The Power of

"NO!"

The Historical and Constitutional Basis for State Nullification to Limit Federal Power and Its Practical Application

By: Michael Maharrey

The Nature of the American Political System

In Federalist #45, James Madison encapsulated the intended structure of America's system of government under the Constitution. The federal government was to operate within a limited scope of power, most authority remaining with the state governments and the people themselves.

"The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation and foreign commerce; with which the last the power of taxation will for the most part be connected. The powers reserved to the several States will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement and prosperity of the State."

The central debate during the ratification process wasn't whether or not the federal government would exercise expansive powers or limited authority. All parties broadly agreed that it was intended to remain limited. Debate centered on whether or not the provisions in the Constitution would adequately restrain federal power. Anti-federalists like Patrick Henry argued that it would not.

> *"My great objection to this government is, that it does not leave us the means of defending our rights, or of waging war against tyrants."*[1]

But the Federalists won the day, promising that the general government would exercise only its enumerated powers and the people of the states would retain their sovereignty. The federal government would enjoy supremacy only when it exercised its delegated powers, and it was understood that the people of the states could rescind those powers if they so desired. Several of the state ratifying instruments reflect this understanding. For instance, the New York ratifying document specifically asserts the states authority to withdraw delegated powers.

> *"We, the delegates of the people of the state of New York, duly elected and met in Convention...Do declare and make known...That the powers of government may be reassumed by the people whensoever it shall become necessary to their happiness; that every power, jurisdiction, and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the government thereof, remains to the people of the several states, or to their respective state governments, to whom they may have granted the*

[1] Patrick Henry, Against Ratification of the Constitution (Virginia Ratifying Convention, 1788). Text found at: http://teachingamericanhistory.org/library/index.asp?document=964

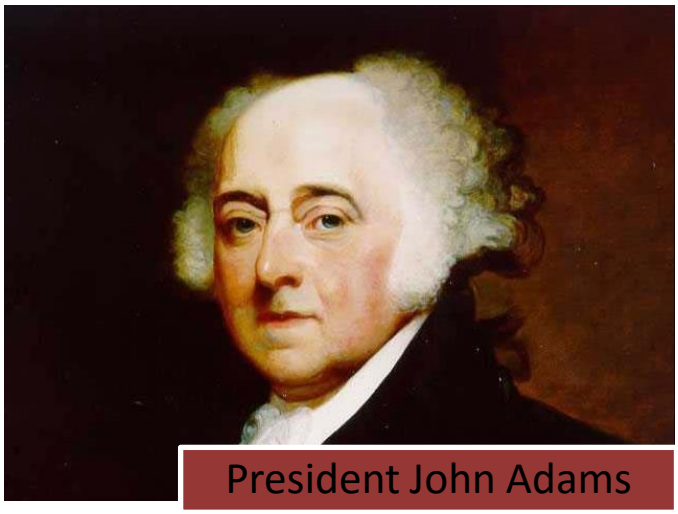
same; and that those clauses in the said Constitution, which declare that Congress shall not have or exercise certain powers, do not imply that Congress is entitled to any powers not given by the said Constitution; but such clauses are to be construed either as exceptions to certain specified powers, or as inserted merely for greater caution." [2]

But merely asserting the federal government must operate with limited powers means nothing without some means to ensure that it remains within its proper bounds. How do the people of the states check federal power?

It wasn't long until this became more than just a theoretical question.

Usurping Power: The Alien and Sedition Acts

During the summer of 1798, Congress passed, and President John Adams signed into law, four acts together known as the *Alien and Sedition Acts*. With winds of war blowing in Europe, the Federalist Party majority wrote the laws to prevent "seditious" acts from weakening the U.S. government. Federalists utilized fear of the French to stir up support for these draconian laws, expanding federal power, concentrating authority in the executive branch and severely restricting freedom of speech.


President John Adams

The Naturalization Act passed on June 18 and extended the amount of time immigrants had to live in the United States before becoming eligible for citizenship form five to 14 years. Like most things political, the stated and the underlying purposes of tightening naturalization requirements were two different things. The law was advanced as a national security measure. But it provided a great benefit to the Federalist Party in power because most recent French and Irish immigrants supported the Democrat-Republican Party.

The Alien Friends Act passed a week later and gave the president sweeping power to deport "dangerous" aliens, in effect elevating the president to the role of judge, jury and "executioner."

"It shall be lawful for the President of the United States at any time during the continuance of this act, to order all such aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret

[2] New York Ratification Document (New York Ratifying Convention, 1788) Text found at: http://www.usconstitution.net/rat_ny.html

machinations against the government thereof, to depart out of the territory of the United States, within such time as shall be expressed in such order."

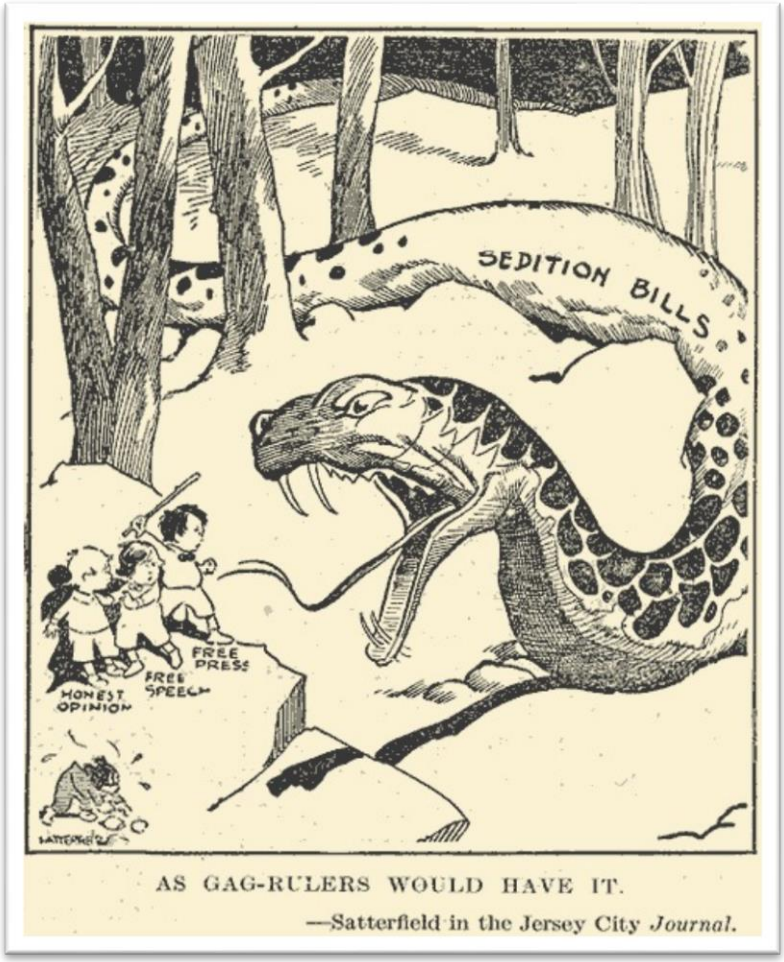
Note the wide latitude afforded the president by undefined terms in the act. What constituted "dangerous" and what exactly is a "secret machination?"

On July 6, Congress passed *The Alien Enemies Act*, allowing for the arrest, imprisonment and deportation of any male citizen of a nation at war with the U.S., even without any evidence that he was an actual threat.

"All natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed, as alien enemies."

The Sedition Act was arguably the most draconian of the four laws. Enacted on July 14, it declared any "treasonable activity" a high misdemeanor punishable by fine and imprisonment. Treasonable activity included "any false, scandalous and malicious writing" against the government or its officials.

"If any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, 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, or any act of the President of the

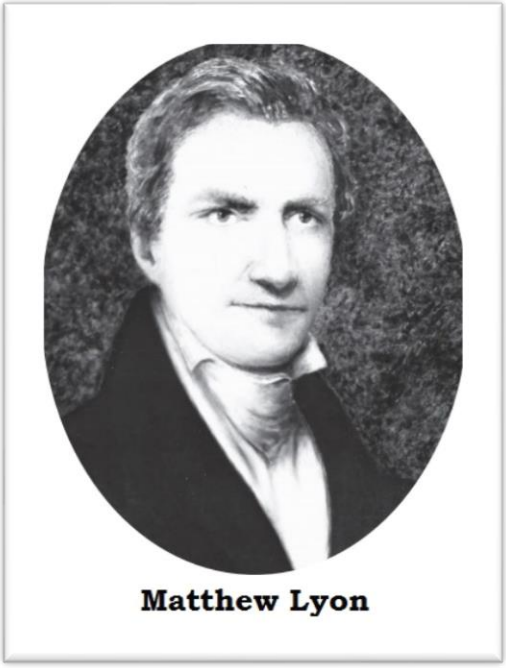


AS GAG-RULERS WOULD HAVE IT.
—Satterfield in the Jersey City *Journal*.

United States, done in pursuance of any such law, or of the powers in him vested by the constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government, 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."

Based on the Sedition Act, federal officials arrested some 25 men, mostly editors of Republican newspapers. There were at least 17 verifiable indictments, 14 under the Sedition Act and three under common law.[3] The Act also effectively shut down many dissenting party presses.

Benjamin Franklin's grandson was among those prosecuted. Federalists sent "committees of surveillance" to spy on Benjamin Franklin Bache, editor of the *Philadelphia Democrat-Republican Aurora*.[4] Bache called the Alien and Sedition Acts an "unconstitutional exercise of power."[5] He was ultimately charged with libeling President John Adams and sedition for his French sympathies. Bache died of yellow fever before he was brought to trial.


Matthew Lyon

A sitting member of Congress even found himself caught up in the web spun by the sedition act. Matthew Lyon represented Vermont in Congress and also served as the editor of the Republican paper *The Scourge of Aristocracy*. During his re-election campaign, Lyon wrote a reply to his Federalist opponents, accusing President Adams of engaging in a "continual grasp for power" and of having "an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice." He also blasted the president for using religion to drum up war against France, writing he could not support the executive, "when I shall see the sacred name of religion employed as a state engine to make mankind hate."

Lyon's political enemies also convinced a Vermont paper to publish a letter he wrote before the Alien and Sedition Act was even passed. In it he called the president "bullying," and the Senate responses "stupid."

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[3] Gordon T. Belt, Sedition Act of 1798 – A Brief History of Arrests, Indictments, Mistreatment & Abuse First Amendment Center library (http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/Sedition_Act_cases.pdf)

[4] Richard N. Rosenfeld, *American Aurora: A Democratic-Republican Returns*, (New York: St. Martin's Griffin, 1997), 80.

[5] Carol Sue Humphrey, *The Revolutionary Era: Primary Documents on Events from 1776 to 1800*, (Westport, Connecticut: Greenwood Press, 2003), 325.

Lyon was indicted on sedition charges on Oct. 5, 1798, and arrested the next day. A judge fined Lyon $1,000 and sentenced him to four months in prison.[6] He served time in a 16' x 12' cell used for felons, counterfeiters, thieves, and runaway slaves. Judge William Paterson – an avid nationalist and supporter of the Federalist Party - lamented the fact he couldn't impose a harsher sentence.

Lyon won reelection while in jail by a landslide.

The Rightful Remedy: The Kentucky and Virginia Resolutions of 1798

Recognizing the grave danger these acts posed to the basic constitutional structure, Thomas Jefferson and James Madison drafted resolutions that were passed by the Kentucky and Virginia legislatures on Nov. 10 and Dec. 21, 1798, respectively. The "Principles of '98" formalized the principles of nullification as the "rightful remedy" when the federal government oversteps its authority.

"The several states composing, the United State of America, are not united on the principle of unlimited submission to their general government."

The *Alien and Sedition Acts* outraged many in Kentucky. Several counties in the Commonwealth adopted resolutions condemning the acts, including Fayette, Clark, Bourbon, Madison and Woodford. A Madison County Kentucky militia regiment issued an ominous resolution of its own, stating, "The Alien and Sedition Bills are an infringement of the Constitution and of natural rights, and that we cannot approve or submit to them." [7] Several thousand people gathered at an outdoor meeting protesting the acts in Lexington on Aug. 13.

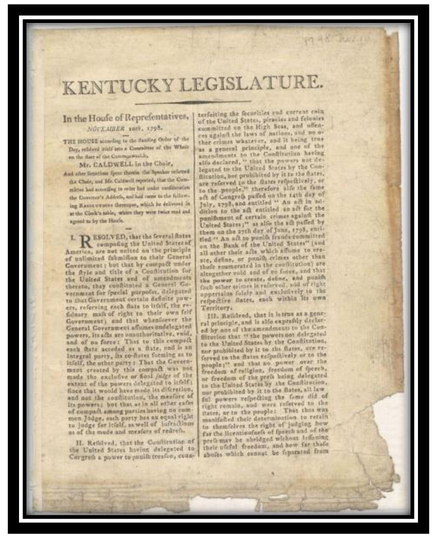
The push to nullify the *Alien and Sedition Acts* was not simply the act of opportunistic politicians. It rose out of the passionate demands of the citizenry in Kentucky, as well as Virginia.

Jefferson penned the original draft of the Kentucky Resolutions within a month of Congress passing the Sedition Act.

> *"That the several States composing, the United States of America, are not united on the principle of unlimited submission to their general government; but that, by a compact under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a general government for special purposes — delegated to that government certain definite*

[6] Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime, from the Sedition Act of 1798 to the War on Terrorism*, (New York: W.W. Norton & Company, Ltd., 2004), 54-56.

[7] Robert H. Churchill, Manly Firmness, the Duty of Resistance, and the Search for a Middle Way: Democratic Republicans Confront the Alien and Sedition Acts, (1999 Annual Meeting of the Society for Historians of the Early American Republic, Lexington, Ky., July 17, 1999) (http://uhaweb.hartford.edu/CHURCHILL/SHEAR_Paper.pdf)



KENTUCKY LEGISLATURE.

In the House of Representatives,
NOVEMBER 10th, 1798.

THE HOUSE according to the standing Order of the Day, resolved itself into a Committee of the Whole on the state of the Commonwealth,

Mr. CALDWELL in the Chair,

And after sometime spent therein the Speaker resumed the Chair, and Mr. Caldwell reported, that the Committee had according to order had under consideration the Governor's Address, and had come to the following RESOLUTIONS thereupon, which he delivered in at the Clerk's table, where they were twice read and agreed to by the House.

I. RESOLVED, that the several states composing the United States of America, are not united on the principle of unlimited submission to their General Government; but that by compact under the style and title of a Constitution for the United States and of amendments thereto, they constituted a General Government for special purposes, delegated to that Government certain definite powers, reserving each state to itself, the residuary mass of right to their own self Government; and that whensoever the General Government assumes undelegated powers, its acts are unauthoritative, void, and of no force: That to this compact each state acceded as a state, and is an integral party, its co-states forming as to itself, the other party: That the Government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself; since that would have made its discretion, and not the constitution, the measure of its powers; but that as in all other cases of compact among parties having no common Judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress.

II. Resolved, that the Constitution of the United States having delegated to Congress a power to punish treason, counterfeiting the securities and current coin of the United States, piracies and felonies committed on the High Seas, and offences against the laws of nations, and no other crimes whatever, and it being true as a general principle, and one of the amendments to the Constitution having also declared, "that the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people," therefore also the same act of Congress passed on the 14th day of July, 1798, and entitled "An act in addition to the act entitled an act for the punishment of certain crimes against the United States;" as also the act passed by them on the 27th day of June, 1798, entitled "An act to punish frauds committed on the Bank of the United States" (and all other their acts which assume to create, define, or punish crimes other than those enumerated in the constitution) are altogether void and of no force, and that the power to create, define, and punish such other crimes is reserved, and of right appertains solely and exclusively to the respective states, each within its own Territory.

III. Resolved, that it is true as a general principle, and is also expressly declared by one of the amendments to the Constitution that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people;" and that no power over the freedom of religion, freedom of speech, or freedom of the press being delegated to the United States by the Constitution, nor prohibited by it to the states, all lawful powers respecting the same did of right remain, and were reserved to the states, or to the people: That thus was manifested their determination to retain to themselves the right of judging how far the licentiousness of speech and of the press may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from

powers, reserving, each State to itself, the residuary mass of right to their own self-government; and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force."

After outlining each constitutional violation and overreach of federal power, Jefferson called for action.

> *"Therefore this commonwealth is determined, as it doubts not its co-States are, to submit to undelegated, and consequently unlimited powers in no man, or body of men on earth: that in cases of an abuse of the delegated powers, the members of the general government, being chosen by the people, a change by the people would be the constitutional remedy; but,* ***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, (casus non fœderis) to nullify of their own authority all assumptions of power by others within their limits: that without this right, they would be under the dominion, absolute and unlimited, of whosoever might exercise this right of judgment for them."* [Emphasis added]

Jefferson sent former Virginia ratifying convention delegate Wilson Cary Nicholas a draft of the resolution, likely hoping the state legislator could get them introduced in Virginia. In October, 1798, Wilson indicated that state representative John Breckinridge was willing to introduce the resolutions in Kentucky. Breckinridge suffered from tuberculosis and made a recuperative trip to Sweet Springs, Va. late in August of that year. Nicholas likely gave the Kentucky lawmaker a copy of Jefferson's draft during that trip.

On Nov. 7, 1798, Gov. James Garrard addressed the Kentucky state legislature, noting the vehement opposition to the *Alien and Sedition Acts*. He said Kentucky was, "if not in a state of insurrection, yet utterly disaffected to the federal government." And noted that the state "being deeply interested in the conduct of the national government, must have a right to applaud or to censure that government, when applause or censure becomes its due," urging the legislature to reaffirm its support of the U.S. Constitution while, "entering your protest against all unconstitutional laws and impolitic proceedings."[8]

That same day, Breckinridge announced to the House he intended to submit resolutions addressing Garrard's message. The following day, the Fayette County lawmaker followed through, introducing an amended version of Jefferson's draft. Most notably, Breckinridge omitted the word nullification from the actual version considered by the Kentucky legislature, seeking to moderate the tone of the resolution. Removal of the nullification reference apparently didn't bother Jefferson, and in fact, did little to change the fundamental thrust of the resolution. By declaring the *Alien and Sedition Acts* unconstitutional, null and void, the Kentucky legislature voted on a nullification bill, even with the actual word omitted.

The resolution passed the House on Nov. 10 with only three dissenting votes. The Senate unanimously concurred three days later, and Gov. Garrard signed the resolution on Nov. 16.

[8] Newspaper article from the Kentucky Gazette dated 14 Nov. 1798

A week after the resolutions passed in Kentucky, Jefferson sent Madison a copy, along with a letter urging him to press forward.

> *"I inclose you a copy of the draught of the Kentuckey resolves. I think 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, & yet may be free to push as far as events will render prudent."* [9]

Madison did just that, drafting resolutions for introduction in the Virginia legislature. The *Virginia Resolutions of 1798* declared the Alien and Sedition Acts "unconstitutional." Madison also asserted that the states had an obligation to act against egregious federal exercises of undelegated power.

> *"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 the compact; as no further valid that they are authorized by the grants enumerated in that compact; and that in 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."*

Madison gave his draft of the Virginia Resolutions to Wilson Cary Nicholas, who showed them to Jefferson. In a letter dated November 29, 1798, Jefferson recommended adding more emphatic language in declaring the Alien and Sedition Acts unconstitutional.

> *"The more I have reflected on the phrase in the paper you shewed me, the more strongly I think it should be altered. suppose you were to instead of the invitation to cooperate in the annulment of the acts, to make it an invitation: 'to concur with this commonwealth in declaring, as it does hereby declare, that the said acts are, and were ab initio—null, void and of no force, or effect' I should like it better. health happiness & Adieu."*[10]

Nicholas added words declaring that the Alien and Sedition Act we unconstitutional "not law, but utterly null, void and of no force or effect."

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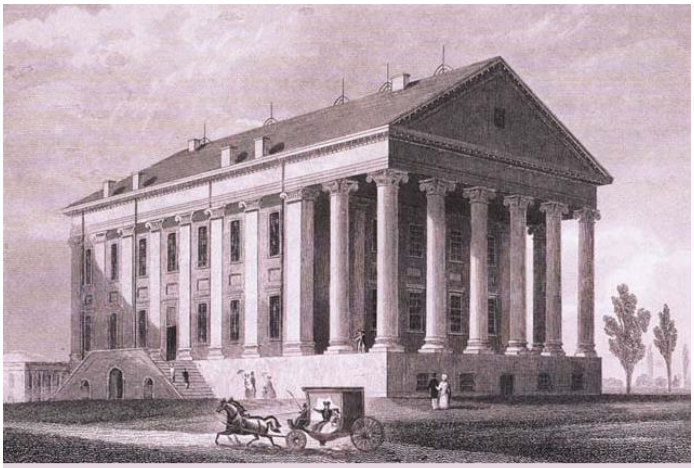
[9] Letter from Thomas Jefferson to James Madison, 17 November, 1798. Text found at: http://founders.archives.gov/documents/Jefferson/01-30-02-0392

[10] Thomas Jefferson to Wilson Cary Nicholas, 29 November 1798. Text found at: http://founders.archives.gov/documents/Jefferson/01-30-02-0399



Virginia State Capitol Building

John Taylor of Caroline introduced Madison's resolutions with Nicholas' addition on Dec. 10, 1798. He described the resolutions, "as a rejection of the false choice between timidity and civil war." Taylor argued that state nullification provided an alternative to popular nullification – in other words outright armed rebellion. In legislative debates, he argued that "the will of the people was better expressed through organized bodies dependent on that will, than by tumultuous meetings; that thus the preservation of peace and good order would be more secure." [11]

In the course of the debate, Jefferson's suggested wording was removed. During the period following passage of the *Alien and Sedition Acts*, there was talk of outright revolution. Both the Kentucky and Virginia legislatures went to great pains to ensure they were striking a balance between a hard line and moderation. They wanted to make their point, but they did not want to spark violence.

Removing Jefferson's wording did not change the substance of the resolutions. In fact, declaring a law "unconstitutional" was essentially the same as calling it "null, void and of no effect." Alexander Hamilton inferred this distinction during the New York ratification debate.

> *"The acts of the United States, therefore, will be absolutely obligatory as to all the proper objects and powers of the general government…but the laws of Congress are restricted to a certain sphere, and when they depart from this sphere, they are no longer supreme or binding."*

The Virginia House of Delegates passed the resolutions on Dec. 21, 1798, by a vote of 100 to 63. The Senate followed suit on Dec. 24, by a 14 to 3 margin.

Kentucky followed up with a second resolution affirming its position in 1799, notably including the word "nullification," omitted in the final version of the Kentucky Resolutions of 1798 passed by the state legislature.

> *"That this commonwealth considers the federal Union, upon the terms and for the purposes specified in the late compact, conducive to the liberty and happiness of the several states: That it does now unequivocally declare its attachment to the Union, and to that compact, agreeably to its obvious and real intention, and will be among the last to seek its dissolution: That, if those who administer the general government be permitted to transgress the limits fixed by that compact, by a total disregard to the special delegations of power therein contained, an annihilation of the state governments, and the creation, upon their ruins, of a general consolidated government, will be the inevitable consequence: That the principle and construction, contended for by sundry of the state legislatures, that the general government is the exclusive judge of the extent of the powers delegated to it, stop nothing short of despotism—*

[11] Churchill

since the discretion of those who administer the government, and not the Constitution, would be the measure of their powers: That the several states who formed that instrument, being sovereign and independent, have the unquestionable right to judge of its infraction; and, That a nullification, by those sovereignties, of all unauthorized acts done under color of that instrument, is the rightful remedy."

Strategy: The Next Steps

Taken together, the *Kentucky and Virginia Resolutions* lay out the principles of nullification. But they did not actually nullify the *Alien and Sedition Acts*. These non-binding resolutions merely made the case and set the stage for further action.

Correspondence between Jefferson and Madison indicate they didn't plan to stop with the resolutions. They hoped to use them as a springboard for state action against the unconstitutional *Alien and Sedition Acts.*

The *Kentucky and Virginia Resolutions* weren't universally well received. Tennessee passed a resolution in support, and there were local ordinances affirming the resolutions in New Jersey, Pennsylvania and New York. But opposition was strong in the New England States. This is unsurprising because these states were controlled by the Federalist Party. Several states, including Massachusetts, passed resolutions of their own condemning the rhetoric of Kentucky and Virginia.

Jefferson asserted in a letter to Madison dated Aug. 23, 1799, that the opposition should not remain unanswered.

"I will in the mean time give you my ideas to reflect on. that the principles already advanced by Virginia & Kentuckey are not to be yielded in silence, I presume we all agree."

He then went on to specify three steps.

(1) *"…answer the reasonings of such of the states as have ventured into the field of reason, & that of the Commee of Congress. here they have given us all the advantage we could wish. take some notice of those states who have either not answered at all, or answered without reasoning.* ***(2)*** *make a firm protestation against the principle & the precedent; and a reservation of the rights resulting to us from these palpable violations of the constitutional compact by the Federal government, and the approbation or acquiescence of the several co-states; so that we may hereafter do, what we might now rightfully do, whenever repetitions of these and other violations shall make it evident that the Federal government, disregarding the limitations of the federal compact, mean to exercise powers over us to which we have never assented.* ***(3)*** *express in affectionate & conciliatory language our warm attachment to union with our sister-states, and to the instrument & principles by which we are united; that we are willing to sacrifice to this every thing except those rights of self government the securing of which was the object of that compact; that not at all disposed to make every measure of error or wrong a cause of scission, we are willing to view with indulgence to wait with patience till those passions & delusions shall have passed over which the federal government have artfully & successfully excited to cover it's*

own abuses & to conceal it's designs; fully confident that the good sense of the American people and their attachment to those very rights which we are now vindicating will, before it shall be too late, rally with us round the true principles of our federal compact…" [Numbering added][12]

"Where powers are assumed which have not been delegated, a nullification of the act is the rightful remedy."

Madison took Jefferson's advice and penned a lengthy defense of the Virginia Resolutions known as the Virginia Report of 1800 (sometimes called the Virginia Report of 1799). Madison fleshed out the Virginia Resolutions at length and answered the opposition's arguments point by point. Most notably, he asserted the people of the states have the final authority to determine the constitutionality of an act.

> *"The States then being the 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; 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."* [13]

While the Kentucky and Virginia Resolutions did not actually nullify the Alien and Sedition Act, they form the philosophical foundation nullification actions rest upon. Ultimately, it remains up to states to take action in the ways they see fit to stop the exercise of unconstitutional federal power – or as Madison eloquently put it to "interpose for arresting the progress of the evil."

Historical Cases of Nullification

We cannot judge the validity of the Principles of '98 based on short-term political outcomes. A Democrat -Republican assent to power, driven by popular opposition to the *Alien and Sedition Acts* and capped by Jefferson's presidential victory in the 1800 election, rendered the nullification issue moot, at least for the time being. But the staying power of the principles became evident just a few years later when the same northeastern lawmakers who condemned the Kentucky and Virginia resolutions invoked those very principles to fight Jefferson's embargo of 1807.

With both the British and French seizing American shipping bound for each other's ports, Jefferson chose to wage economic warfare, forbidding any U.S. merchant vessel to sail for any foreign port, anywhere in the world. Finding the usurpation shoe on the other foot, Massachusetts suddenly became an ardent supporter of a state's right to judge the constitutionality of an act, declaring the embargo, "in many respects unjust, oppressive and unconstitutional, and not legally binding on the citizens of this

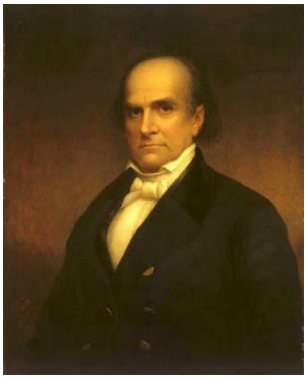
[12] Letter from Thomas Jefferson to James Madison, 23 August 1799. Text found at: http://founders.archives.gov/documents/Jefferson/01-31-02-0145

[13] Virginia Report of 1800. Text found at: http://press-pubs.uchicago.edu/founders/documents/v1ch8s42.html

state."

And Connecticut Governor Jonathan Trumbull channeled James Madison.

> *"Whenever our national legislature is led to overleap the prescribed bounds of their constitutional powers, on the State Legislatures, in great emergencies, devolves the arduous task – it is their right – it becomes their duty, to interpose their protecting shield between the right and liberty of the people, and the assumed power of the General Government."* [14]



Over the next 50 years, states advanced the Principles of '98, fighting against federal overreach on a wide range of issues, including federal conscription during the War of 1812. Daniel Webster of New Hampshire wrote:

> *"The operation of measures thus unconstitutional and illegal ought to be prevented by a resort to other measures which are both constitutional and legal. It will be the solemn duty of the State governments to protect their own authority over their own militia, and to interpose between their citizens and arbitrary power. These are among the objects for which the State governments exist"* [15]

Nullification was also invoked during the battle against the Second National Bank, against tariffs in the 1830s and to fight fugitive slave laws in the 1840s and 50s. In an argument against the bank, Ohio "recognized and approved" the Kentucky and Virginia Resolutions of 1798.

Members of every political party appealed to the nullification principles at various times, proving that they stand the test of time as more than partisan tools used to advance specific agendas, or the property of one political wing.

The Modern Nullification Movement: Strategy for Today

Still, the question remains: how can states effectively put nullification into practice? Without some mechanism to actually confront and stop federal overreach, we have nothing more than an intellectual exercise.

Some have advocated arresting federal agents acting in ways that violate the Constitution. For instance, a state could pass a law criminalizing enforcement of acts violating the Second Amendment. Under such a law, a county sheriff could arrest and charge an ATF agent. But this would likely accomplish nothing.

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[14] Carol Sue Humphrey, *The Revolutionary Era: Primary Documents on Events from 1776 to 1800* (Westport, Connecticut: Greenwood Press (2003), 325.

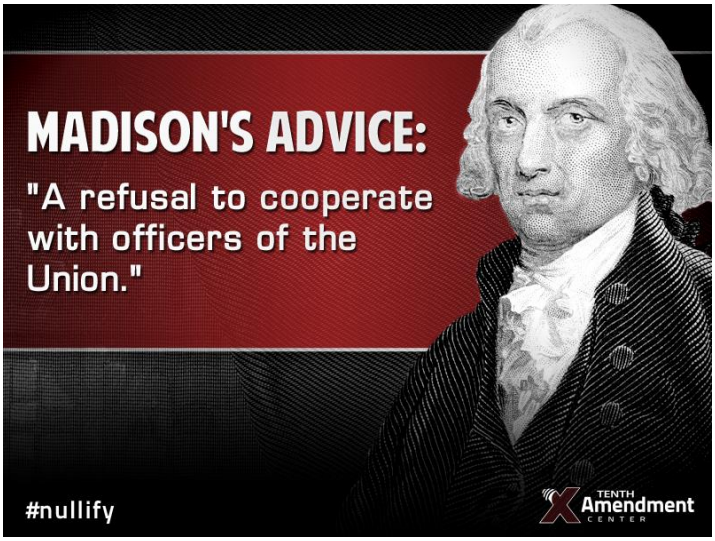
[15] Edward Everett, *The Writings and Speeches of Daniel Webster: Writings and speeches hitherto uncollected, v. 2. Speeches in Congress and diplomatic papers* (Google eBook, 1903), 68

The agent's attorney would have the case remanded to federal court and a federal judge would quickly dismiss it.

Under federal law, impeding a federal official with force or threats constitutes a federal crime.[16] So attempting to physically impede or arrest a federal officer won't work in practice.

In today's system, everybody assumes that any action taken by the federal government automatically qualifies as legal and legitimate. In the minds of most Americans, every act of Congress, every presidential edict and every federal judicial opinion stands supreme simply by virtue of its existence. Thousands of academics, lawyers and legal scholars will quickly line up to prop up the system, endlessly quoting the "supremacy clause."

But every law enacted by Congress doesn't become supreme just by virtue of its passage and a presidential signature. Every presidential utterance doesn't automatically become the law of the land. And every opinion issued by politically connected lawyers serving on the federal bench doesn't qualify as "constitutional." The Constitution's supremacy clause contains a condition. Legitimate federal laws must be "in pursuance" of the Constitution. Any federal act not in pursuance of the constitution is, as Thomas Jefferson put It, "unauthoritative, void, and of no force."



Alexander Hamilton summed up this principle succinctly and clearly in *Federalist #78*.

"There is no position which depends on clearer principles, than that every act of a delegated authority contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the constitution, can be valid."

But no matter how true all of this may be in theory, it really makes no difference in a system run by federal judges. The federal government will meet any efforts to constrain its power by force with superior force, using the weight of a legal system most Americans consider legitimate. As Saul Alinsky wrote in *Rules for Radicals*, "'Power comes out of the barrel of a gun!' is an absurd rallying cry when the other side has all the guns."

It seems we have only two options – violent revolution, which will fail, or complete submission.

But a third way exists, a moderate middle road between violence and submission – nullification through noncooperation.

[16] 18 U.S. Code § 372 - Conspiracy to impede or injure officer

Americans can impede federal actions without using threats or intimidation. They can simply refuse to cooperate with the federal government. This was the blueprint James Madison gave us in *Federalist #46*.

During the ratification debates, many Americans remained skeptical of the Constitution because they did not believe the federal government would remain limited – as all of the supporters of the Constitution promised it would. They asked a very good question: how will we keep this "limited" federal government in check? This was Madison's answer.

> *"Should an unwarrantable measure of the federal government be unpopular in particular States, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are powerful and at hand. The disquietude of the people; their repugnance and, perhaps* **refusal to cooperate with officers of the Union**, *the frowns of the executive magistracy of the State; the embarrassment created by legislative devices, which would often be added on such occasions, would oppose, in any State, very serious* **impediments**; *and were the sentiments of several adjoining States happen to be in Union, would* **present obstructions** *which the federal government would hardly be willing to encounter." [Emphasis added]*

"Today we hold that Congress cannot circumvent that prohibition by conscripting the States' officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." – U.S. Supreme Court

Madison had no problem with the concept of impeding or obstructing the federal government when it imposes "unwarrantable measures" or even simply unpopular measures. In fact, he encouraged it. He intended for the states to serve as a check on federal power.

But not through violence, nor by intimidation. Madison said simply refusing to cooperate would be enough to impede or obstruct federal actions.

The federal government depends on state and local cooperation for virtually every action it undertakes. It needs state and local police to enforce federal gun and drug laws. It needs state and local assistance to implement programs such as Obamacare. It needs state and local cooperation to "manage" lands. It lacks the resources to implement all of its laws, rules, regulations and programs alone. Pull the rug of state cooperation out from under their feet and the feds will find themselves impotent. We've seen this vividly play out as states have legalized marijuana, effectively nullifying federal prohibition in practice within those states.

During the partial federal government shutdown in 2013, the National Governor's Association sent out a letter noting "states are partners with the federal government on **most federal programs**." [17] [Emphasis added.]

That means by refusing state cooperation, we have within our power the ability to thwart "most federal programs."

The beauty of this approach lies in the fact that it uses the federal system against itself. The Supreme Court has consistently held since 1842 that the federal government cannot force states to help implement or enforce any federal act or program. The anti-commandeering doctrine rests primarily on four Supreme Court cases. *Printz v. US* serves as the cornerstone. Justice Antonin Scalia wrote the majority opinion.

> *"We held in New York that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States' officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policy making is involved, and no case by case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty."*

Non-cooperation provides us a moderate middle-road we can follow to impede and obstruct federal actions and nullify them in effect.

Nullification in Effect

While many academics and legal scholars will take issue with Thomas Jefferson and James Madison's conception of the Union, and the role of states as the final arbiters in settling disputes concerning the limits of federal power, there is no question that the states have the legal right to simply refuse to cooperate. While state governments cannot effectively block federal actions, they can simply withdraw state personnel and resources. While a given federal law will remain on the books, enough states refusing to help enforce or implement it can nullify it in practice. It becomes unenforceable and practically speaking – void.

We've seen this strategy play out in the realm of marijuana policy.

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[17] National Governors Association letter dated Sept. 20, 2013. Text found at: http://www.nga.org/cms/home/federal-relations/nga-letters/executive-committee-letters/col2-content/main-content-list/federal-government-shutdown.html

Beginning in California with legalization of cannabis for medical use in 1996, states have advanced the issue each year, in spite of a 2005 Supreme Court opinion against the efforts, and a relentless year-to-year increase in spending and enforcement efforts by the federal government.

Today, 17 states have decriminalized marijuana possession, 19 states have legalized it for medical use, and Colorado, Washington state, Oregon and Alaska have legalized it for recreational use. Each year, new state laws and regulations continue to expand the industry, and each expansion further nullifies in practice the unconstitutional federal ban. The feds need state cooperation to fight the "drug war," and that has rapidly evaporated in the last few years with state legalization and decriminalization.

While state legalization does not alter federal law, it takes a step toward nullifying in effect the federal ban.

Nullification rests on a solid moral, philosophical and historical foundation. If government is to remain limited, some mechanism must exist to hold it within its prescribed bounds. Relying on a branch of the federal government to limit the federal government is not only a logical absurdity, it has proven completely ineffective.

On the other hand, nullification through non-cooperation has proven an effective tool. It was the remedy for federal overreach offered by the "Father of the Constitution." It stands on solid legal ground affirmed by the Supreme Court. And most importantly, it works.

The federal government bears no resemblance to the vision Madison cast in *Federalist #45*. In fact, it has been flipped on its head. The federal government exercises powers "numerous and indefinite," while those remaining with the states and the people have become "few and defined." If the American people ever want to reclaim the founding generation's vision, it will take a revolution. But not a revolution fought with guns and bombs, not an uprising characterized by a physical upheaval against the established order. Instead America needs a deeper, more philosophical revolution.

A revolution in thought.

John Adams described the American Revolution in much the same way. In his 1818 letter to Hezekiah Niles, he wrote:

> *"But what do we mean by the American Revolution? Do we mean the American war? The Revolution was effected before the war commenced. The Revolution was in the minds and hearts of the people; a change in their religious sentiments of their duties and obligations. … This*

radical change in the principles, opinions, sentiments, and affections of the people, was the real American Revolution." [18]

Today's nullification movement counts as revolutionary because it offers the hope of smashing the established political order; an alternative to "voting the bums out" only to see them replaced by new "bums" who violate the Constitution in more costly and dangerous ways each year, or relying on the federal government to limit its own power.

This revolution of thought may still seem small at this time, but it grows a little bit every day. In the words of American revolutionary John Dickinson, "Concordia res parvae crescunt." – Small things grow great by concord. [19]

[18] Letter from John Adams to H. Niles February 13, 1818. Text found at:
http://www.constitution.org/primarysources/adamsniles.html?PageSpeed=noscript

[19] Letters from a Pennsylvania Farmer, Dec. 21, 1767. Text found at:
http://www.earlyamerica.com/bookmarks/letters-pennsylvania-farmer/letters-from-a-pennsylvania-farmer-text/