves, Adams might have had Jefferson arrested and tried for sedition (1948, 149–50).

16. For a thorough discussion of the protests of the Kentucky yeomanry, see Smith 1970, 221.

The resolution explicitly disclaimed that the national government was the judge of its own powers. Allowing it to judge its own powers would be akin to permitting an agent, rather than the principal, to determine the breadth of the agent's authority. The law of agency at its most basic level recognizes that an agent can act as such only subject to the consent and control of the principal to whom the agent owes a fiduciary duty (see Restatement [Second] of Agency, sec. 1). Just as A, B, and C, the partners in a business firm, decide what authority to give their agent Z, so the parties to the Constitution decide the powers of the national government. In light of such logic, Jefferson proclaimed in the resolution that "each party [to the federal compact] has an equal right to judge for itself, as well of infractions as of the mode and measures of redress" (Virginia Commission 1964, 144). For Jefferson, the people acting through their states—the authentic organs of government—were the final arbiters of constitutional interpretation. Jefferson feared that giving the federal government the exclusive power to interpret the Constitution through the Supreme Court would lead to arbitrary government. As John Taylor later wrote in his *Construction Construed and Constitutions Vindicated*, "a jurisdiction, limited by its own will, is an unlimited jurisdiction" ([1820] 1970, 131). With the states stripped of the power to construe the Constitution, the enforcement of constitutional limitations on the central government would be chimerical. Thus, it is not surprising that none of the convictions under the Sedition Act were appealed to the Federalist-dominated Supreme Court. The Republicans did not want to give the Court an opportunity to set a dangerous precedent.

The resolution continued by spelling out why the Alien and Sedition Acts were unconstitutional. With respect to the Sedition Act, the second resolve reasoned that the states delegated to Congress the power to punish but a few specific crimes, such as treason, counterfeiting, and piracy. Thus, in light of the Tenth Amendment's unmistakable declaration that what is not given is reserved, the Sedition Act failed constitutional examination.

The third resolve examined the Sedition Act in light of the First Amendment. Jefferson argued that because the First Amendment operated as a restraint only on the national government, the states "retain to themselves the right of judging how far the licentiousness of speech...may be abridged" (Virginia Commission 1964, 14). Though today it seems obvious that the Sedition Act was a violation of the First Amendment, in 1798 that understanding was not universal, and Jefferson's argument was in the libertarian vanguard. As Leonard Levy has pointed out, the "Framers were nurtured on the crabbed historicism of Coke and the narrow conservatism of Blackstone" and thus probably did not intend to abolish the common law of seditious libel when adopting the First Amendment (1985, xv, 220–81). Original intent aside, Jefferson's First Amendment arguments were instrumental in forming the libertarian view of freedom of speech.

The fourth, fifth, and sixth resolves dealt with the Alien Friends Act. Jefferson asserted that alien friends were under the jurisdiction of the laws of the state in which they resided. He pointed out that under the Constitution, Congress could

not prohibit “the Migration or Importation of such Persons as any of the States now existing shall think proper to admit” until 1808 (Article 1, sec. 9). That reading of the Constitution’s slave-import clause demonstrates Jefferson’s inclination to read broadly the clauses limiting power. Conversely, Jefferson read the power-granting clauses narrowly.<sup>17</sup>

Moreover, the act denied the aliens due process of law insofar as the president was judge, jury, and executioner. By investing the president with judicial power, the Alien Friends Act violated Article 3 of the Constitution. To Jefferson such a transgression of the separation of powers was but a sign of things to come. In the 1790s many Americans feared their republican experiment would end in a monarchy like the one from which they had seceded.

The seventh, eighth, and ninth resolves protested the construction of the necessary and proper clause that would give the general government unlimited power, and called upon the governor of Kentucky to transmit the Resolves to the legislatures of the several states. The ninth resolve expressed apprehension that continued usurpation by the national government could only “drive these states into revolution and blood, and will furnish new calumnies against Republican Governments, and new pretexts for those who wish it to be believed, that man cannot be governed but by a rod of iron” (Virginia Commission 1964, 149–50). The iron-rod statement exemplified Jefferson’s view, as expressed in his letter of 21 June 1823 to Justice William Johnson, that man is rational and need be restrained only “by moderate powers” exercised by officials chosen by their fellow citizens (1854b, 291). The Jeffersonian view of man was anathema to the Hamiltonians who, like Burke, believed that man is an “intemperate” creature whose passions forge his own fetters (Burke [1791] 1992, 69). To the Federalists, the Sedition Act exemplified a necessary restraint on man’s unruly passions.

The Kentucky resolution continued with the axiom that “free government is founded in jealousy and not in confidence,” because confidence “is every where the parent of despotism” (Virginia Commission 1964, 150). Therefore, when dealing “in questions of power then let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution” (150). The resolution ended with a call to other states to express their opinions of the Alien and Sedition Acts. Though the resolution expressed confidence that “the co-States...will concur in declaring these acts void and of no force, and will each unite with this Commonwealth in requesting their repeal at the next session of Congress,” the response, to be discussed later, was not what the Republicans expected (151).

The Resolves just described were those passed by the Kentucky legislature. Several changes had been made to the original draft written by Jefferson and introduced by Breckinridge. One change was the omission of the term “nullification.” With Hamilton and others hoping for an opportunity to march on the so-called agents of

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17. I am indebted to David Mayer for this observation. See Mayer 1994, chap. 7.

Jacobinism, the use of Jefferson's strong term might have given the hawks the opportunity they sought. In 1798 the Union was far closer to civil war than to a French invasion, and talk of "nullification" might have provided the spark to start a national conflagration.<sup>18</sup>

As passed, the Kentucky resolution also omitted Jefferson's call for a "committee of conference and correspondence" to foster communication among the states, which Hamilton had suggested in *Federalist 28*. As in the Cabell affair, Jefferson saw no reason to inform the Congress, inasmuch as Congress was not a party to the compact. The Kentucky legislature apparently preferred to work within the generally accepted constitutional framework and therefore shunned the creation of a committee of correspondence.

The most significant omission was Jefferson's request that each of the co-states, as a party to the compact, "take measures of its own for providing that neither these acts, nor any others of the General Government not plainly and intentionally authorized by the Constitution, shall be exercised within their respective territories" (Jefferson 1943, 134). Such actions would have differed greatly from merely appealing to Congress for repeal of the acts; Jefferson expected the states to take active measures to thwart the execution of the Alien and Sedition Acts. And when he learned of the negative responses from the other states, he contemplated secession. Rather than relinquish liberties to a consolidated national government, Jefferson was prepared for Virginians and Kentuckians to "sever ourselves from that union we so much value, rather than give up the rights of self-government which we have reserved, & in which alone we see liberty, safety & happiness" (quoted in Koch and Ammon 1948, 166). Madison, who frequently served as a moderating influence on Jefferson, talked him out of moving toward secession, but the fact remains that the resolution as penned by Jefferson was meant to be more than a protest; Jefferson envisioned the states defying the unconstitutional acts of the national government (Banning 1995, 393).

On 17 November 1798, Jefferson sent Madison a copy of his draft of the Kentucky resolution. Jefferson wrote that

we should distinctly affirm all the important principles they contain, so as to hold to that ground in future, and leave the matter in such a train as that we may not be committed absolutely to push the matter to extremities, and yet may be free to push as far as events will render prudent. (Jefferson 1854a, 258)

That statement is noteworthy for several reasons. First, he was obviously pressing Madison to see that a similar resolution be passed in Virginia. Second, and more important, Jefferson outlined his original strategy for the Kentucky Resolves in just a few

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18. The term "nullification" was used in the Kentucky resolution of 1799, but by that time tensions had been relieved somewhat.



words. He did not want to be forced into a general confrontation with the national government over nullification, but intended to retain the option to push as far as events permitted. In light of the language in Jefferson's original draft, had a number of states supported the resolution, it seems plausible that Jefferson might have begun drafting an ordinance of nullification for Kentucky.

Madison's Virginia resolution, which was introduced in the Virginia Assembly by John Taylor, was much shorter and more moderate than Jefferson's fervent Kentucky resolution. After expressing Virginia's warm attachment to the Union, the resolution appealed to the Tenth Amendment and declared that the powers of the federal government are "limited by the plain sense and intention of the instrument constituting that compact" and

that in the case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the States...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. (Virginia Commission 1964, 152)

Madison did not consider interposition a proper response to every disagreement with the central government. Only when the central government's exercise of power was "deliberate, palpable and dangerous" should the states interpose to protect the liberties of the people. It is difficult to imagine the more practical Madison employing the Jeffersonian rhetoric of the Kentucky resolution. Though Jefferson most assuredly intended the Resolves to be more than protests, Madison's intention is more difficult to judge. From his statements made in the 1830s (discussed below), it appears that Madison merely intended to elucidate constitutional principles, with emphasis on the Tenth Amendment, and thereby to encourage repeal of the acts. Considering that until the ratification of the Seventeenth Amendment in 1913 the state legislatures appointed senators and thus the states as such had representation in the national government, a state protest was more likely in those days to have an effect than it would be today. A state legislature could instruct its senators to seek repeal of legislation, and if the senators failed to do so, the state legislature could remove them when their terms expired.

## **The Response of the States**

The state responses to the Kentucky and Virginia resolutions disappointed the Republicans. For example, Delaware considered the Resolves an "unjustifiable interference with the General Government." Rhode Island declared the Alien and Sedition Acts to be constitutional insofar as they promoted the general welfare of the United States. Rhode Island, Massachusetts, Vermont, and New Hampshire asserted that the Supreme Court was the ultimate authority for deciding the constitutionality of acts of Congress. Massachusetts proclaimed that liberty of the press was not interfered with, because true freedom of the press forbade only prior restraints. To their chagrin, Madison

and Jefferson received not one favorable answer from the seven states that responded. The legislatures of the Republican-dominated southern states did not answer at all. According to Jefferson scholar Dumas Malone, the replies from the North and lack of responses from the South were not accurate gauges of public opinion. In any event, Kentucky reaffirmed its resolution, and Madison delivered his report of 1800, which considered the responses of the states at length and remains one of the clearest expositions of the Constitution.

## Tension Relieved

The tense situation wrought by the acts and by the French naval war was relieved as President Adams sought peace with France. Adams realized that the nation did not need war. Federal spending was double what it had been during Washington's last term, and revolts against high taxation, such as Fries's Rebellion, convinced the president that peace was the only course to pursue.

Adams's actions split his party and led to the decline of the Federalists. Pickering, the administration's chief Jacobin-hunter, was dismissed in the early summer of 1800 for attempting to thwart the president's plans for peace. Hamilton, denied a war, felt betrayed and wrote *The Public Conduct and Character of John Adams, Esq., President of the United States*. Had that pamphlet, which ruthlessly attacked President Adams, come from the pen of a Republican, it would no doubt have landed the author in prison for sedition. That Hamilton could get away with such an attack confirms the partisan character of the Sedition Act.

The election of 1800 was bitterly contested—the Federalists alleged that a vote for Jefferson was a vote against God—but the general outrage at the Federalists' partisanship and their extraconstitutional actions led to the electoral victory of the Republicans and to the triumph of their beliefs in a strict construction of the Constitution, states' rights, and freedom from taxes and debt. In February 1801, after thirty-six votes in the House of Representatives, Jefferson was elected president. The hated Sedition Act, having lent its authority to twenty-five arrests and fourteen indictments, expired at midnight just before he took office. Jefferson ordered the termination of pending prosecutions, and he pardoned persons convicted under the act.

## The Influence of the Resolutions

Though the doctrines of the Kentucky and Virginia resolutions are most often thought of as the staple of southern states' rights advocates, many states of both the North and the South have at some time either expressly approved the principles of the resolutions or acted in their spirit. What follows are but four examples.

In 1803 in the Olmstead case, the governor of Pennsylvania ordered the state's militia to defend two ladies against service of process by any officer "of any Court of the United States." That stance was not abandoned until the chief justice of the state

court held that it was not clear the United States courts did not have jurisdiction (Kilpatrick 1957, 101–18).

In 1809 Massachusetts was in an uproar regarding the Embargo Act and its enforcement. The commonwealth legislature passed the following resolution: “That the said act of Congress...[is]...in the opinion of this Legislature in many respects, unjust, oppressive and unconstitutional, and not legally binding on the citizens of this State” (Kilpatrick 1957, 125–31).

In 1820, when Ohio was fighting against the unconstitutional Bank of the United States, it recognized and approved “the doctrines asserted by the Legislatures of Virginia and Kentucky, in their resolutions of November and December, 1798, and January 1800—and do consider that their principles have been recognized and adopted by a majority of the American people” (Kilpatrick 1957, 144–58).

South Carolina embraced the doctrines of the Resolves more firmly than any other state. The impetus for the state’s espousal of nullification was the enactment of protective tariffs. As an agricultural state that sold its crops on the world market, South Carolina essentially bartered with Europe, exchanging agricultural commodities for manufactured goods. Because of the tariff, South Carolina paid much more for those goods and also feared a trade war in which Europe would retaliate against the American tariffs by placing duties on southern exports. South Carolina’s legislature rightly complained that the North discarded the teaching of the classical economists regarding free trade whenever a factory was planned. Had the offending tariffs been imposed to pay the national debt, South Carolina would not have protested. But because the avowed purpose of the tariff was the perpetuation of the American system of industrial protection, South Carolinians took themselves to have been wronged. Protection and redistribution of wealth for internal improvements were unconstitutional in their eyes.

At the center of the movement for nullification was the same Thomas Cooper who had earned the wrath of the Federalists in the 1790s for his opposition to the Adams administration. Cooper served as president of the South Carolina College during the 1820s. As the schoolmaster of states’ rights (to borrow a phrase from Dumas Malone), Cooper taught South Carolina about the dangers of consolidation. In 1827, as the tariff controversy grew, Cooper publicly questioned the benefit of the Union at a time when such talk raised eyebrows even in the Palmetto state. In a fervid speech, he described the South as the perennial loser and the North as the gainer in an “unequal alliance.” Viewing the question as a choice between separation and suppression, Cooper prophetically averred that South Carolina would in the near future “be compelled to calculate the value of our union.” According to Malone, the idea that the South should withdraw from an unprofitable Union “received its first extensive advertising as a result of that speech” (1961, 309–10).<sup>19</sup>

Amid the controversy over the protective tariff, South Carolina called a special convention in November 1832 and actually passed an ordinance of nullification in response to the 1828 Tariff of Abominations and the Tariff of 1832. Notably, South

Carolina took its action in a convention of the people acting in their sovereign capacity, just as it had when it entered the federal Union. The nullification was not an act of the legislature.<sup>20</sup> Margaret Coit succinctly sums up South Carolina's action:

Nullification did not suspend a law for the nation, but only within the state that protested. It was not an end in itself, but a method of appeal. It gave opportunity for three-quarters of the states in convention to determine whether or not to confer the questioned power upon the Union by constitutional amendment. The nullifying state would then have to obey—or secede (1991, 188).

The greatest champion of what many called the South Carolina doctrine was John C. Calhoun. Clyde Wilson, the editor of Calhoun's papers, writes that Calhoun began his career as, "and always considered himself to be, a Jeffersonian Republican" (1992, xix). The principles of the Kentucky and Virginia resolutions were his guiding light as his state faced a belligerent President Andrew Jackson. Writing to Bolling Hall on 13 February 1832, Calhoun remarked that "we are certainly more United against the Tariff, than we ever have been; and, I think, better disposed to enhance the old Republican doctrines of [17]98, which can save the Constitution" (Calhoun 1978, 553). Jefferson himself agreed with Calhoun on the tariff and even prepared Virginia's own protests of 1825. As Robert Y. Hayne remarked in a speech to the Senate in 1830, the South Carolina doctrine was not an innovation but "the good old Republican doctrine of '98" (Hayne 1830, 28). To many patriotic South Carolinians it was the last and best chance to preserve the Union.

In his South Carolina Exposition, Calhoun wrote that the state had a "sacred duty to interpose—a duty to herself—to the Union—to present, and future generations—and to the cause of liberty over the world, to arrest the progress of a usurpation which, if not arrested, must, in its consequences, corrupt public morals and destroy the liberty of the country" (Calhoun [1828] 1992, 361). For Calhoun the question revolved not around the dollars and cents of the tariff, though South Carolina felt that sting as much as any state, but around the future of liberty in the republic.

Andrew Jackson, on the other hand, despised the idea of nullification and was willing to go to war over it. Rumors abounded in Washington that he had ordered the arrest of

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19. Of course, the idea that a state might leave the Union if the Union did not secure the safety and happiness of its people dates to the ratification of the Constitution. For example, in its ratification message, Virginia declared that "the powers granted under the Constitution being derived from the People of the United States may be resumed by them whensoever the same shall be perverted to their injury or oppression" (Virginia Commission 1964, 71). Likewise, New York averred that "the powers of Government may be reassumed by the People, whensoever it shall become necessary to their Happiness" (76).

20. As early as 1798, Madison appreciated the distinction between the legislature and a convention. In a letter of 29 December 1798 to Thomas Jefferson, Madison postulated that because the states ratified the Constitution by conventions, a convention was the proper assembly for judging infractions of the compact (Madison 1991, 191).

Calhoun and other South Carolina representatives. Jackson then surrounded South Carolina with federal troops in an effort to maintain the supremacy of the Union at all costs.

Fortunately, a compromise was crafted at the last minute in the Senate—by Henry Clay, the father of the “American System”—that gradually lowered import duties. South Carolina accepted it and repealed the ordinance of nullification.<sup>21</sup> Not until South Carolina seceded after the election of Abraham Lincoln was a state to go farther in accordance with the principles of the Kentucky and Virginia resolutions.

Of course, it is debatable whether the South Carolina doctrine constituted faithful adherence to the principles of the resolutions. The old Jeffersonian Republican John Randolph supported the Carolina doctrine, grandiloquently stating that if because of senescence he could not participate in the possible armed conflict, he would “at least be borne, like Muley Moluc, in a litter to the field of battle and die in your ranks” (quoted in Houston [1896] 1967, 120–21). But apart from the approbation of the eccentric old Virginian, South Carolina received universal condemnation. Virginia reaffirmed the principle of 1798 but made clear that Madison’s Virginia resolution did not countenance South Carolina’s actions.

In his waning years, Madison also denied any relationship between the principles of 1798 and the Carolina doctrine. In a letter of 29 August 1834 to Edward Coles, Madison characterized the Carolina doctrine as an “anarchical principle” that “has the effect of putting powder under the Constitution & Union, and a match in the hand of every party, to blow them up at pleasure” (Madison 1910, 540–41). In April 1830, Madison responded directly to Hayne, who had sent him a copy of speeches espousing nullification. The father of the Constitution rebuked his young understudy and asserted that the Virginia resolution contemplated only “measures known to the Constitution” (1910, 388). According to Madison, if a state considered a law unconstitutional, it could appeal to the Supreme Court, urge impeachment of offending officials, or in the “last resort” seek to amend the Constitution. Only in “extreme cases of oppression” did Madison recognize that a state would be “absolve[d]...from the Constitutional Compact to which it is a party” (1910, 383).

Clearly, the Resolves, as *used* in 1798, did not sanction the actions of South Carolina. Virginia and Kentucky did not attempt to interfere with federal officials or with the operation of the hated acts. Studies of the contemporary grassroots protests also indicate that the people did not countenance secession or nullification as they demanded redress (Smith 1970). As James Jackson Kilpatrick has pointed out, the refusal to consider more drastic means might have reflected the impending expiration of the Sedition Act in 1801 rather than a lack of innovative thinking (1957, 85–86).

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21. When South Carolina repealed the ordinance of nullification regarding the tariff, it passed another to void the Force Bill, which had been enacted to give the national government power to collect tariff revenue by force if necessary. With the compromise, however, the point became moot. For discussions of the nullification controversy, see Bancroft 1966 and Houston [1896] 1967.

In the same vein, one must question whether the inaction comported with the spirit of the Resolves or whether, when confronted by the objurgations of the Northern states, Virginia and Kentucky abandoned any thoughts of further action, declining to push harder because of the staunch opposition. In his draft of the Kentucky resolution, Jefferson seems to have envisioned disobedience when he wrote that the co-states should enact measures to prevent the execution of the Alien and Sedition Acts within their respective territories. Moreover, though Madison persuaded him otherwise, Jefferson questioned the value of the Union in 1799 insofar as he expressed a preference for secession over the relinquishment of the rights of self-government. The states that responded to the Resolves also interpreted them more broadly than did the aged Madison. Why would several of those states have responded that the Supreme Court was the final arbiter of constitutional questions if the Kentucky and Virginia resolutions were viewed as mere complaints? Had the southern states responded favorably to the Resolves and had Adams's popularity been greater (thus diminishing the chance of a revolution at the ballot box), the Revolution of 1800 might not have been bloodless.

### Implications for the Present

Whether one approves of the Carolina doctrine or not, the Kentucky and Virginia resolutions highlight a grave flaw in the Constitution of 1787: it does not explicitly provide an umpire to settle disputes between the states and the central government. If the Supreme Court is the ultimate arbiter of the Constitution, as the Court unanimously proclaimed in *Cooper v. Aaron* (358 U.S. 1 [1958]), then the caprice of the national government and not the Constitution is the supreme law of the land. Clearly, if the national government is the judge of its own powers, it will construe them broadly and dispose of any hopes for limited government.<sup>22</sup> Jefferson inferred that in the absence of an umpire, the parties to the compact are the ultimate arbiters of the Constitution. Although his reasoning is sound even without a written provision in the Constitution, an amendment to the Constitution is needed to end the controversy once and for all. (See the appendix for a proposed amendment.)

Unfortunately, Congress is not likely to propose an amendment that would divest the national government of the luxury of determining the breadth of its own powers. That unsurmountable barrier brings us to yet another problem with the Constitution: it contains no provision for the states to propose amendments except by a convention that could treat the Constitution as a blank slate. Currently, amendments

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22. A prime example is the commerce clause. The Court has interpreted that clause as giving the national government the power to pass comprehensive civil rights laws (*Heart of Atlanta Motel v. United States*, 379 U.S. 241 [1964]) and criminal statutes (*Perez v. United States*, 402 U.S. 146 [1971]). Though the case (*United States v. Lopez*, 115 Sup. Ct. 1624 [1995]) in which the Court struck down the Gun-Free School Zones Act as having no substantial relation to interstate commerce offers some hope of narrowing the scope of the commerce clause, commentators have noted that the Court's most expansive precedents would be upheld under the test established in *Lopez* (see Hagen 1996, 1388 n. 209).

may be proposed in two ways: two-thirds of both houses of Congress may propose amendments to the states, or two-thirds of the states may petition Congress for a constitutional convention. Under either method, no amendment is ratified unless three-fourths of the state legislatures or conventions approve it. As William Quirk and Robert Wilcox (1998) have explained, Article 5 of the Constitution as originally drafted by Madison eschewed the dangers of a constitutional convention and forced Congress to submit amendments “on the application of two thirds of the Legislatures of the several States” (18). As the Philadelphia convention prepared to adjourn, Gouverneur Morris suggested the never-used and dangerous convention method that we now have. Though Madison noted that the convention method might cause difficulties, he did not put up much of a fight, and thus the national government became the *de facto* agent of constitutional change.

Under a Madisonian amendment process, the states—as the parties to the compact—could confer among themselves and offer amendments to the Constitution to curb the national government. Such an amendment procedure would obviate the need for more radical measures, because the states would have a voice in revising the Constitution in order to defend the exercise of the reserved powers and the liberties of the people. Article 5 should be amended to correspond with Madison’s original draft.

But what are the states to do when a constitutional provision is in place and the national government ignores it? For example, what if a modern version of the Sedition Act were passed by Congress and signed by the president? The First Amendment is already perfectly clear that “Congress shall make no law...abridging freedom of speech.” This example demonstrates the weakness of any amendment process when the national government remains the judge of its own powers. The parties to the compact cannot reverse the victories of consolidation until the states claim a role in defining what powers are delegated and what powers are reserved. The amendment specified in the appendix would shift the power of interpretation while acknowledging the sectional differences that existed in Jefferson’s time and that persist as the nation approaches the new millennium (see Cawthon 1997).

Before any such amendment is added to the Constitution, however, the spirit of 1776 must be rekindled in the people. Congress will never propose amendments that surrender the discretion of the national government to interpret the Constitution or that give the states a role in suggesting amendments unless a great popular demand arises. A revival of the spirit that animated the Revolution of 1800 is needed again today.

During the crisis of the Alien and Sedition Acts, Jefferson wrote in letter of 12 March 1799 to Thomas Lomax:

The spirit of 1776 is not dead. It has only been slumbering. The body of the American people is substantially republican. But their virtuous feelings have

been played on by some fact with more fiction; they have been the dupes of artful maneuvers, and made for a moment to be willing instruments in forging chains for themselves. (1854a, 300)

Like the early Americans who supported the unconstitutional acts of the Federalists, modern Americans have been “dupes” in forging their own chains.<sup>23</sup> Americans support programs concocted by the national government, such as Social Security, Medicare, and Medicaid, which render the recipients dependent on the national government. Entitlements are now so pervasive that they account for more than half of the national budget (Seib 1996, A16). Hilaire Belloc’s predictions about the servile state have come true.<sup>24</sup>

The fundamental question is whether the spirit of 1776 can be revived. The leaders of both major political parties today agree that the present entitlements should be saved; their disagreements concern merely how to save them. In the twentieth century a progression of New Deals, Fair Deals, Great Societies, wars, and social upheavals has created the current Leviathan. Hollow “victories” such as the so-called Reagan revolution have left only debt and growing social programs in their wake.

For true change to take place, Americans must once again conceive of their history as a struggle to create and maintain real freedom. Part of that reconceptualization would entail making a place for the Kentucky and Virginia resolutions in the pantheon of American charters. The resolutions articulate the fundamental principles of our government in an eloquent yet logical manner; in their import, they rank second only to the Constitution. For Americans who would recreate a limited federal government of enumerated powers—the government created by the Founders—the resolutions can serve as an enduring inspiration.

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23. Occasionally the people of the states do protest and prevail. See *Printz v. United States* (117 Sup. Ct. 2365 [1997]), in which the Supreme Court struck down an interim provision of the Brady Handgun Violence Prevention Act requiring local law enforcement officials to conduct background checks. According to Justice Scalia, who wrote for the Court, “residual state sovereignty was also implicit...in the Constitution’s conferral upon Congress of not all governmental powers, but only discrete, enumerated ones...which implication was rendered express by the Tenth Amendment” (2376–77). Just after *Printz* was decided, South Carolina protested the Driver’s Privacy Protection Act (DPPA) in the federal courts and won a permanent injunction (*Condon v. Reno*, 972 F. Supp. 977 [1997]). The DPPA requires that “a State department of motor vehicles...shall not knowingly disclose or otherwise make available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record.” South Carolina, already having a statute regulating access to motor vehicle records, took umbrage at the federal intrusion and sought a remedy in the federal district court. Relying on the Tenth Amendment, Judge Dennis Shedd found that the DPPA exceeds the power of the national government. The case is currently on appeal to the Fourth Circuit.

24. According to Belloc ([1913] 1977), “The future of industrial society...left to its own discretion, is a future in which subsistence and security shall be guaranteed for the proletariat, but shall be guaranteed at the expense of the old political freedom and by the establishment of that proletariat in a status really, though not nominally, servile” (198).



## Appendix

The following is an example of an amendment that would embody Jefferson and Madison's principles in the Resolves of 1798 as well as John C. Calhoun's contribution to constitutional theory.

*Section 1.* The Constitutional Commission shall settle questions presented by the several States concerning the constitutionality of measures or actions taken by the government of the United States.

*Section 2.* The Constitutional Commission shall be composed of one Commissioner from each State chosen every second year by the people of the several States from two candidates chosen by the State Legislature, and the electors in each State shall have the qualifications requisite for the electors of the most numerous branch of the State Legislature; each Commissioner shall have one vote.

*Section 3.* No person except a natural born citizen shall be eligible to the office of Commissioner; nor shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States, and been nine years a resident of that State for which he shall be chosen. No person shall be elected to the office of Commissioner more than four times.

*Section 4.* When vacancies happen by resignation, or otherwise, during the recess of the Legislature of any State, the executive thereof may make temporary appointments until the next meeting of the Legislature, which shall choose two candidates to present to the people to fill the vacancy.

*Section 5.* The Constitutional Commission shall assemble at least once in every year, and such meeting shall begin at noon on the third day of January, unless they shall by law appoint a different day. The Constitutional Commission shall choose their Chairman and other officers. The Commission shall be the judge of the election returns and qualifications of its own members, and three-fourths of its members shall constitute a quorum to do business. The Commission may determine the rules of its proceedings. The Commission shall keep a journal of its proceedings, and from time to time publish the same.

*Section 6.* The Commissioners shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. No Commissioner shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States.

*Section 7.* Whenever the Chairman of the Constitutional Commission shall receive petitions from one-fifth of the legislatures of the several States requesting a

ruling on the constitutionality of a specific measure or action of the government of the United States, the Commission shall convene. The act or measure of the national government shall be void and of no force if three-fourths of the Commissioners present vote against its constitutionality, or if three-fourths of the Commissioners from one section of the United States shall vote against the constitutionality of the act or measure.

*Section 8.* The three sections of the United States are defined as follows.

The Western Section shall be composed of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

The Southern Section shall be composed of Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia.

The Northern Section shall be composed of Connecticut, Delaware, Illinois, Indiana, Iowa, Maine, Massachusetts, Michigan, Minnesota, New York, New Hampshire, New Jersey, Ohio, Pennsylvania, Rhode Island, Vermont, and Wisconsin.

Whenever new States are admitted to the Union, the Commission shall make the necessary modifications to the sectional compositions.

*Section 9.* The Constitutional Commission shall not sit as a Convention as prescribed in Article 5 of the Constitution of the United States.

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