“States’ Rights Apogee, 1776-1840”
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A Thesis Submitted To
The Faculty of the History Department and Graduate School
At Liberty University

In Partial Fulfillment of the Requirements for a
Masters of Arts in History

December 2011
America’s states’ rights tradition has held much influence since the ratification of the U.S. Constitution in 1788. In late 1798, in response to the Federalist administration’s adoption of the Alien and Sedition Acts, the Virginia and Kentucky Resolutions were formally adopted by the legislatures of Virginia and Kentucky respectively. These resolutions set a lasting precedent for state interposition and nullification. As well concurrence with these doctrines can be found in the Virginia Resolves of 1790, the constitutional debates of 1787-1790, and all throughout the colonial-revolutionary period of the 1760s to 1780s. In time, the Virginia and Kentucky Resolutions would gain stature and would define the American political culture of the nineteenth century. They became known as the Principles of 1798. The Tariff Crisis of 1828-1832 in South Carolina may be contextualized in light of the Principles of 1798. This inquiry endeavors to answer why those principles are integral to the American constitutional tradition. The continuity of the 1798 resolves with colonial-revolutionary practice reveals them as neither rash nor innovative, but in accord with the localism innate to American political tradition.
– Acknowledgments –

Special thanks to my thesis committee participants for their mentorship. In particular, my thesis advisor Dr. Samuel C. Smith, Professor of History, and committee reader, Dr. Roger Schultz, Professor of History and Dean of the School of Arts and Sciences, have my gratitude for their assistance and encouragement in this project.
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Introduction

“[C]onfidence is everywhere the parent of despotism—free government is founded in jealousy, and not in confidence; it is jealousy and not confidence which prescribes limited constitutions, to bind down those whom we are obliged to trust with power: that our Constitution has accordingly fixed the limits to which, and no further, our confidence may go... 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...”

—Thomas Jefferson, Draft of the Kentucky Resolutions

The Principles of 1798

The states’ rights tradition reverberated through the political discourse following the adoption of the Constitution and was an outgrowth of the jealous solicitude for local rights and individual liberty embodied in the American Revolution. In late 1798, the Virginia and Kentucky Resolutions were written and formally adopted by the respective state legislatures in response to the Federalist administration’s adoption of the Alien and Sedition Acts which they perceived as unconstitutional. These resolutions set a powerful precedent for state interposition and nullification. In time, they would gain stature and define the American political culture of the early nineteenth century—and would become known as the Principles of 1798. This inquiry endeavors to answer why those principles are integral to the American constitutional tradition.

Foreshadowing state interposition, Senator William Maclay of Pennsylvania remarked in his journal for 22 March 1790: “Is it to be expected that a federal law passed directly against the sense of a whole State will ever be executed in that State?” The Tenth Amendment to the

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2 Richard Weaver, “The South and the American Union,” The Southern Essays of Richard Weaver (Indianapolis, IN: Liberty Press, 1987), 234; Texas v. White, 74 U.S. 700 (1869). Author’s Note. What is a ‘State’ in the American political parlance? Justice Salmon Chase offered this definition of state, “A State, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written Constitution, and established by the consent of
Constitution manifests the integral role of the states vis-à-vis the *limited federal role* evident in a delegation of *express powers*. The powers conferred upon the federal government, under the Constitution, including those of Congress, are *delegated* by the people, *enumerated* in express terms in that instrument, and are *limited* in scope. The people delegate to the government only so much power as they think prudent to exercise while they reserve to themselves all the rights and powers that are not delegated to the government, whether federal or state. The preamble to the Constitution reads, “We the people… do ordain and establish this Constitution…,” which declares that power resides with the people. “All [federal] legislative Powers herein granted shall be vested in Congress….” This implies a limitation upon the federal power. As had been the case in the old Confederation, pursuant to its thirteenth article, all remaining authority belonged to the people, including the power to make and unmake government. All acts by the Congress, or any officer, beyond the limits of power delegated, were considered to be null and void *ipso facto*.

To encapsulate this doctrine of delegation in the constitutional fabric, the Tenth Amendment was proposed and ratified in 1791. “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 governed.”

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5 Russell Kirk, *The American Cause* (Wilmington, DE: ISI, 2002), 68; Roger Pilon, “Madison’s Constitutional Vision: The Legacy of Enumerated Powers,” *James Madison and The Future of Limited Government* (Washington, DC: Cato Institute, 2002), 29. “The most basic limit on power, however, could not have been simpler in its conception. In fact, it can be reduced to a short admonition: if you want to limit power, don’t give it in the first place. Notice that is not simply an instruction for limiting government. It is a principle of legitimacy. It draws from the Declaration’s claim that government’s just powers are derived from the consent of the governed. Powers are legitimate if and only if they have been delegated by the people and enumerated in the document through which the people constitute themselves as a political entity, their constitution. Thus, the doctrine of enumerated powers.”
Jefferson inferred that the Tenth Amendment was the “foundation” of the Constitution. “The states supposed that by their tenth amendment, they had secured themselves against constructive powers,” he remarked. “To take a single step beyond the boundaries thus specifically drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition.” The Constitution, he added, should be construed “according to the true sense in which it was adopted by the States, that in which it was advocated by its friends [such as Nicholas and Randolph]… I am for preserving to the States the powers not yielded by them by the Union.”

Henry Lee before the Virginia Convention: “When a question arises with respect to the legality of any power,” the question will be “Is it enumerated in the Constitution? … It is otherwise arbitrary and unconstitutional.” Lee compared the Constitution with the “familiar manner” of “a man [who has] delegated certain powers to an agent.” He asserted, it would “be an insult upon common sense to suppose that the agent could legally transact any business for his principal which was not contained in the commission whereby the powers [of the agent] were delegated.” Thus the states as parties to the compact (i.e., U.S. Constitution) were the principals, and the federal government but its agent in trust.

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7 U.S. Const., Amd. X.; Akhil Amar, The Bill of Rights: Creation and Reconstruction (New Haven, CT: Yale Univ. Press, 1998), 123. “[W]e the people conquer government by dividing it between two rival governments, state and federal, a structural scheme textually reaffirmed in the Tenth Amendment. In this sense, the Tenth Amendment beautifully sums up many of the themes of prior amendments—and it is wholly unsurprising that, alone among the successful amendments, the Tenth was the only one proposed by every of the state ratifying conventions that proposed amendments.”


Prior to the adoption of the first ten amendments in 1791, James Madison reviewed the many criticisms of the Constitution as it stood. “The great mass of the people who oppose it,” found that “it did not contain effectual provision against the encroachments on particular rights, and [for] those safeguards which they have long been accustomed to have *interposed* between them and the magistrate who exercised the sovereign power…”\(^{11}\) Here interposition is presented as a desirable and proper constitutional remedy. Just as the Supreme Court may interpose via judicial review, the states may justly interpose their authority between their citizens and that of the federal government, whenever the later usurps the rights of the states or the people.\(^{12}\) This much was asserted in the pleadings for the adoption of the Constitution: Alexander Hamilton declared it an “axiom that the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority.”\(^{13}\) In the Virginia Resolutions, Madison proclaimed, “the States” who “are parties” to the “compact” and “have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them.”\(^ {14}\) The states are “the true barriers of our liberty in this country,” avowed Jefferson, and remain “the wisest conservative power ever contrived by man.”\(^ {15}\)

The states stand as ready-made instruments to counter the encroachments of an out-of-

bounds federal government. When faced with a misplaced exercise of federal power, a state may set itself in variance to an unconstitutional measure, and deploy effectual resistance by its magistrates and officers to arrest federal usurpations that are without remedy. Madison described this state prerogative at the First Congress: “The state legislatures will jealously and closely watch the operations of this government, and will be able to resist with more effect every assumption of power.”¹⁶ Jurist Edwin Vieira of Harvard Law made this keen observation:

> The traditional understanding of interposition is that it involves an assertion of a State’s constitutional privilege, right, and power to defend by direct action her and her citizens’ constitutional rights against the usurpation of power by any official or agent of the General Government. So, rightly understood, interposition is not an extra-constitutional or anti-constitutional doctrine, but a device for protecting and preserving the Constitution. Interposition embodies the States’ privilege and power of legal, political, and even armed self-defense against oppression of their constituent people or their own destruction qua States.¹⁷

Interposition as a remedy to the abuse of power has found advocacy among the greatest political thinkers, such as Johannes Althusius, John Calvin, David Hume, Thomas Jefferson, John Calhoun, and John Acton. Republican self-government is not conceivable without states’ rights and its corollary of state interposition.¹⁸ In pressing for adoption of the Constitution, the authors of the Federalist averred that the states would provide “a complete counterpoise” to “the power of the Union.”¹⁹

The most salient point that the Principles of 1798 addressed was that a limited government that is the sole arbiter of the scope of its own powers cannot remain limited. Power

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¹⁶ James Madison, Selected Writings of James Madison, Ralph L. Ketcham, ed. (Indianapolis, IN: Hackett, 2006), 173.
¹⁷ Edwin Veira, How to Dethrone the Imperial Judiciary (San Antonio, TX: Vision Forum, 2004), 155.
corrupts, and it must be restrained. The authority to exercise power must be checked, diffused and dispersed. This is a lesson historic experience has demonstrated.\textsuperscript{20} Many jurists see these Virginia and Kentucky Resolutions as coherent, reasoned, and a practical import from the political philosophy of the Revolution. The Principles of 1798 convey the basics of constitutionalism in an expressive, yet logical, approach and are possessed of enormous stature given their pedigree, and second only to the Constitution and the Declaration of Independence in their merit among the plethora of American charters.\textsuperscript{21} Kevin Gutzman noted the Resolutions should not be viewed as the fabrication of distraught minds faced with peculiar circumstances, but rather a reasoned and measured approach. These clarion statements of the republican position match up faithfully to the explication of the federal Constitution offered by Federalists in the Virginia Convention of 1788 to secure ratification.\textsuperscript{22}

The history of liberty is a record of great charters. They were either fashioned to forestall anticipated encroachments upon liberty or made in reaction to a violation after the fact. Since the days of the Magna Charta, the English people have made sundry attempts to fortify their historic rights and guard against depredations of those rights at the hands of the government. Written charters served as an \textit{aide memoire} to political leaders about the limits of their powers. In the Old World, this custom was nowhe re stronger than in England. This practice England bequeathed to her colonies in North America. Colonial charters were crafted to uphold liberty, established rights, and popular rule. The Declaration of Independence signified the aspirations


\textsuperscript{22} Gutzman, \textit{Virginia's American Revolution}, 114.

Evocative of the colonial era charters, states still possessed their own unique charters through their respective constitutions. States were the building blocks of the Union and jealous to guard their reserved rights and the liberty of their citizens. The need for suitable mediation compelled the states to demarcate discernible lines concerning the judgment of offenses by the federal government. Resolutions, remonstrance, and other measures aided the general purpose. The states’ duty to uphold liberty demanded a return to ‘the unquestionable right to judge of its infractions,’ though the states’ faculty to arbitrate conflicts was limited yet resolute.\footnote{H.L. Cheek, Jr., \textit{Calhoun and Popular Rule: The Political Theory of Disquisition and Discourse} (Columbia, MO: Univ. Press of Missouri, 2001), 47.}

In 1798, the Virginia and Kentucky Resolutions would earn their place in history as charters of free government. These Principles of 1798 would become the diadem of republican liberties in the American political discourse.\footnote{Forrest McDonald, \textit{States’ Rights and the Union: Imperium in Imperio, 1776-1876} (Lawrence, KS: Univ. Press of Kansas, 2000), 43.} Jefferson’s theory of federalism affirmed that “the true barriers of our liberty in this country are our State governments.”\footnote{Meyer, 199.} As Gutzman observed the elements of the Virginia Resolutions had been present in its political tradition for decades.\footnote{Gutzman, \textit{Virginia’s American Revolution}, 116.} The continuity of the 1798 resolves with colonial-revolutionary practice reveals them as neither rash nor innovative, but in accord with the localism innate to American political tradition.
The Constitution, A Compact

How the character, shape and form of the American government would take form was subsumed in the constitutional debates of 1787-1790. This question of how the constitutional system would take form was not adequately settled in the minds of Americans. Disagreement over the meaning and character of American political associations has lingered since ratification. From whence came its authority? From the sovereign states? From the nation? From the people? In the 1790s, centralizing nationalist arguments and decentralizing states’ rights arguments were put forward to describe the nature of federal authority. These discussions reverberated as hostilities broke out between the U.S. and Great Britain in the War of 1812. The echoes of the controversy could be felt in the tariff crisis of the 1820s and 1830s. This contest resounded in the years leading up to the climactic rupture of the Union in 1861.

As Calhoun rhetorically inquired, “Is this a federal union? A union of States, as distinct from that of individuals? Is the sovereignty in the several states, as distinct from that of individuals? Is the sovereignty in the several States, or in the American people in aggregate?”

One may ascertain that the Constitution is a compact as the people of the several States in their

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29 Frohnen, ed., 381. “The term ‘United States,’ which always means, in constitutional language, the several states in their confederated character, means also, as has been shown when applied geographically, the country occupied and possessed by them”; Warren L. McFerran, Political Sovereignty: The Supreme Authority in the United States (Sanford, FL: Southern Liberty Press, 2005), 14, “[There are] two great opposing schools in the United States – the Consolidating School of Thought and the States’ Rights School of Thought – during the antebellum period of our history . . . [I]t was the former school that posed the primary threat to the sovereignty of the people, by advocating unconstitutional centralization of all powers in the Government of the United States and the transfer of sovereignty to that government. The latter school . . . championed the cause of the sovereignty of the people by defending the rights of the States and the constitutionally prescribed limits to the powers of the Federal Government.”

sovereign capacities are parties to this compact. “The Constitution now before the public, is not a compact between individuals, but between several sovereign and independent political societies already formed and organized,” declared one Federalist writer.31 Madison, in his Report of 1800, wrote, “The [Constitution] was formed by the sanction of the states, given each in its sovereign capacity. It adds to the stability and dignity, as well as to the authority of the Constitution, that it rests on this legitimate and solid foundation.”32 Here states’ rights and popular sovereignty were inseparably declared the bedrock of the constitutional union.

Donald Livingston expounded upon the compact theory of the Union with depth and clarity, which points to the realization that each state is “a sovereign political society.”33 First, he noted the states created the general government as their agent, endowing it with a limited delegation of enumerated powers—primarily on matters of defense, regulation of commerce, and foreign treaties. Second, this government (including its supreme court) cannot have finality as to what powers the states delegated and reserved as the federal government is the agent and the states are principals. Third, if an act of the agent exceeds the scope of delegated powers, then a state may interpose its authority to pronounce such an act null and void. Livingston concluded, “any federal system that is serious about protecting moral communities of its constituent units must allow some form of state, provincial, or cantonal resistance.”34 He suggested it was more a reality of political practice at the time than mere theory.35

33 Livingston, “The Founding and the Enlightenment,” Gary L. Gregg II, ed., 255-256. Livingston is a professor of philosophy at Emory University, and is a respected authority on American political philosophy.
34 Ibid.
The Union had formed by the voluntary agreement of the states, according to Alexis de Tocqueville, the author of *Democracy in America*, and in so doing, the states did not forfeit their nationality, and he further held that it would be difficult to disprove their right to secede given the contractual nature of the Union. In 1812, Rhode Island declared the people of their State to be “one of the parties to the federal compact.” In 1827, South Carolina dubbed the Constitution a compact. In 1852, New Jersey described the Constitution “a compact among the several states.” In 1859, Wisconsin described the Constitution as a compact, and begged the propriety of identifying infractions of it and acting as the determiner of the “mode and means of redress.” And it was in Richmond at the Virginia Convention of 1788, that Madison observed “the people” ratified the Constitution, “but not the people as composing one great body; but the people composing thirteen sovereignties.” This compact understanding of the Union gave republicans intellectual ammunition in their effort to legitimize the authority of state interposition. Accordingly the states as parties to the compact may justly interpose against trespasses upon their reserved rights under the Tenth Amendment to the U.S. Constitution.

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38 Ibid.
39 Ibid.
40 Ibid.
Chapter One

Antecedents

The tenets of the Virginia and Kentucky Resolutions were not blanket innovations of distraught minds, but rather they stood in continuity with a broader colonial-revolutionary tradition. This tradition stressed the primacy of the local community, and the legitimacy of the interposition of lesser magistrates and officers on behalf of the liberties of the people to arrest the usurpations of a remote government. The Principles of 1798 stand in continuity with the Principles of 1776. With this in mind, it is beneficial to examine the antecedents of the American states’ rights tradition, in particular the great constitutional struggles.

In the New World, colonists came from many European lands at various intervals in time. English settlers led by John Smith landed at Jamestown in 1607. Other seafarers aboard the Mayflower landed at Plymouth Rock in 1620. They brought with them—a common culture, ideals, heritage, and religious beliefs. As partakers of the English spirit of localism, colonists were habituated to self-government by geography, circumstance and custom. In August 1619, the Virginia Company authorized the newfound Commonwealth to set up an elected House of Burgesses, along with an appointed council, in order “to make and ordain whatsoever laws should by them be thought good and profitable for our subsistence.” Even when James I suspended the Virginia Company’s charter, the representatives of the colony continued to meet on a regular basis for years. As Charles I ruled arbitrarily by decree in England after he

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1 McClellan, Liberty, Order, and Justice, 33.
suspended Parliament, the General Assembly of Virginia still met in formalized annual meetings. Virginia warmly petitioned the King, and asked that he not reinstate a charter company over her domain again, but rather to continue Virginia under charter as a Royal Colony dependent upon the Crown. Virginians like other colonists were acclimated to self-government. They came to correlate this prerogative with the grace and protection of the Crown.⁴

Americans, in the exercise of self-government, looked first to their communities or townships, then to the colonial governments, and only rarely in common matters, such as defense, beyond their borders.⁵ The states’ rights tradition has a longer pedigree than those of the more modern nationalist tradition.⁶ British North America began not as a single continent-wide political entity but remained a conglomerate of distinct colonies, founded at varying junctures in time, each possessing an individual character and history. In the years after the French and Indian War, colonial assemblies lead the way in protecting their citizens from perceived abuses by Crown-in-Parliament. They launched protests, organized comprehensive plans of resistance when abuses proved deleterious to their liberty.⁷

In the mid-eighteenth century, America consisted of thirteen colonies. Connecticut and

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⁴ Ibid.
⁵ The American Republic: Primary Sources, Bruce Frohnen, ed., 299.
⁶ Akhil Amar, The Bill of Rights: Creation and Reconstruction (New Haven, CT: Yale Univ. Press, 1998), p. 5. “The foundation of states’-rights traditions are even older than those of the nationalist tradition—indeed, older than the Union itself. In the seventeenth century, British, North America began not as a single continent-wide juridical entity but a series of different and distinct colonies, each founded at a different moment with a distinct character, a distinct history, a distinct immigration pattern, a distinct set of laws and legal institutions, and so on. In 1780s, ‘Virginia’ was, legally speaking, an obvious fiat accompli—its House of Burgesses had meetings since the 1620s—but America, as a legal entity, was still waiting to be born. During the fateful years between the end of the French and Indian War and the beginning of the Revolutionary one, colonial governments took the lead in protecting their citizens from perceived Parliamentary abuses. Colonial legislatures kept a close eye on the central government, sounded public alarms whenever they saw oppression in the works; and organized political, economic, and (ultimately) military opposition to perceived British evils. The rallying cry of the Revolution nicely illustrates how states’ rights and citizens’ rights were seen as complimentary rather than conflicting. No taxation without representation sounds in terms of both federalism and the rights of Englishmen.”; Andrew C. McLaughlin, “The Background of American Federalism,” 12 Am. Pol. Sci. Rev. 215, 222 (1918). The McLaughlin piece argued how states’ rights and individual rights were subsumed one in the other during the colonial struggles against Parliament.
⁷ Ibid.
Rhode Island were corporations chartered by the Crown. Pennsylvania, Delaware, and Maryland, were considered “proprietary colonies” helmed by leaders such as William Penn and Charles Calvert under Crown charter. Other colonies originated in either direct or derivative grants of corporate or proprietary charters. The royal colonies typically were ruled by the Crown through appointed governors and judges and legislatures authorized by the Crown.  

These charters served as memorials which colonials could appeal to when the Crown’s abuses of power threatened the historic rights of colonists. They established a precedent of self-government that was practiced day-to-day in their communities and colonial assemblies. The charter of Virginia said that subjects dwelling there “shall have and enjoy all liberties, franchises and communities… as if they had been abiding and born within this realm of England.” The Massachusetts charter stated there should be “laws not contrary to the laws and statues of England.”

Next, it is helpful to examine the Anglo-American political tradition. It has been trendy to interpret constitutional events backward, tracing the annals retrospectively from our time back to 1763 or the 1770s, instead of forward from the time of the ancient Saxon constitution and the Magna Charta. The English experience guided and informed the American colonial-revolutionary experience. To appreciate the significance of 1776 and 1798, it merits recollections from the pivotal English constitutional struggles in order to contextualize the doctrines of nullification and states’ rights. Nationalist historiography emphasizes the

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10 Evans, *The Theme is Freedom*, 209.
11 Ibid.
innovation and radicalness of the Revolution, and its adherents dismiss the colonial antecedents of states’ rights, which weakens the continuance of an Anglo-American constitutionalism; and such efforts hold the adoption of the Constitution as tantamount to the zeroing of the calendar.\footnote{Marshall DeRosa, “M.E. Bradford’s Constitutional Theory,” A Defender of Southern Conservatism: M.E. Bradford and His Achievements, Clyde N. Wilson, ed. (Columbia, MO: Univ. of Missouri Press), 101. “The American rule of law has a continuity that predates the drafting of the Constitution and can be traced to colonial America.”}

On 15 June 1215, on the field of Runnymede, King John was compelled to sign the Magna Charta at the behest of barons, bishops, and “the lower magistrates” or face their armed resistance. It consisted of a preamble and sixty-three clauses that bound the king to observe the established rights and liberties of noblemen. It was a protracted catalogue of legal protections against arbitrary rule, legal rights, guarantees of religious liberty, taxation by consent, and so on. The Magna Charta emerged as a safeguard against arbitrary rule.\footnote{James Clarke Holt, Magna Charta (Cambridge, UK: Cambridge Univ. Press, 1992), 1-22.} English noblemen appealed to customary practice rooted in the common law, such as the right to be tried for crimes by a jury of peers and the right to be taxed only with the consent of one’s representatives. The monarch was expected by custom to exhibit fealty to these practices and institutions, which became the root of the English constitutional order. The Saxon constitution did not countenance absolutism in the monarchy, and its lineaments were reaffirmed in spite of the Norman invasion by William the Conqueror.\footnote{Ibid.} In 1256, jurist Henri de Bracton wrote, “the king must not be under man but God and under the law, because law makes the king… Let the king therefore bestow upon the law what the law bestows upon him, namely, rule and power for there is no king where his will rules rather than law.”\footnote{Henry de Bracton, On the Laws and Customs of England, Samuel Thorne, ed. (Cambridge, MA: Harvard Univ. Press, 1968), 33.}

Starting in sixteenth century England, and among continental Protestant Reformers, a
momentous rally transpired against the civil and ecclesiastical structures dominated by the
Roman Catholic Church. These Reformers set a precedent for interposition of the lesser civil
magistrates against the perceived corruption of kings and executives on behalf of their religious
liberty. The teachings of Reformer John Calvin on the duty of the citizen toward an unjust
magistrate was premised on the admonition of the Apostle Paul in Romans 13 to be obedient “to
the higher powers” ordained of God. This admonition seems to all but preclude resistance.
Calvin’s *Institutes* left a conduit for sensible resistance to a corrupt body politic.\(^\text{17}\) First, he
denied the right of individuals to take the law into their own hands by vengeance against corrupt
officials. Second, the people may appoint and bid “popular magistrates… to curb the tyranny of
kings.” Calvin asserted the right, and indeed the duty, of lesser magistrates to interpose their
authority between a wicked ruler and the people. They may take appropriate action to restrain or
conceivably even depose him. These representatives of the people have a duty to “restrain the
willfulness of kings,” even if it means they must “overturn… their intolerable governments.”\(^\text{18}\)

These ideas were well-received by the English Puritans. As many sought refuge in Calvin’s
Geneva from James II and Charles I, the Reformation ideas of the continent steadily cross-
pollinated on the British Isles and in her American colonies.\(^\text{19}\)

\(^\text{17}\) Douglas F. Kelly, *The Emergence of Liberty in the Modern World: The Influence of Calvin on Five
Governments from the 16th Through the 18th Centuries* (Phillipsburg, NJ: Presbyterian and Reformed Publishing,
1992), 29-31. “For if there are now any magistrates of the people appointed to restrain the willfulness of kings (as in
ancient times the ephors set against the Spartan kings, or the tribunes of the people against the Roman consuls, or
the demarchs against the senate of the Athenians; and perhaps, as things now are, such power as three estates
exercise in ever realm when they hold their chief assemblies,) I am so far from forbidding them to withstand, in
accordance with their duty, the fierce licentiousness of kings, that, if they wink at kings who violently fall upon and
assault the common folk, I declare their dissimulation involves nefarious perfidy, because they dishonestly betray
the freedom of the people, of which they know that they have been appointed protectors by God’s ordinance.”

\(^\text{18}\) Kelly, *The Emergence of Liberty in the Modern World*, 29-30; Gary T. Amos, *Defending the Declaration*
(Charlottesville, VA: Providence Foundation, 1999), 136.

\(^\text{19}\) John Eidsmore, *Christianity and the Constitution: The Faith of our Founding Fathers* (Grand Rapids,
MI: Baker Academic, 1987), 18-19. George Bancroft, the famed 19th-century historian, surmised that Calvin was
“the father of America,” adding, “He who will not honor the memory and respect the influence of Calvin knows but
little of the origin of American liberty.” The German historian Ranke dubbed, “John Calvin… the virtual founder of
America.”
In 1628, in the Petition of Right, King James I bound himself from the exercise of arbitrary and illicit power. He pledged never again to imprison any person except by due process of law, to circumvent the judicial processes of regular courts through the imposition of military tribunals, to quarter soldiers in private homes without the consent of the owner, or to raise money without again the consent of Parliament. Later the Crown would assert an exception concerning the limits on the power of taxation, claiming the right to issue special writs sanctioning tax levies in times of emergency. Charles I then issued a writ in 1636 in violation of the Petition of Right. Many declined to pay the tax, declaring it illegal since it was a tax levied without the consent of Parliament. John Hampden, a member of the House of Commons, challenged the arbitrary rule of the Crown. In the 1637 Ship Money Case, Hampden was tried for refusing to pay the sum of twenty shillings assessed upon his land, and he claimed in defense that the Crown had no authority for levying such a tax. He lost his case, but the judges’ decision was later omitted from legal standing. Hampden became a popular symbol of the defiance of arbitrary power, and his defiance helped the Petition of Right gain stature. Word of his case spread. Later American lawyers in the 1760s and 1770s would cite the Ship Money Case and the Petition of Right to legitimize their opposition to Parliamentary abuses.20

In 1644, a renowned Scottish Presbyterian minister Samuel Rutherford wrote his famous treatise Lex Rex, translated ‘Law is King.’ He made a philosophical case against the imagined divine right of kings and their supposed infallibility. Rutherford’s argument weighed on the integral notions of compact, condition and material breach. He explained that a ruler obtains his office by entering into a compact with the people that entails an exchange of promises whereby the people oblige themselves to allegiance and obedience to the law; and in turn, the ruler

promises to rule for their well-being within the constraints of natural law. The compact is thus conditional, and if the ruler fails to live up to his pledge then he may forfeit his right to rule.\textsuperscript{21} As the common law is deducible by reference to natural law and set by convention, rather than legislative contrivance, colonists were quick to ascertain and decry royal abuses. \textit{Lex Rex} saturated the minds of many colonists, and they in turn decried abrogation of historical rights, and regarded such acts as null and void.

The Glorious Revolution proved to be the culmination of English constitutional struggles. In the seventeenth century, English liberty had been threatened by the despotism of the Stuart kings who attempted to graft a divine-right monarchy onto the English body politic. This ran counter to constitutional norms. James II, a convert to Roman Catholicism, acceded to the throne in 1685. Thus the Puritan Parliamentarians were natural antagonists to James II. There were fears that James II would unite with the Catholic Bourbon monarchs such as Louis XIV of France. Encouraged by English Protestants, the Stadtholder of the Netherlands, William of Orange, then landed in England assembling an army. James II fled England, abdicating his throne, as William acceded to power with the consent of Parliament. In 1689, the Bill of Rights was enacted by Parliament, and stated the liberties of the English, and solidified the gains made in 1688.\textsuperscript{22}

Earlier James II had decided to reorganize colonial administration on his own initiative. He eliminated representative institutions in New England, and centralized rule under Crown


appointee Sir Edmund Andros. He violated established constitutional norms and the sanctity of contract by revoking the charters of all the New England and Middle colonies. He sought to wipe out colonial boundaries in New England. Andros ordered the suspension of colonial assemblies and forbade town meetings, attempted to levy taxes without the people’s consent, and announced his personal command over local militias. James II’s plan brought upheaval. In reality, Andros remained isolated in Boston, and ignored by the interposition of local leaders who rebuffed his edicts. On 4 April 1689, word reached Boston that William of Orange had deposed King James II, and “all magistrates who have been unjustly turned out” should resume “their former employment.” Colonists gleefully reacted and civilly deposed Andros from power. Cotton Mather drew up a new charter, rescinded the centralized ‘Dominion of New England’; and restored colonial self-rule.23

These, and other, struggles for liberty set the groundwork for the colonial-revolutionary resistance to the tyranny of King George III in the 1770’s. Colonial inhabitants of British North America were mindful of the English constitutional struggles from the time of Magna Charta. They were aware of the tyranny of Stuart monarchs, the ousting of Charles II, the protectorate of Cromwell, the short-lived restoration of James II, and the Revolution of 1688. The deposed were deemed the “rebels” who had “unkinged” themselves by assuming the role of usurper.24 Reed wrote, “and all the principles of the [Glorious] Revolution show that there are certain cases

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24 Pauline Maier, From Resistance to Revolution: Colonial Radicals and the development of American opposition to Britain, 1765-1776 (New York, NY: W.W. Norton, 40-41. Lord Somers wrote, “They are the traitors who design and pursue the Subversion of [the constitution]; they are the rebels that go about to overthrow the Government of their Country, whereas [those who] seek to Support and defend it are the truly loyal Persons.”
wherein resistance is justifiable to him [the king].”

Blackstone acknowledged that from 1688 “a new era commenced, in which the bounds of prerogative have been better defined, the principles of government more thoroughly examined and understood, and the rights of the subject more explicitly guarded by legal provisions, than in any other period of English history.” Willi Paul Adams highlighted the significance of Americans appropriating an essentially English constitutionalism to vindicate their resistance, (and that tradition lingered on after 1776 and the peace of 1783.) A key premise of the colonists’ argument was the notion that the political order of 1688, codified in statutes, could not be altered even by a majority decision of Parliament. This constitution, they argued, constituted a permanent code to which the Crown and Parliament were subject, and they had no authority to alter.

The Act of Settlement reconfigured the locus of sovereignty within the English system, removing it from the Crown and placing it in ‘the Crown-in-Parliament.’ Thereafter the Parliament politically dominated Great Britain. This transformation in 1688 propagated the germ of the later 1776 Revolution. The colonies were afforded autonomy and had their own representative assemblies. They regarded the Crown as the grantor of their charters.

“The fundamental principle of the [American] revolution was, that the colonies were coordinate

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members with each other, and with Great Britain, of an empire united by a common executive sovereign,” wrote James Madison in his Report of 1800, “but not united by any common legislative sovereign. The legislative power was to be maintained as complete in each American Parliament, as in the British Parliament… A denial of these principles by Great Britain, and the assertion of them in America, produced the revolution.”

Colonials thought of themselves as more connected to the Crown than Parliament. They had an established tradition of their own representative assemblies that mirrored the authority of Parliament in England since the 1600s. They denied the authority of any legislature superior to their colonial assemblies, and this became the raison d'être for 1776. Imperialists in Parliament may have denied their right to rule arbitrarily after the 1760s, but Americans were habituated to self-government and jealous for their liberties. The earliest settlements had received their charters from the Crown, and by inference, they owed no allegiance to Parliament. For this reason, their petitions were addressed to the King. By custom, colonial assemblies had alone exercised the power of taxation, hence the revolutionary slogan, ‘no taxation without representation.’ Nearly every colonial-revolutionary treatises reflected this common theme: John Dickinson in the Pennsylvania Farmer, Richard Bland in his Inquiry into the Rights of British Colonies, John Adams in Novanglus, Thomas Jefferson in A Summary View of the Rights of British America, and James Wilson in his Considerations on the Authority of Parliament.

Leading up to 1776, the colonial magistrates resisted the usurpations of Parliament by solemn protest, establishing committees of correspondence between the colonies to establish a mode of protest and resistance. In 1805, Mercy Otis Warren, in her History of the Rise and

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30 Evans, The Theme is Freedom, 211; Merrill Jenson, The Articles of Confederation (Madison, WI: Univ. of Wisconsin Press, 1959), 103, 211,214, 221.
Progress and Termination of the American Revolution, stated, “Perhaps no single step contributed so much to cement the union of the colonies, and the final acquisition of independence, as the establishment of the Committees of Correspondence… that produce unanimity and energy throughout the continent.”

The propriety of these Committees of Correspondence would later be lauded in Hamilton’s Federalist #28 in describing the probable operation of state interposition to perceived encroachments upon liberty. Through committees, patriots spread the word about encroachments upon the public liberty and drew up concerted plans for resistance. So called Writs of Assistance proved to be a major affront to colonial liberties. These general search warrants gave British customs officers free reign to ransack and invade homes and offices in search of alleged contraband. Memory of these odious writs lingered in the minds of post-1783 Americans and the authors of the Virginia and Kentucky Resolutions. On occasion, colonial leaders interposed their authority to arrest perceived encroachments by Parliament upon the charters and the rights of English subjects. This marked the inauguration of a colonial-revolutionary tradition of corporate resistance by lesser magistrates and officers to thwart perceived Tory tyranny, and this tradition would define the American political culture after the United States secured independence.

Prior to their assertion of independence, the colonies fell under the supervisory jurisdiction of the King’s privy council, and were also subject to the general regulations of

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33 Ibid.
Parliament.35 In the fifteenth article of the Charter of King James I, the Crown promised its subjects:

Also we do, for us, our heirs and successors, declare, by these presents, that all and every persons, being our subjects, which shall dwell and inhabit within every or any of the said several colonies and plantations, and every and of their children, which shall happen to be born within any of the limits and precincts of the said several colonies and plantations, shall have and enjoy all liberties, franchises, and immunities, within any of our other dominions, to all intents and purposes, as if they had been abiding and born, within this our realm of England, or any of our said dominions.36

This charter embodied the Crown’s formal acknowledgement of colonial liberties. The colonists did not presuppose that mere enumeration of overt acts of misgovernment were the sole vindicator of their corporate acts of resistance to Crown-in-Parliament. Rather they strove to garner legitimacy for their grievances by appealing to the normative authority of their colonial charters that embodied a broad English constitutionalism since the time of the Magna Carta.37

A Long Train of Abuses and Usurpations

No modern revolution was so deeply rooted in an aversion to over-taxation and over-regulation as the revolt of the thirteen American colonies. Perceiving mercantile regulations as unjust, merchants had consciously evaded taxes. Merchant John Hancock, earned repute as one of the colonies’ most notorious smugglers. One of his ships docked in Boston Harbor was loaded with a cargo of Madeira wine. Its customs manifest listed only a few cases. When an officer boarded the ship for inspection, the crew locked him in a cabin, and he could hear the chiming of wine bottles being unloaded by dock workers. Upon release three hours later, the

crew shrugged it off as a mishap.\textsuperscript{38} Resistance of this sort occurred during the 1760s and 1770s.

In 1733, Parliament enacted the infamous Sugar Act in order to help the British West Indies at the expense of British North America, whereby trade between British North America and the French West Indies became unlawful, in favor of the British-administered islands. A labyrinth of mercantile regulations entangled importers. Personal effects of seaman were subjected to arbitrary seizure if the contents were not declared on a customs declaration. Tax litigation moved to Admiralty courts in loyalist strongholds such as Nova Scotia. Litigants were denied the right to a public trial by a jury of their peers. Civil actions against taxmen were forbidden, and informants could lay claim to one-third of a smuggler’s cargo.\textsuperscript{39}

In 1761, British magistrates made application to Massachusetts courts for writs of assistance, which were summarily issued. This writ was similar to a search warrant, but much broader in scope. Unlike a traditional search warrant, it did not require that the place to be searched even be named, or that the goods to be seized were to be specified, and it had no fixed date of expiration. This carte blanche for officers of state to engage in search and seizure at their discretion proved detrimental to liberty and stood in direct contradiction to the longstanding Rights of Englishmen.\textsuperscript{40} In much the same way statutes today have innocuous titles, the statute that gave Writs of Assistance the color of law, in the title “An Act to prevent frauds, and regulating abuses in His Majesty’s customs.” The fifth section made reference to prohibited goods on vessels and at port that had not passed customs, making provision for their seizure.\textsuperscript{41}

\textsuperscript{40} Reid, \textit{The Authority of Rights}, 196-198, 206.
\textsuperscript{41} William Tudor, \textit{The Life of James Otis, of Massachusetts} (Boston, MA: Wells and Lilly, 1823), 78-79. The Act provided, “it shall be lawful to or for, any person or persons, authorized by these writs of assistance under the seal of His Majesty’s Court of the Exchequer, to take constable, headborough, or other public officer, inhabiting near unto the place, and in the day time enter, and go into any house, shop, warehouse, cellar, or room, or other
James Otis, a prominent attorney in Massachusetts on behalf of the Boston Merchant’s Association emerged to decry these instruments as unconstitutional attacks on the public liberty. He went before the court in the old townhouse in Boston to argue against the issuance of these writs. He maintained that Parliament had no right to authorize customs officials to issue general search warrants without naming any persons. He cited the absence of precedent and the lack of authority in the colonial charter. He held that the writs were contrary to evident reason and arbitrary and tyrannical by nature. Otis assailed the writs as “an act against the Constitution is void… if an act of Parliament should be made, in the very words of the petition [for writs of assistance], it would be void; the executive courts must pass such acts into disuse.” The traditional common law approach had been supplanted by Hobbesian notions of unbounded legislative power vested in Crown-in-Parliament. The colonists were apt to maintain the traditional outlook in defense of their liberties. They could find precedent in Dr. Bonham’s Case (1610). Jurist Sir Edward Coke maintained that the common law circumscribed the acts of Parliament—which proved useful to Otis in his case. Otis stated, “Every one with this writ may be a tyrant; if this commission be legal, a tyrant in a legal manner also may control, imprison, or murder any one within the realm…. Every man may reign secure in his petty tyranny, and spread terror and desolation around him.” Then he defiantly proclaimed his opposition to such Writs, and dubbed “all such instruments of slavery on the one hand, and

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42 Evans, The Theme is Freedom, 223; Oliver M. Dickerson, The Navigation Acts and the American Revolution (Philadelphia, PA: Univ. of Penn. Press, 1951); Thomas R. Dye, American Federalism: Competition Among Governments (Lexington, MA: Lexington Books, 1990). “All governments… are dangerous. They wield coercive power over the whole of society. They tax, penalize, punish, limit, confine, order, direct, and regulate. They seize property, restrict freedom, and even take lives, all under the claim of legitimacy… Thomas Hobbes justified the creation of such a dangerous institution by arguing that it was the only alternative to anarchy—a war of all against all, ‘where every man is enemy to every man’ and life is ‘solitary, poor, nasty, brutish and short.’ Only the ‘continual fear and danger of violent death’ justified the establishment of a Leviathan.”

villainy on the other, as this writ of assistance is.”

Otis did not prevail in this particular case before the court, but a powerful precedent had been struck.

The arbitrary nature of the Writs of Assistance provoked further protest and resistance. Essentially open-ended, self-written search warrants that allowed officials to demand entrance by force, in effect, it deputized British soldiers and officers with nearly limitless discretion to search private buildings and effects ostensibly for smuggled goods. It made no provision for judicial oversight or the irregularity of the warrants. After 1776 the memory of these devices compelled the revolutionary governments to craft their own Bill of Rights. The reminiscence inspired the framers of the 1791 federal Bill of Rights to make provision for safeguards against illegal search and seizure. To the generation of ‘76, the thought of government officers being able to write their own warrants was abhorrent and unlawful.

Massachusetts men were at the forefront of the resistance to the Crown’s taxes. Instructions were prepared on 24 May 1764, for Boston’s representatives in Assembly:

But what still heightens our Apprehensions is that those unexpected proceedings may be preparatory to new Taxations upon us: For if our Trade may be taxed why not our Lands? Why not the produce of every Thing we possess or make use of? This we apprehend annihilates our Charter Right to Govern and Tax ourselves.— It strikes at our British Privileges which as we have never forfeited them we hold in common with our Fellow Subjects who are Natives of Britain: If Taxes are laid upon us in any shape without ever having a Legal Representative where they are laid, are we not reduced from the Character of Free subjects to the miserable state of Tributary Slaves?

But these acts marked the beginning of a long series of calculated oppressions, which

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46 Napolitano, 20-21.
would in time elicit the corporate resistance of lesser magistrates and colonial assemblies, as well as protests of principled patriots from Massachusetts to Virginia. Otis published his *Rights of the British Colonies Asserted and Proved*. He maintained that a Parliament without American representatives, though supreme in its authority, could not legally levy taxation upon Americans. He rejected distinctions between internal and external taxation, and affirmed colonial legislatures possessed authority to tax their respective states internally. Parliament he maintained had no right to levy internal taxation upon the colonies.  

American arguments became more innovative, as did their desire to assert self-government over their own affairs.

Opposition to the Stamp Act

In 1765 Parliament passed the Stamp Act which levied a tax on newspapers, almanacs, legal documents, insurance policies, pamphlets, ship’s papers, licenses, dice and even playing cards and dice. Such stamps were required to validate legal documents like deeds, titles, and wills. Newspapers could not be distributed without an authorized stamp affixed to the masthead. Colonial response remained impassioned. In New York, the offensive act was reprinted under the masthead, “The folly of England and the ruin of America!” It exposed colonials to the risk of confiscation. The *Newport Mercury*, claimed the Stamp Act would “deprive us of all our invaluable charter rights and privileges, drain us suddenly of our cash, occasion entire stagnation of trade, discourage every kind of industry, and involve us to the most abject slavery.” John Dickinson honed in on the perverse nature of the Stamp Act as it menaced customary legal

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norms, and he dubbed it a “dangerous innovation” that went beyond customary regulation.  

Samuel Adams rose at a Boston town meeting to state a man’s property is the product of his labor, and if these fruits are capriciously plundered then such an act strikes at a man’s liberty.  

Merchants, tavern owners, lawyers, and printers denounced the tax that imperiled livelihoods. It sparked protest in the American colonies, provoking the cry, “No taxation without representation!”

Colonists attributed economic hardship to these tax levies. Samuel Adams avowed that if Americans were overburdened with taxes then their economy would soon collapse. The great offense of the Stamp Act went beyond economic injury. Violators were to be tried in Vice Admiralty courts, or military courts. This signified the first attempt by Parliament to curtail the right of public jury trial by one’s peers in the colonies. Prosecutions for violations were not cognizable at common law, and were instead subjected to admiralty law jurisdiction whereby law and questions of fact were determined by an imperially-appointed judge. The colonial grievances pertained to constitutional usurpation, more so than economic injury. Amidst a flurry of resolutions, town meetings, and assemblies, colonial statesmen sounded alarms about the danger posed to the right of the accused to a public trial by jury.

John Adams summed up the

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52 Evans, The Theme is Freedom, 218. “I have looked over every statute relating to these colonies from the first settlement to this time; and I find every one of them founded on this principle [of trade regulation], till the Stamp Act administration. All before are calculated to regulate trade… Here we may observe an authority expressly claimed and exerted to impose duties on these colonies, not for the regulation of trade… but for the single purpose of levying money upon us. This I call an innovation; and a most dangerous innovation…”  
54 Mercy Otis Warren, History of the Rise, Progress and Termination of the American Revolution, Lester Cohen, ed. (Indianapolis, IN: Liberty Fund, 1989), 1:15. As the Mercy Otis Warren observed, “It had ever been deemed essential to the preservation of the boasted liberties of Englishmen, that no grants of monies should be made, by tolls, talliage, excuse, or any other way, without the consent of the people by their representative voice.  
55 Puls, Samuel Adams, 60. “By restrictions and duties she is even in danger of putting an end to their usefulness to her; whereas, by abolishing those duties and giving them indulgences, they would be enabled to repay her a hundredfold.”  
56 Reid, The Authority of Rights, 52-53. Since Whig resisters serving on juries could feasibly nullify loathed parliamentary statutes by not enforcing them, and acquitting the prosecuted, imperialists reasoned the need to
position in resolves that he drafted for the town of Braintree, Massachusetts:

> We take it clearly... to be inconsistent with the spirit of the common law and the essential fundamental principles of the British constitution that we should be subjected to any tax imposed by the British Parliament... the most grievous innovation of all is the alarming extension of the power of courts of admiralty... no juries have concern there... [this] is directly repugnant to the Great Charter itself; for by that charter... ‘no free man shall be... condemned, but by lawful judgment of his peers’... 57

In Virginia, the tidewater aristocrats deferred to the Crown, and many enjoyed the emoluments of its offices and grants. Patrick Henry as spokesperson for the western counties of Virginia was not so differential towards King George. Henry, famous for his flashy oratory, assailed the illegality of the Act. Henry held that power to tax remained in the colonial assembly and any levies imposed require the assent of its people through their assemblies. He and his cohorts published the Virginia Resolves descried and codified a multitude of abuses which they hoped to put to an end. The first two resolutions insisted that the colonists were possessed of all the right of Englishmen. The third proclaimed that the colonial principle of self-taxation was integral to the British constitution. The fourth proclaimed the right of colonial self-government, as each colony had the right to be governed only by the acts of its legislature approved by the royal governor. The fifth echoed the sentiments of the third in a more forceful manner. The sixth begged the logical inference of the forth and basically declared null and void all usurpations of colonial self-government by the Crown and Parliament. The seventh climatically declared that those who denied colonial self-government were traitors to Virginia and by implication the English Constitution. On 30 May 1765, the Virginia House of Burgesses passed suspend the right to trial by jury as a practical expedient. Perceptive of the colonial inclination to interpose against such laws, the British gave no longer afforded deference to the colonists.

the first three of five draft resolves introduced at the behest of Patrick Henry. The latter two points were considered too radical, though all of the resolves were published in the colonial newspapers.\(^5\)

Below, is the verbatim text of the first five resolutions of the Virginia Resolves of 1765:

> Whereas the honorable House of Commons in England have late drawn into question how far the general assembly of this colony has power to enact laws for laying taxes and imposing duties payable to the pope of this his majesty's most ancient colony — For settling and ascertaining the same to all future times, the House of Burgesses of this present general assembly have come to the several following resolutions:

> Resolved, That the first adventurers and settlers of this his majesty's colony and dominion of Virginia brought with them and transmitted to their posterity and all others, his majesty's subjects since inhabiting in this is majesty's colony, all the privileges and immunities that have at any time been held, enjoyed, and possessed by the people of Great Britain.

> Resolved, That by the two royal charters granted by King James the First, the colonists aforesaid are declared entitled to all privileges of faithful, liege, and natural born subjects, to all intents and purposes, as if they had been abiding and born within the realm of England.

> Resolved, That his majesty's liege people of this his most ancient colony have enjoyed the right being thus governed by their own assembly, in the article of taxes and internal police; and that the same have never been forfeited or any other way yielded up, but have been constantly recognized by the kind and people of Great Britain.

> Resolved therefore, That the general assembly of the colony, together with his majesty or his substitute have in their representative capacity the only exclusive right and power to levy taxes and impositions on the inhabitants of this colony and that every attempt to vest such a power in any person or persons whatsoever other than the general assembly aforesaid is illegal, unconstitutional, and unjust, and has a manifest tendency to destroy British, as well as American freedom.\(^6\)

The Virginia Resolves manifested that solemn protest as a precursor to nullification.\(^6\) A Connecticut minister Ezra Stiles spoke of the Virginia Resolves influence that “came abroad, and


gave fire to the continent.” Indeed committees of correspondence transmitted the Virginia Resolves throughout the thirteen colonies. Rhode Island followed in imitation of Virginia. Rhode Island’s Assembly convened in September, as delegates from Providence moved a series of resolves modeled after those of Virginia. As adopted, the Rhode Island resolutions included the first, second, fourth, fifth and sixth, of the original Virginia Resolves. The one difference being that Rhode Island did not pay the usual salutary homage to His Majesty King George III and inserted the phrasing “internal” before the word taxation. This was to clarify its grievance. Rhode Island added an additional resolution. “That all the officers in this colony, appointed by the authority thereof, be, and they are hereby, directed to proceed in the execution of their respective offices in the same manner as usual; and that this Assembly will indemnify and save harmless all the said officers, on account of their conduct, agreeably to this resolution.”

In August 1765, shortly before the Stamp Act Congress convened, the Grenville ministry collapsed. Charles Watson-Wentworth, 2nd Marquess of Rockingham formed a new ministry. Burke and his Whig allies favored reconciliation with the colonies. British merchants suffered from the colonial boycott of trade, and they too, began to protest the Act. William Pitt then delivered a speech before the British House of Commons on 14 January 1776 on behalf of American colonials describing the offensive legislation “an absurdity in terms….” As its legal

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63 Bernhard Knollenberg, Growth of the American Revolution: 1766-1775 (Indianapolis, IN: Liberty Fund, 2003), 14
64 William Pitt quoted in Graham, A Constitutional History of Secession, 75. “In ancient days, the Crown, the barons, and the clergy possessed the lands. In those days, the barons and the clergy gave and granted to the Crown. They and granted what was their own… [S]ince the discovery of America… the Commons are become the proprietors of the land. The Church… has but a pittance. The property of the Lords, compared with that of commons, is a drop of water in the ocean; and this House represents those Commons, the proprietors of land; and those proprietors virtually represent the rest of its inhabitants. When, therefore, in this House we give and grant, we give and grant what is our own. But in an American tax, what do we do? ‘We, your Majesty’s Commons for Great
flaws were laid bare, and now faced with a united opposition in both the colonies and in England, Parliament repealed the Stamp Act on 17 March 1766, but refused to repudiate its new assumption of power. Parliament abruptly passed the Declaratory Act and affirmed its right “to bind them in all cases whatsoever.” This set off alarms to the colonists. After Parliament renounced a direct tax over the colonies in favor of an indirect tax, a new indirect excise levied.65

British Treasurer Charles Townshend came forward in a renewed effort to extract funds from the colonies. The purpose of his tax bill was to initiate levies on certain articles, namely paper, glass, painters’ colors, and other items imported into America. The newly appointed collection agents in Boston were rendered wholly independent of the general assembly and local magistrates.66 Townshend held that “America should be deprived of its militiating and contradictory charters, and its royal governors, judges and attorneys be rendered independent of the people.”67 In response, Samuel Adams issued a circular letter in February 1768 with the backing of the Massachusetts House. The Massachusetts General Court censured the offensive act as a violation of the tenet of no taxation without representation. Adams boldly condemned the unlawful attempt to make colonial governors and judges independent of the people.68

Colonials, enthusiastic in their reception of Adams’ circular letter, pushed for approval in their representative assemblies. New Hampshire, Virginia, Maryland, Connecticut, Rhode Island,

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68 Samuel Adams quoted in Puls, *Samuel Adams*, 73-74. “It seems necessary that all possible care should be taken, that the representations of the several assemblies, upon so delicate a point, should harmonize with each other. The House, therefore, hope that this letter will be candidly considered in no other light than as expressing a disposition freely to communicate their mind to a sister colony upon a common concern, in the same manner as they would be glad to receive the sentiments of your or any other house of assembly on the continent”
Georgia, and South Carolina soon endorsed the Resolves, either by their assembly or Speaker.  

The Intransigent Spirit of Resistance.

In 1766, Richard Bland published *An Inquiry into the Rights of the British Colonies*. Drawing from the Whig interpretation of history, he claimed that the Saxon constitution had been “founded upon Principles of the most perfect liberty.” Landed freeholders under this constitution were all members of the Saxon parliament. Gradually they succumbed to the lust for power following the Norman Conquest. Some five-hundred years later, Henry VIII abridged the voting franchise. Freeman naturally possessed the right to emigrate, and being deprived of their ancient rights was a powerful inducement for their settlement in North America. American colonials, insisted Bland, maintained a unique position in history, having established their colonies with little financial backing from the mother country. Their emigration into a sparsely-populated land of aborigines put them under “the Law of Nature,” and at liberty to establish a mutually binding relationship with the Crown. James I was obliged never to alter Virginia’s form of government, and this charter bound the Crown’s successors. Virginia’s consent to English rule was thus conditional, and on the stipulation that James I’s guarantee would remain in place. Virginia possessed the right to taxation by the consent of her elected representatives. Charles II abdicated the charter of James, in trying to levy a *direct* tax on Virginia, and thus abdicated his claim to rule Virginia. Virginians had a historical basis through its charter and the custom of its colonial assembly *alone* levying its *direct* taxes.  

Samuel Adams had long proven that the pen was mightier than the sword. When the

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69 Carson, *The Rebirth of Liberty*, 95.
prospect of martial law loomed, he alerted patriots in the *Boston Gazette* on 17 October 1768. The British repaid petitions of colonial grievances with the force of arms to compel their compliance. In Adams’ estimation, military occupation would destroy self-government in the colonies unless it was stopped. He declared, “Where military power is introduced, military maxims are propagated and adopted which are inconsistent with, and must soon eradicate, every idea of civil government.”\(^7\) British soldiers were not bound by the city’s laws in Boston.

The British East India Company despite its monopoly status had managed to run itself nearly insolvent. By regulation, its exports had to pass through England first where the goods were taxed, before being re-exported to the American colonies.\(^7\) This kindled the ire of patriots. The Boston Tea Party commenced on 16 December 1773, as ‘*The Sons of Liberty*’ dressed as Mohawk Indians dumped the duty-free cargo into the harbor. The British East India Company retaliated by demanding ruinous legislation to suppress colonial resistance. Parliament obliged in early 1774. In Delaware a similar event occurred nine days later, as colonists sunk another seven hundred chests of sea to the bottom of the ocean. New Yorkers compelled the cargoes to stay on their ships in port. John Adams joked that if they rise up they should do so in manner “to be remembered, something notable and striking.”\(^7\) This fit the bill.

In 1774, the colonists were greeted with more injuries to add insults to their professed grievances. The Coercive Acts were passed. The British tried to exact swift punishment upon

\(^7\) Samuel Adams quoted in Puls, *Samuel Adams*, 88-89. “This may, in time, make them look upon themselves as a body of men different from the rest of the people; and as they, and they only, have the sword in their hands, they may sooner or later begin to look upon themselves as the lords, and not the servants, of the people.” He appealed to a spirit of civility to animate resistance.; William V. Wells, *The Life and Public Services of Samuel Adams*, 3 Vols. (Boston, MA: Little Brown, 1888), Vol. 1., 221-222. “It behooves the public, then, to be aware of the danger, and like sober men to avail themselves of the law while it is in their power. It is always safe to adhere to the law, and to keep every man of every denomination and character within its bounds. Not to do this would be in the highest degree imprudent.”


\(^7\) Allen and Schweikart, *A Patriot’s History of the United States*, 68.
the colonials—especially in Massachusetts. First, in accordance with the Boston Port Act, Boston Harbor was blockaded and commerce closed, and a levy was assessed for payment for the destroyed tea. Second, the charter of Massachusetts was annulled, and a governor’s council was appointed by the king. It implied the cessation of English common law protections for her citizens. Third, the Quartering Act passed which compelled homeowners and innkeepers to put up and board British soldiers and assume the costs attendant to their stay. Fourth, in accordance with the Administration of Justice Act, British soldiers and officials could only stand trial in England for crimes committed against colonial subjects, if the governor deemed it necessary.\footnote{74 \textit{Allen and Schweikart, A Patriot’s History of the United States}, 68-69; \textit{Carson, The Rebirth of Liberty}, 98-99.}

Virginian Richard Henry Lee wrote to Samuel Adams on 4 February 1775 and declared outrage at pending legislation in the Parliament. “Should such Acts pass, will it not be proper for all Americans to declare them essentially vile and void?” Such acts would be regarded as “void” since they were contrary to the inherited rights of the colonists.\footnote{75 Gutzman, \textit{Virginia’s American Revolution}, 22; Woods, \textit{Nullification}, 104.} Here was a portent of nullification, by the interposition of their republican assemblies, which was presumed correct in the face of repeated usurpation.

The first combined resistance occurred in September 1774 as delegates to a Continental Congress convened in Philadelphia summoned by Virginia and Massachusetts. Delegates from every colony except Georgia soon arrived. Congress received a series of resolves, known as the Suffolk Resolves that declared loyalty to the king, but derided the “hand which would ransack our pockets” and “the dagger to our bosoms.” Congress endorsed the Resolves. William Legge, 2nd Earl of Dartmouth, the British Secretary of State for the Colonies, apprehended that Americans were keen on adopting any proposal for resistance that their Continental Congress
may advocate, and would press for civil war.76 George III remarked that “the die is cast—the colonies must either submit or triumph.”77

Richard Henry Lee saw the Boston Port Act as “a most violent and dangerous attempt to destroy the constitutional liberty of and rights of all North America.” He had to summon delegates to a continental congress to carry out a “systematic plan for” opposition to the encroachment upon American “constitutional rights.” Boston’s cause, Lee counseled Samuel Adams, was “the common cause of British America.”78 Americans were now finding common cause in resisting the perceived usurpations of the Crown-in-Parliament.

‘Virginia and Massachusetts take the Helm’

In the days before hostilities broke out, the Virginia House of Burgesses clashed with the royal governor. Angry correspondence went back and forth between citizens and their legislators. Governor Dunmore seized the arsenal, disabled weapons so as to render them useless in anticipation of their requisition by colonial militia. He left Virginia in June 1775. The Virginia House of Burgesses dissolved itself in Williamsburg; it reconvened in Richmond forming a provisional government, the Virginia Convention of 1775. Delegates attending the convention were elected just as landed freeholders had elected their delegates to the House of Burgesses beforehand. On 15 May 1776, Virginia declared a declaration of independence assuming all the attributes of sovereignty that the Crown had claimed over Virginia. The Convention could rule in accord with the wishes of the people of the Virginia commonwealth.79

On 7 June 1776, Richard Henry Lee, motioned for the adoption of these famous words at

78 Richard Henry Lee quoted in Kevin Gutzman, *Virginia's American Revolution*, 12. He added, “…all America will owe their political salvation in great measure, to the present virtue of Massachusetts Bay…”
the Continental Congress, “Resolved, That these United Colonies are, and of right ought to be free, and independent States,” and he ended his proposal with a summons “that a plan of confederation be prepared and transmitted to the respective Colonies for their consideration and approbation.” The Virginia Convention of 1776 established a new fundamental basis of law in her dominion, “a republican form of government,” which would become the perennial innovation of the American cause. On 12 June 1776, the Convention adopted the Virginia Bill of Rights. On 29 June, it framed and adopted the new Virginia Constitution. It was the handiwork of George Mason and among the proposals that influenced its phraseology were Lee’s “Government Scheme” and Adams’ “Thoughts on Government.” The preamble hearkened back to the protest language of the Glorious Revolution that had decried the abuses of James II. Now George III was the target of colonial ire. The Virginia Convention declared, “By which several acts of misrule, the government of this country, as formerly exercised under the Crown of Great Britain is totally dissolved,” and this declaration spoke for Virginia only. Virginia appointed a governor and privy council that acted as a provisional body until the General Assembly could be elected, which would adjourn sine die. Other states quickly followed Virginia’s lead.

‘The Declaration of Independence’—the High Act of Interposition

George III made an oration before Parliament in late 1775, which was dispatched to America for print on 4 January 1776. This upset Americans. Declaring the colonies to be in rebellion, George III declared them outside of the protection of the Crown. This signaled the irreconcilability the American cause with Great Britain. At the heart of the conflict were conflicting interpretations of the English constitution. The one extolled by Americans was the

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81 Graham, A Constitutional History of Secession, 91-94; Gutzman, Virginia’s American Revolution, 25.
82 Ibid., 18.
ancient constitution stemming from Magna Charta and culminating in the settlement of 1688, with its customary limited powers, with rights secured as property from the caprice of the government. The constitution under George III presumed the validity of Acts of Parliament.\textsuperscript{83}

When the Second Continental Congress convened on 10 May 1775, delegations were received from all thirteen United Colonies of North America. This body had no independent powers. When it omitted bills of credit, commissioned officers of the Continental Army and Navy, directed military operations, granted letters of marquee and reprisal, or declared independence and engaged in a treaty with France, it had acted upon authority delegated by the several states. It was a body entirely amenable to those states.\textsuperscript{84}

The Virginia Convention then authorized its delegates in the Continental Congress to approve of a joint declaration that the United Colonies were “FREE AND INDEPENDENT STATES, absolved of all allegiance and dependence upon Crown and Parliament of Great Britain.” Other states followed suit in instructing their delegates to do the same.\textsuperscript{85}

On 4 July 1776, the eloquent words of Jefferson would echo in history. “The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.” The Crown’s refusal to allow rule by consent of the governed, deprivation of the colonists’ right to trial by jury, conscripting them into armies “to become the executioners of their friends and brethren,” and for otherwise subjecting them to the tyranny of arbitrary rule elicited colonial disapproval and resistance.\textsuperscript{86} Colonial charters supposedly guaranteed the rights of Englishmen to colonial

\textsuperscript{83} Evans, \textit{The Theme is Freedom}, 210, 310-311; Reid, \textit{The Authority of Rights}, 236.
\textsuperscript{84} McDonald, \textit{States’ Rights and the Union}, 8.
\textsuperscript{85} Graham, \textit{A Constitutional History of Secession}, 96.
subjects, and they believed that they had been denied those ancient rights.\textsuperscript{87}

The Declaration served as a legal justification for independence in appealing to historic rights. As grievances went unanswered and were met with repeated injuries, Americans lamented the Crown’s refusal to honor their charters. They made appeals to “the laws of nature and nature’s God,” calling upon the world at large to behold the spectacle of British tyranny. This identifies a higher authority to which man’s laws must justly conform. Unless one recognizes some form of supreme law by which man’s laws may be judged then there is no moral basis for sanctioning the legitimacy of organized civil resistance.\textsuperscript{88} This moral argument helped to elicit foreign support that served the Americans in their bid for self-rule from an empire possessed of the most powerful armies and navies in the world. The closing paragraph declared the separation of the American states from Great Britain! There is appeal “to the Supreme Judge of the world for the rectitude of our intentions,” and “in the Name, and by Authority of the good People of these Colonies.” They “solemnly publish and declare” that they are henceforth, “Absolved from Allegiance to the British Crown,” and that they are now “FREE AND INDEPENDENT STATES.”\textsuperscript{89}

When their attempts to peaceably secede were met with force, Americans fought the War for Independence to re-establish their way of life. It was a life lived out in their farms and communities that they sought to preserve, and in their view this was best protected by their mixed constitution and the customs of their ancestors. They fought to defend the English constitution of their forefathers, not to overthrow it. This is a crucial distinction in contrast to the

\textsuperscript{87} Gottfried Dietze, America’s Political Dilemma: From Limited to Unlimited Democracy (Lanham, MD: Univ. Press of Maryland, 1985), 5. “The Great Charter of Liberties, the Petition of Right and the Bill of Rights, brought about by the people, enumerated the rights to be protected from the King and left no doubt that popular government was to secure such protection.”

\textsuperscript{88} Eidsmore, Christianity and the Constitution, 363.

violent French Revolution. Americans had no intention of turning society upside down, or starting the calendar at year zero as the French would attempt in 1789.90

The independent sovereignty of the States was *writ large* on the face of the Articles:

“Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.”91 State sovereignty was also reaffirmed in the 1783 Treaty of Paris. King George III admitted defeat to the “sovereign and independent states.” The Treaty read thus: “His Britannic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations….”92

Through the Confederation, the states established a union for common security, taking a self-defense posture against the former mother country, and all threats to their common liberty.93 The patriots of 1776 intended no significant break with the past. Their revolutionary struggle sought to restore their ancient rights. Patriots of 1776 could appeal to the constitutional settlement of 1689 to validate their resistance.94 In the years leading up to independence, colonial magistrates and representatives had on innumerable occasions rebuffed the abuses and unlawful edicts of the Crown-in-Parliament. They interposed on behalf of the colonial subjects

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93 Marshall DeRosa, “States’ Rights,” *American Conservatism: An Encyclopedia*, Bruce Frohnen, Jeremy Beer, and Jeffrey O. Nelson, eds. (Wilmington, DE: ISI Books, 2006), 813. Article III explains “The said states hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their Liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.”
94 Daniel Boorstin, *The Genius of America Politics* (Chicago, IL: Univ. Of Chicago Press, 1958), 68-69. “The most obvious peculiarity of our American Revolution is that in the modern European sense of the word, it was hardly a revolution at all.”
to protect their rights and their community’s right of self-government. Colonial legislatures resisted the encroachments of Parliament’s appointed governors. Private associations formed with the goal of organizing civil disobedience to the offensive Parliamentary ordinances. The prudence of pursuing independence found its justification in the patience, redress, and remonstrance exemplified by the colonies prior to their claim of political severance from the mother country.

The outcome of the Declaration is tantamount to an affirmation of republican self-government in the United States, not independence as one nation, but independence as sovereign states. As the Massachusetts Constitution of 1780 proclaimed, “The people… have the sole and exclusive right of governing themselves, as a free, sovereign and independent state.”95 This colonial-revolutionary tradition of interposition and states’ rights was not vanquished with the Constitution of 1787. This tradition was on the minds of Madison and Jefferson in 1798 in the Virginia and Kentucky Resolutions respectively.

Ascertaining historical continuity is integral to understanding the Principles of 1798. One must ascertain the substance of 1776 to understand 1798. To do so, this necessitates tracing constitutional struggles and recognizing the correlation of the Principles of 1798 with the broader Anglo-American constitutional tradition.

Chapter Two
The Principles of 1798

The French Revolution was a violent spectacle. In spite of manifestos on the Rights of Man and platitudes of ‘liberty, equality, and fraternity,’ Jacobins committed regicide against Louis XVI, toppled the Christian church in favor of a cult of reason, and murdered thousands. War soon broke out between Britain and France. American sentiment was divided. Federalists feared Jacobin revolution would come to America.1 French Ambassador Edmond-Charles Genêt arrived in Charleston, South Carolina, aimed at subversion, as he sought to outfit privateers and plot insurrections against monarchical powers. Such intrigue struck a blow at American neutrality. It could give Britain cause to censure the United States as a haven for revolutionary Jacobinism. The Washington administration demanded his recall.2

During the presidency of John Adams, America fought an undeclared naval war on the high seas against revolutionary France. Under the terms of the Jay Treaty, the British were allowed to seize U.S. ships on the high seas carrying cargo to its enemy France. France saw this as betrayal of the Alliance of 1778 and perceived it as American ingratitude. France retaliated by ordering its warships to seize and board American ships.3

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The American envoys were rebuffed by the French upon arrival in Paris in October 1797. Foreign Minister Talleyrand snubbed them at the first meeting. Days of silence followed. Then American envoys were informed that the French were favorably disposed to them. This charade was soon revealed as French conceit. The price of admission for dialogue was a $250,000 bribe for Talleyrand. A $10,000,000 ‘loan’ from the U.S. was demanded as recompense for Adams’ “insults” towards France. American envoys expressed shock. The mission failed to elicit French deference for the United States’ newfound independence. Word of French duplicity spread throughout America. Charles Pinckney uttered the famous words, “No; no, not a sixpence!”

Amid this hysteria, Federalists found pretext for their program to counter the imagined Jacobinism on the home-front. Four legislative acts were involved. The Alien Enemies Act authorized the President to deport alien enemies in the event of a war. It was never invoked as the war with France was an undeclared naval engagement. The Alien Friends Act made provision for the same powers during peacetime, and only one individual was deported under the rubric of its authority. The Naturalization Act was aimed at both French and wild-eyed Irish expatriates; it extended the time requisite for citizenship of aliens from five to fourteen years. It violated the principle of comity in international law as resident aliens were entitled to the same liberties of procedural due process as citizens in criminal proceedings as citizens. The Act subverted customary rights, privileges, and immunities in criminal proceedings. By authorizing the President to expel persons “without jury, without public trial, without confrontation of the witnesses against him, without having witnesses in his favor, without defense, [and] without...
counsel,” it basically denied the accused the benefit of due process and their procedural rights arising under the Fifth and Sixth Amendments. Before an alien (or citizen) may be detained, the law obliges grounds of suspicion to be confirmed before a court that must be supported by an oath. The party in question must have benefit of a Habeas Writ to secure release by judicial interposition if wrongfully detained. As Madison lamented, “All these principles of the only preventive justice known to American justice are violated by the alien-act.” The original Constitution it seems was not on the side of the Federalists.

Federalists rationalized the controversial legislation in the power of Congress to defend the country. Sounding alarms, Jefferson remarked to Madison that the menacing passage of Alien Bills frightened the French expatriates in the United States to leave the country, as many had chartered passage to leave. The administration targeted some foreigners under the Alien Friends Act, and Adams signed some hollow deportation orders which were never utilized.

The centerpiece of the Federalist program to counter dissent directed against the Federalist administration was the Sedition Act:

SEC. 2… That if any person shall write, print, utter or publish… any false, scandalous, and malicious writing or writings against the government of the United States, or either house of Congress, with intent to defame [them], or to bring them [into] contempt or disrepute; or to excite against them [the] hatred of the good people of the United States… then such a person shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.

Its constitutionality remained doubtful. The First Amendment states, “Congress shall

make no law… abridging the freedom of speech, or of the press.” Freedom of the press rated high among the liberties that the patriots of 1776 fought to secure. In 1792, Jefferson wrote Washington about the value of a free press. “No government ought to be without censors, and where the press is free, no one ever will. If virtuous, it need not fear the fair operation of attack and defence.”

Amid the conflict with France, Federalist politicos stirred a fury about imagined Jacobin bogeymen lurking in the shadows. They claimed America to be awash in “French apostles of Sedition”—enough “to BURN ALL OF OUR CITIES AND CUT THE THROATS OF ALL THE INHABITANTS.” Such assertions were baseless. James Otis suggested “every independent government has a right to preserve and defend itself against injuries and outrages which endanger its existence,” thus seditious speech justified efforts to deter, prosecute, and arrest it.

The Federalists designed the Sedition Act to expire on the last day of Adams’ presidential term on 3 March 1801. Deemed a temporary expedient to deal with the crisis, Federalists designed the Act to end prior to the next presidential election. At the time, the second runner-up candidate in a presidential race assumed the Vice Presidency. Jefferson was Vice President, and the Sedition Act made one exception of who could be criticized—the Vice President. During the debates over the legality of the Act, Federalists in favor of it stated that only Jacobins

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10 U.S. Const., Amd. I; McClellan, Liberty, Order, and Justice, 409, 417-418.
11 Thomas Jefferson to George Washington, Thomas Jefferson Papers, Paul Leicester Ford, ed., 3:467; Jefferson to Madison, 7 June, 1798, A.E. Bergh, ed., 8:406. Decrying censorship, Jefferson added, “Nature has given to man no other means of sifting out the truth whether in religion, law or politics. I think it as honorable to the government neither to know nor notice its sycophants or censors, as it would be undignified and criminal to pamper the former and persecute the latter.”
12 Albany Centinel, 7 Aug., 1798; Porcupine’s Gazette, 3 Jul., 1798; Miller, 41.
were the targets and loyal Americans need not fear.\textsuperscript{16} This proved illusory. Jefferson expressed his concern to Madison, averring its unconstitutionality from the moment the bill was proposed. He averred that the Act were “palpably in the teeth of the Constitution as to show they mean to pay no respect to it.”\textsuperscript{17}

On the 4 July 1798, as deliberations continued in Congress, Madison toasted to the freedom of press—“The Scourge of the guilty and the support of virtuous Government”—though the Sedition Act imperiled this freedom.\textsuperscript{18} The Sedition Act was approved by Congress on 11 July, with a vote of forty-four to forty-one, and became law with the signature of President Adams on 14 July. Benjamin Bache’s \textit{Aurora} asked “what efficacy is a law made in direct contravention of the Constitution?”\textsuperscript{19} George Mason noted, “People have been told that the Sedition Bill was harmless, was only meant as a bug-bear, and would not be enforced.”\textsuperscript{20} Under the said bug-bear, at least twenty-five people were arrested for criticizing the government and fourteen were indicted. This transpired between 1798 and 1799, though many trials proceeded on the eve of the 1800 election. Show-trials were staged as judges and prosecutors collaborated in their denunciations of the accused.\textsuperscript{21}

Even before the Sedition Act was passed, Benjamin Bache had been indicted under a spurious federal common law indictment. John Daly Burk, an Irish-born alien, and editor of the New York \textit{Time Price}, was arrested in July 1798, and he jumped bail not to be heard from


\textsuperscript{17} Jefferson to Madison, 7 June, 1798, A.E. Bergh, ed., \textit{7:266-67}; Adrienne Koch, \textit{Jefferson and Madison – The Great Collaboration} (New York, NY: Alfred A. Knopf), 179. “They have brought into the lower house a sedition bill, which . . . undertakes to make printing certain matters criminal.” While the First Amendment “has so expressly taken religion, printing presses &c. out of their coercion.”

\textsuperscript{18} Miller, \textit{Crisis in Freedom}, 70.

\textsuperscript{19} Richard N. Rosenfeld, \textit{American Aurora: A Democratic-Republican Returns} (New York, NY: St. Martin’s Griffin, 1997), 190.

\textsuperscript{20} Miller, \textit{Crisis in Freedom}, 101-102.

\textsuperscript{21} Ferling, \textit{John Adams}, 43.
Jefferson decried that “a singular phenomenon” had arisen whereby the government of the United States had become in a decade “more arbitrary, and has swallowed up more of the public liberty than even that of England,” and as oppressed as they were at the hands of the English, said Jefferson, even they “blush and weep over our sedition law.”

“The firstborn of American rights was the free examination of public servants. Were we to surrender that, could we be certain that the rest would be secured?,” proclaimed John Taylor in debate in the Virginia Assembly. Deprived of that right to scrutinize leaders, Americans would forfeit their liberty.

Jefferson and his Republican cohorts never objected to the state’s enforcement of laws punishing libelous and seditious speech. Rather they objected to Congress’ attempt to enact federal criminal statutes citing a lack of constitutional authority. As Federal Farmer wrote in 1788, “The people’s or the printers claim to a free press, is founded on the fundamental laws, that is, compacts, and state constitutions.…” In the end he declared the people can limit this right. While recognizing that “newspapers may sometimes be the vehicles of abuse,” Federal Farmer held “the key stone was put to the arch, by the final establishment of the freedom of the press.”

Jefferson, Madison, and Republicans shared this sentiment, believing republican liberty threatened by these encroachments on the freedom of the press.

Federalists claimed prudence would constrain efforts to enforce federal libel and sedition statutes to only the most egregious of cases. Yet some prosecutions were incongruous. David

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22 Ibid., 43-44.
Brown, a said ‘apostle of sedition’ in Dedham, Massachusetts, was sentenced to four years in jail for erecting a liberty pole with a provoking inscription in front of Fisher Ames’ house. A tavern dweller in Newark, N.J., was jailed after he professed the wish that the wadding of cannon shot fired in Adams’ honor might lodge in Adams’ backside. Federalist newspapers were as prone to spreading falsehood, but not a single indictment was ever handed down against any of them.

The Republicans mounted objections to the Alien and Sedition Acts. St. George Tucker’s View of the Constitution declared, “Our state bill of rights declares, that the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments. The constitutions of most of the other states in the union contain articles to the same effect…” He found support in the ratifying ordinance of the Virginia Convention of 1788 “that among other essential rights, the liberty of conscience, and of the press, cannot be cancelled, abridged, restrained, or modified by any authority of the United States.”

Republican James Barbour offered a telling point, “If the Alien and Sedition Acts are unconstitutional, they are not law, and of course of no force.” Such an usurpation is “void.” Barbour marked the boundaries upon which the federal government had trespassed. He reiterated that federal powers not delegated were reserved to the people. His position found support in the First and Tenth Amendments to the Constitution. Federalists contended that the

30 Gutzman, Virginia’s American Revolution, 126.
31 Ibid. “[T]he sense of the American people, contemporaneous with the adoption of the general government, when the attributes and qualities of that government were best understood,” was “that all powers not granted were retained.”
Alien Act could not be unlawful on the grounds that Virginia had enacted a similar statute in 1792. Barbour deduced that allowing Congress to enact statutes on such matters was unlawful, but the states were governments of general jurisdiction unlike the federal government.32

What recourse did they have to resist the encroachments of the Adams’ administration? The First Amendment declared, “Congress shall make no law… abridging the freedom of speech, or of the press.” All rights and powers respecting those freedoms thus remained with the states and the people. Republicans perceived the Acts as a ploy to silence opposition to the Federalists, and Congress lacked authority to enact such laws. The Constitution conferred no common law jurisdiction on federal courts.33

What prospect did Republicans have for the repeal of these statutes? At the federal level, prospects seemed bleak as Federalists held sway over Congress. Popular resistance would compel zealous enforcement.34 Edward Livingston asked Congress, “If we are ready to violate the Constitution, will the people submit to our unauthorized acts? Sir, they ought not to submit; they would deserve the chains that our measures are forging for them, if they did not resist.”35

One aspect of the crisis that is often neglected concerns the grassroots protests. On 27 June, the Lexington Kentucky Gazette published the text of the House omnibus bill, containing

32 Ibid., “Federalist #45,” Wright, ed., 328. Madison exclaimed that the powers of the federal government were “few and defined,” and of that federal power, it was to be “exercised principally on external objects as war, peace, negotiations and foreign commerce… The power 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.”; James Madison, “Address of the General Assembly to the People of the Commonwealth of Virginia,” The Writings of James Madison, Gaillard Hunt, ed. (New York, NY: G.P. Putnam's Sons, 1900-10), 6:333-334. Madison foreboded that the Sedition Act was dubiously rationalized as legal “from the existence of state law, [and] some inferred that Congress possess a similar power of legislation,” a supposition of “concurrent power,” which he regarded as a “death-wound on the sovereignty of the states.”

33 U.S. Const., First Amendment; John Taylor of Caroline, New Views of the Constitution of the United States, James McClellan, ed. (Washington, DC: Regnery Pub., 2000), xxv; Meyer, 202-203; Smith, Freedom’s Fetters, 133-134. The crimes defined in the Acts were common law offenses cognizable in the state courts only.

34 Ibid., Taylor.

the Alien and Sedition Acts. A 4 July edition summoned a mass meeting to consider the current grave condition of public affairs and to express disfavor of the Acts.\textsuperscript{36} John Breckenridge and George Nicholas coordinated a grassroots campaign to stir protest in Kentucky. Under the pen name “A Friend of Peace,” (likely written by Breckinridge or Nicholas) a remonstrance was crafted and conciliatory to the Adams’ administration in seeking redress of grievances.\textsuperscript{37}

John Nicholas said he “looked in vain amongst the enumerated powers” of the Constitution, “for authority to pass a law like the present; but he found what he considered an express prohibition against it.”\textsuperscript{38} In the case of opposition to the offensive Alien and Sedition Acts, musings of discontent erupted in Virginia, her sister state Kentucky, and the Carolinas. It belonged to a vocal minority of Republicans to press for the vindication of their rights.\textsuperscript{39}

A Republican Remedy

This crisis became the occasion for a republican remedy. The Virginia and Kentucky Resolutions were written by Madison and Jefferson respectively, though their authorship was not publicized until years later. Working in secrecy, Jefferson drafted what would become the Kentucky Resolutions of 1798 between 21 July and 26 October 1798. The original gameplan turned to the delivery of Jefferson’s resolves to William Cary Nicholas to initiate in the North Carolina Assembly for approval. Due to setbacks there, Nicholas then handed the resolves to John Breckinridge for initiation in Kentucky. The Kentucky House adopted the resolutions on


\textsuperscript{37} Ibid., Smith, 221-245. “May the object of his ambition be, to preserve, protect, and defend the United States.” He concluded “that all attempts to exercise powers not delegated, or forbidden to be exercised by the constitution of enumerated powers, shall be illegal and void.” Amid high spirits, the Kentucky militia toasted to freedom of the press, and to President John Adams; \textit{Kentucky Gazette} (Lexington: KY), 4 Jul., 1798.


\textsuperscript{39} Gutzman, \textit{Virginia’s American Revolution}, 333.
10 November 1798, and the Senate on 13 November. Madison’s resolutions found sponsorship in the Virginia legislature with John Taylor. The Virginia House approved the resolutions on 21 December 1798, and the Senate concurred three days later. Both sets of resolves were circulated amongst the various state legislatures in hopes of gaining support.40

The invocation of the Ninth and Tenth Amendments were the logical basis for popular opposition to the hated Alien and Sedition Acts. The Principles of 1798 entailed the idea that the states could nullify abusive federal laws when Congress denied remedial legislation in redress of grievances. The defense of civil liberties, or “republican principles,” was the vindicator of states’ rights and the deployment of such remedies.41 Taylor, the open sponsor of the Virginia Resolutions, perceiving the gravity of the situation, did not want to stop at protest. He wanted to exert brinkmanship amid the crisis, and believed it would set a great precedent for nullification. By truly ratifying an ordinance declaring the offensive acts null and void, Virginia could place “the State and general governments at issue.” Taylor perceived that Virginia could set a momentous precedent for upholding liberty for generations to come.42 His uncle Edmund Pendleton wrote in November 1798 of a Federalist plot to “subject America to executive despotism.” He claimed, “‘the federal party’ [stands for] absolute submission and non resistance to the administration of government, although it should be in direct violation of the constitution.”


His foreboding was felt in the presence of a standing army, a Sedition Act, and a national bank.\textsuperscript{43}

The prospect Jefferson feared was that the federal government would become the final judge of its own powers, and by increments, it would devour the reserved rights of the people and the states. The effect would be the evisceration of the original compact that set out to limit federal power. As Hamilton conjectured the federal head could enlarge its power by “salutary privilege” and extension of the numbers and functions of federal courts. Such an outcome was feared by Jefferson, which explained his professed indifference to federal judges.\textsuperscript{44}

Madison held that the Constitution was “a compact to which the states are parties.” He had retreated from his scuttled 1787 Virginia Plan that called for a federal veto over state power. Madison proclaimed that the state governments “have the right and are duty bound to interpose in arresting the progress of evil” perpetuated by a federal effort to usurp the authority of the states or otherwise exceed the scope of its delegated powers.\textsuperscript{45} As Madison wrote:

“Encroachments springing from a Government, whose organization cannot be maintained without the co-operation of the states, furnish the strongest excitements upon the State Legislatures to watchfulness, and impose upon them the strongest obligation, to preserve unimpaired the line of partition.”\textsuperscript{46} Such phraseology alluded to the necessity of delineating a clear line between the federal and state authorities, distinguishing between delegated and reserved powers respectively, and implying the veracity of state interposition. It hearkened back


\textsuperscript{44} Alexander Hamilton quoted in James Truslow Adams, \textit{The Living Jefferson} (New York, NY: Charles Scribner and Sons, 1936), 290-291.


to the proceedings of the Philadelphia Convention.\textsuperscript{47} It begged the right of the parties to the compact (i.e., the states), whether in singular and severally, to mark the innovation by protest, effectuate its arrest if necessary by force, and to otherwise confine “within their respective limits, the authorities, rights and liberties appertaining [to the states].”\textsuperscript{48}

Jefferson remarked to Madison that he thought it vital to “affirm” the principles of states’ rights, so as to establish a future stronghold, and leave the matter so as to avoid present radical extremes, yet remain “free to push as far as events will render prudent.”\textsuperscript{49} Here Jefferson hoped republicans could gain ground not simply by the usage of remonstrance against the offensive acts of Congress, as the resolves implied the propriety of nullification if Congress did not abate its perceived offenses. The conservative character of the resolves is evident in its appeal being made first to the agent to correct its misstep before any extreme remedy would be deployed, and it afforded a reasonable measure of time for Congress to address it. It remained radical in affirming the states’ right to correct the error should their demands go unheeded.\textsuperscript{50}

John Taylor of Caroline, a partisan of Jefferson, then serving in the Virginia House of Delegates, emerged as a powerful voice for states’ rights. Taylor saw the intent of the resolutions as embodying the right of a state to withstand any encroachments upon the states by the Congress, and such a right was vital for their survival and integrity.\textsuperscript{51} When met by objections that states had no right to confront the legality of a federal law as the people were

\textsuperscript{47} Ibid.
\textsuperscript{50} Ibid.
\textsuperscript{51} McDonald, \textit{States’ Rights and the Union}, 42-44. Taylor upheld “a right [of the states] to withstand such unconstitutional laws of Congress as may tend to their destruction, because ’such a power is necessary for their preservation.’”; Shalhope, \textit{John Taylor of Caroline}. Refer to the aforementioned biography for insight on this Virginia statesman.
declared parties to the compact, Madison’s *Report of 1800* clarified the issue. Therein Madison presented the states as parties to the compact, and therefore justified in adjudging trespasses upon its reserved rights, by their agent, the federal government.\(^{52}\)

The Republican argument did not preclude seditious libel as a prosecutable crime, but opposed federal enforcement of such prosecutions. The ratifiers of the First Amendment understood that it impeded Congress from imposing prior restraints on publications, and precluded any federal efforts to license, regulate or restrict books, periodicals or printing-presses, and punish libelous or seditious speech. These activities were state concerns.\(^{53}\)

On 10 November 1798, in response to the legislation, the Kentucky legislature ratified a series of resolutions. The pertinent portion of Jefferson’s draft resolution therein declared:

> 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 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 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 part, 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 powers 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.\(^{54}\)

Breckinridge admonished his colleagues in the Kentucky House that the resolutions were more than mere protest, for it implied the propriety of nullification should the need arise.

Averring a cautionary approach, he added that his opinion favored “the right and duty of the

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several States to nullify those acts,” in order to protect the citizens of Kentucky.\footnote{James J. Kilpatrick, *The Sovereign States: Notes of a Citizen of Virginia* (Washington, DC: H. Regnery & Co., 1957), 75; Woods, *Nullification*, 49. “When the government of the United States enact impolitic laws,” he declared, “we can only say: We pray you to repeal them. As to matters of mere policy, they are, it is admitted, vested with a discretionary power.” He added: “But when they pass laws beyond the limits of the Constitution… we… ought to make a legislative declaration that, being unconstitutional, they are therefore void and of no effect.”}

When objects mounted that the federal courts upheld the legitimacy of the offending acts, an implication emerged that no one could question the decisive ruling of federal courts. Breckinridge then queried, “Who are they, but a part of the servants of the people created by the Federal compact? And if the servants of the people have a right, is it good reasoning to say that the people by whom and for whose benefit both they and the government were created, are destitute of that right?”\footnote{Ibid.} Republicans were not assuaged by the prospects of an independent federal judiciary checking a wayward Congress.

The fourth of Jefferson’s draft resolutions declared that the Commonwealth would cast a protective shield around “alien friends … under the jurisdiction and protection of the laws” of Kentucky; and it appealed to the authority of the Tenth Amendment of the Constitution.\footnote{“The Kentucky Resolutions,” 16 Nov., 1798, Frohnen, ed., 400.}

The fifth resolution manifested Jefferson’s unfamiliarity with the proceedings of the 1787 Convention, for he took the black-letter Constitution too literally and inadvertently disregarded the original understanding of Article 1, Section 9. It granted that “the migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808.”\footnote{Ibid.} It should be implicit that regulation of the slave trade constituted the intent of the clause, as it sanctioned the end of the trade at a later date, 1808, but Jefferson took the phrasing “such persons” too literally, and argued that “this commonwealth does admit the migration of alien friends,” targeted by the illicit Alien Act.
Jefferson reasoned that the act stood void for violating this article, a specious argument at best. David Meyer inferred that Jefferson was prone to inventive arguments in making his case for the limitation of federal powers.\textsuperscript{59} Jefferson may take heat for misreading the Constitution in part, but Federalists had also misread this clause. For instance, James Otis did so, and Jefferson likely weighed his reading in reactionary fashion based on that originally claimed by the Federalists.\textsuperscript{60}

On 24 December, 1798, the Virginia Assembly passed Madison’s resolves. After affirming Virginia’s “warm attachment to the Union,” the Assembly did “peremptorily declare,”

\[\text{T}hat 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.\textsuperscript{61}

The Virginia Resolutions here affirmed the compact nature of the Union—and that the States were the guardians of their rights. The fourth resolve was prefaced with “deep regret” that “a spirit has… been manifested by the federal government, to enlarge its powers by forced constructions of the constitutional charter which defines them…” He warned about the perils of an interpretive construction so misconstrued that it subverted the Constitution. This would lead to the “consolidat[ion of] the States by degrees, into one sovereignty, the obvious and inevitable consequences of which would be, to transform the present republican system of the United States, into an absolute, or at best, a mixed monarchy.”\textsuperscript{62} The resolves cautioned against the countenance of any act of encroachment upon the compact, and warned of perils that followed

\textsuperscript{59} Meyer, 203; U.S. Const. Art. 1, §9.
\textsuperscript{60} James Morton Smith, Freedom’s Fetters, 81-82.
the tolerance of such usurpations.  

Federalists in Virginia could not thwart the passage of the Virginia Resolutions, but they did pose opposition. Helmed by George Keith Taylor of Prince George, the brother-in-law of John Marshall and Henry Lee, the Federalist leadership in Virginia drafted a minority address which defended the Alien and Sedition Acts.  George Keith Taylor rationalized the acts on the basis of implication, an appeal to implied powers under the ambit of the Necessary and Proper Clause of the U.S. Constitution. Whatever necessary implications emanated from these powers, were within the scope of Congress’ authority supposedly. He expanded this claim, and posited that the framers intended “to invest every power relating to the general welfare and tranquility of the Union in the General Government.” He announced a “liberal as well as candid interpretation” to justify the Alien and Sedition Acts.  This view proves problematic in reference to the original representations made to secure ratification of the Constitution.

In Madison’s original draft of the Virginia Resolutions offered to the Assembly by John Taylor of Caroline, the third clause read, “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 alone are parties.” Federalists objected to the phrase ‘states alone,’ as if it precluded the people. George Keith Taylor contended that the states are not the only parties to the federal compact, implying the general government of the United States to be a party to the

63 Author’s Note – It warned of perils that followed the acceptance of such usurpations whether directly through sponsorship or tacitly through accommodation and non-resistance.


compact, and he claimed that the people alone ratified the Constitution.\textsuperscript{68} John Taylor then agreed to strike out the word \textit{alone}, the Resolutions were modified, and then adopted to read that the states are parties to the compact. This prompted Madison in his \textit{Report of 1800} to address the meaning of the word \textit{states}, and its connotations. He clarified the relationship of the several states to the Constitution as \textit{parties} to the compact.\textsuperscript{69}

Not surprisingly Federalist strongholds in the northeast rebutted the resolutions.\textsuperscript{70} The Federalist-controlled legislatures of New York, Vermont, New Hampshire, and Connecticut denounced the resolves of the Virginia and Kentucky legislatures as illicit.\textsuperscript{71}

John Mercer tendered the defense for the Republicans. “Force was not thought by any one. The preservation of the federal Constitution, the cement of the Union with its original powers, was the object of the resolutions.”\textsuperscript{72} Republicans endorsed the resolutions while rejecting the notion that the federal courts had exclusive jurisdiction to rule on the validity of acts of Congress.\textsuperscript{73} In November 1799, the Kentucky legislature declared despotic the notion that federal officials were the sole arbiters of their own powers. They declared the authority of the states to construe that instrument. “A nullification, by those sovereignties, of all unauthorized

\textsuperscript{68} Diane Tipton, \textit{Nullification and Interposition in American Political Thought} (Albuquerque, NM: University of New Mexico, Division of Government Research, 1969), 21. His summation ran contrary to Madison in Federalist #39. George Keith Taylor claimed, “they did not give it birth or organization: the state legislatures were not consulted respecting its adoption. It was the creature of the people of the United America; their voice spoke it into birth; their wills and supports it.”


\textsuperscript{70} McDonald, \textit{States’ Rights and the Union}, 43.

\textsuperscript{71} “Counter-resolutions,” Frohnen, ed., 406-407; Woods, \textit{Nullification}, 136-137. New York declared the resolves to be “inflammatory and pernicious sentiments and doctrines,” and “destructive to the Federal Government.” Connecticut proclaimed it “views with deep regret, and explicitly disavows the principles” in the resolves. New Hampshire declared “that the state legislatures are not the proper tribunals to determine the constitutionality of the laws of the general government…” Vermont declared the resolutions “as being unconstitutional in their nature, and dangerous in their tendency,” and that the power to decide on constitutionality devolved upon “the judiciary courts of the Union.”

\textsuperscript{72} \textit{State Papers on Nullification} (Boston, MA: Dutton and Wentworth, 1834), 134.

\textsuperscript{73} McClellan, \textit{Liberty, Order, and Justice}, 493-494.
acts done under color of that instrument, is a rightful remedy.’’

Jefferson told Madison in January 1799 that the South must follow a course of “firmness . . . but a passive firmness” since “anything rash or threatening might check the favorable dispositions of the middle States, and rally them around the measures ruining us.” He counseled hesitance on deploying ‘the republican remedy.’ Madison took the same stance. To counter claims of intemperance among supporters of the resol ves, Jefferson counseled patience by way of remonstrance and postponing deployment of the republican remedy—“nullification.” Jefferson hoped to garner respectability for the Principles of 1798 by crafting an exposition that defended the right of interposition and nullification, without yet exercising the later right.

Madison’s Report of 1800 served as a calculated vindication of the resol ves and the republican principles it encompassed. It expounded upon the doctrine of state interposition, and it was an eloquent apologetic for what Madison dubbed the vital precepts of the Constitution.

The crisis furnished the occasion for the republicans to articulate the Principles of 1798. The precepts would gain stature, as one scholar dubbed them “one of the most potent factors in American history,” and he added that they were more than a campaign program, but embodied the principles which will reverberate in the future.

Jefferson’s 1800 election became tantamount to a referendum in favor of the Principles of

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His first official acts were the cessation of prosecutions arising under the Acts. He interposed executive authority, and promptly pardoned those convicted. Forty years later, on 4 July 1840, Congress repaid all the fines paid under the Sedition Act. A report declared that the Act was a “mistaken exercise” of power rendering it “null and void.” The illegality of the Sedition Act had been “conclusively settled.”

The 1798 resolves stand as a continuance of the colonial-revolutionary tradition, and arose to counter perceived usurpations of the public liberty that were without remedy from its culprit, the federal government. These resolves find credence in the proceedings of the state ratifying conventions. The representations made to the ratifiers are the best means to ascertain the true character of the Constitution and the role of the states.

For whatever arguments the nationalists could muster in favor of a robust federal government with the power to supersede the states, they lacked the authority to usurp the rights of the states and the people under the Ninth and Tenth Amendments to the Constitution. There were contours and limits to federal powers. The Principles of 1798 reaffirmed these limits, and asserted the rights of the states to make them effectual. The states could appeal to the original representations at the state ratifying conventions to prove correct their efforts to thwart encroachment upon their reserved rights. These representations as to the character of the Constitution assured their ability to resist perceived encroachments upon their reserved rights and prerogatives under law. With the passage of time, the 1798 resolves would become sacred to adherents of the States’ Rights canon.

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78 Ibid.; Berger, Federalism, 200. The “victors viewed the ‘revolution of 1800’ as the people’s endorsement of the approach to constitutional interpretation embodied in the ‘doctrines of 1798.’”
80 Stone, Perilous Times, 73.
Chapter Three
Northern States’ Rights Tradition

“The doctrine of States’ Rights was in itself a sound and true doctrine, as a starting point of American history and constitutional law, there is no other which will bear a moment’s examination.”
—HENRY ADAMS

The American nationalist tradition had strong roots in the northern section of the United States, but there was also a robust states’ rights tradition there as well. Just as Thomas Jefferson could refer to Virginia as ‘his country,’ John Adams likewise referred to his native Massachusetts as such. Contrary to popular belief, states’ rights were never the exclusive credo of southern Democrats. Strong states’ rights sentiments were embraced throughout the Union. Eugene Genovese spoke of the notable northern concurrence with states’ rights doctrine in the formative years of the American Republic, and posited that the northern embrace of the doctrines were arguably more intense than in the South prior to the War of 1812.

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2 Timothy S. Huebner, The Southern Judicial Tradition: State Judges and Sectional Distinctiveness (Athens, GA: Univ. of Georgia Press, 2008), 9; Kilpatrick, The Sovereign States, 102. “At one time or another, every major section of the Republic has asserted the sovereignty of States, and has resisted Federal encroachment upon state prerogatives. States’ Rights is not a doctrine peculiar to the South. The essential rightness of the States’ position has been acknowledged no less by New England than by Georgia; and the Doctrine of ’98 has been asserted as vigorously in Wisconsin as Virginia and Kentucky”; McClellan, Liberty, Order, and Justice, 494.
3 M. Stanton Evans, “The States and the Constitution,” Arguing Conservatism: Four Decades of the Intercollegiate Review, Mark Henrie, ed. (Wilmington, DE: ISI Books, 2008), 165. A.V. Dicey noted that “in 1787 a citizen of Massachusetts felt a far stronger attachment to [...] Massachusetts than to the body of confederated states.”
5 Eugene Genovese, The Southern Tradition: The Achievement and Limitations of an American Conservatism (Cambridge, MA: Harvard Univ. Press, 1994), 54; McClellan, Liberty, Order, and Justice, 494. “The state-rights interpretation of the Constitution has always had numerous supporters in the North. Southerners never ceased to remind their Yankee tormentors that not only state rights but secessionist doctrine had played well in
At the 1787 Philadelphia Convention, it was not the southern delegates that first took up the cause of the states, but rather northern delegates. The small size of northern states, such as Connecticut, Rhode Island and New Jersey in contrast to Virginia made them apprehensive of plans that weighed their strength and influence, merely on ‘King Numbers.’ Hence they not only sought to preserve the federal character of the old Confederation, but also to possess the means of protecting their reserved rights. A Connecticut Delegate to the Constitutional Convention, Oliver Ellsworth declared, on 29 June 1787, “The power of self-defence was vital to the small States. Nature had given it to the smallest insect of the creation.” Ellsworth declared of the Constitution, after the Great Compromise, on 20 August that “…the U.S. are sovereign on their side of the line dividing the jurisdictions—the States on the other—each ought to have the power to defend their respective Sovereignties.” The geographically imposing Virginia in 1787 was only thinking of its short-term gains that could come by proportional representation in Congress based on population.

As the party of Jefferson gained the majority in 1800, Federalists opportunely appropriated the same Principles of 1798 that they previously opposed. Both Connecticut and Massachusetts endorsed interposition in 1808, and the New England states collectively did so in

New England well before the Hartford Convention… [R]egional particularism and state-rights doctrine were stronger in the North than in the South until after the War of 1812. During the 1820s and 1830s, two of the most powerful constitutional defenses of states’ rights came from Pennsylvanians who graced the Supreme Court of the United States William Rawle and Henry Baldwin. Rawle was in fact a strong nationalist who only reluctantly conceded that the states had a constitutional right to secede.” Genovese also wrote, “Although Interposition, Nullification, and Seccessionist doctrines were southern in origin, it should not be overlooked that there were faithful adherents to these principles throughout the Union.”

9 McClellan, Liberty, Order, and Justice, 241, 257-259.
10 Forrest McDonald, States’ Rights and the Union: Imperium in Imperio, 1776-1876 (Lawrence, KS: Univ. Press of Kansas, 2000), 60.
1814 under the auspices of the Hartford Convention. In 1846, the Massachusetts House declared the Mexican War unlawful and refused the federal requisition of soldiers. Vermont nullified fugitive slave laws in 1840, 1843, and 1850. Massachusetts did the same in 1843 and 1850. In 1854, Wisconsin asserted the right of nullification over the Fugitive Slave Act of 1850. During the Civil War, northern governors countered the many centralizing policies of Lincoln.  

If states’ rights doctrine were arguably taken to an extreme in the U.S., one must first look at the northern exploitation of the doctrine. New England embraced much suspicion towards the southern and western sections. Timothy Pickering had served as an officer in the War for Independence, sequentially as Postmaster-General, Secretary of War, Secretary of State, in the cabinet of Washington, and later as a U.S. Senator. In 1803, he wrote, “I will rather anticipate a new confederacy, exempt from the corrupt and corrupting influence and oppression of the aristocratic democrats of the South.” He forecasted a separation between New England and the other sections. Pickering vigorously affirmed the compact nature of the Union no less than the right of secession. His ire towards the plantation aristocracy was intense. His aversion to Jefferson’s presidency so strong he brooded over the idea of secession before any offense.  

Divergent sects such as the ‘Essex Junto’ of Massachusetts and the ‘River Gods’ of Connecticut arose by 1803. They plotted separation from the South, a northern confederacy with greater New England as its core, perhaps in league with New York. They worked covertly

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confining knowledge of the plot to an inner circle of ranking Federalists. By way of intrigue, the British foreign minister to the U.S. was aware of its plotting and gave his blessing. He prepared for the worst. “Must we with folded hands wait the result?” He pleaded, “The principles of our Revolution point to the remedy—separation.” 14 Fearing loss of economic clout, in 1804, Governor Roger Griswold of Connecticut foreboded that balance of power was being upset, and that New England would be burdened unfairly by the costs of government. 15 Here it becomes apparent that New England felt their economic and political interests were threatened.

The Olmstead Case

The Olmstead case manifests the readiness to assert state sovereignty on the part of northern states. On 6 September 1778, naval skirmishes rocked the American coast in the midst of the War for Independence. In the North Atlantic, aboard the British sloop Active, Gideon Olmstead, a sailor from New England and three of his fellow countrymen were being transported as prisoners of war. The British captain Underwood had ordered the Active to New York, which at the time was under British control. Late that night, Olmstead and his cohorts fell upon Underwood. Wrestling for control of the Active, they overthrew Underwood’s command the following day. They changed course for Egg Harbor on September 8. The American brigantine Convention helmed by Capt. Thomas Houston then intercepted the Active. They requisitioned the captured sloop as a prize of war on 14 September. After the war Olmstead would petition

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Pennsylvania for his prize of war, or some compensation for it. The case was tossed aside. In January 1798 the legislature of Pennsylvania passed a resolution declaring that any further efforts by the Congress to obtain “the money of this State” would be regarded “as a high infringement on the honor and rights of the Commonwealth.” Olmstead continued to petition for the war prize to no avail. In November 1775, Continental Congress suggested that the states establish admiralty courts for adjudicating prize cases. It recommended provision for appeals from state decisions, but lacked the authority to give any semblance of law to its plan. A state law established an admiralty court in Pennsylvania, and made provision for application to the Appeals Commission of the Continental Congress, though a supplemental act had forbidden the appellate court from reviewing findings of fact made by the state jury.

Olmstead tried in vain for years to claim the portion of the prize that Pennsylvania had sequestered. In 1802, he found a considerate federal judge Richard Peters who issued an order that the prize sequestered by Pennsylvania be handed over to Olmstead. Pennsylvania refused to comply. Maintaining that findings of fact could not be overturned on appeal, Pennsylvania declared the decision “null and void” and stated the ruling “illegally usurped” the jurisdiction of Pennsylvania. Its legislature avowed that “it hath become necessary for the general assembly of Pennsylvania, as guardians of the rights and interests of this commonwealth… to prevent any future infringements on the same.” The legislature compelled the governor “to protect the persons and properties of [State Treasurer David Rittenhouse’s executors] from any process

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18 Watkins, 84-85.
whatever issued out of any federal court in consequence” of Judge Peters’ order. Seeing the effort as vain, Peters declined to issue any compulsory process. With Jefferson as President and Congress’ repeal of the Judiciary Act of 1801, it was doubtful Peters would find recourse for executive interposition on his behalf.\textsuperscript{19}

The \textit{Aurora} approved the state’s action in 1803, and warned against the “incipient encroachments of the Judiciary.” Bache’s paper held that the federal judiciary under the cover of legal forms and technicalities could impose its decrees upon the separate states, emaciating their independence and jurisdiction, and thereby trampling the liberties of the people.\textsuperscript{20}

The matter languished for a half-decade, as the 82-year-old Olmstead petitioned the Supreme Court for a writ of mandamus to give efficacy to Judge Peter’s order. After hearing oral arguments, the high court ruled in favor of Olmstead. It denied that state legislatures had the authority “to determine the jurisdiction of the courts of the union” and issued a writ of mandamus ordering Peters to give effect to his earlier judgment awarding a portion of the prize to Olmstead. Pennsylvania remained defiant. It summoned the militia to protect its treasury from service of federal process. The Pennsylvania legislature passed resolves promising to:

[C]heerfully submit to the authority of the general government, as far as that authority is delegated by the constitution of the United States. But whilst they yield to this authority, when exercised within Constitutional limits, they trust they will not be considered as acting hostile to the General Government, when, as guardians of the State rights, they cannot permit an infringement of those rights, by an unconstitutional exercise of power in the United States’ court.\textsuperscript{21}

On 27 February 1809, Governor Simon Snyder defiantly declared his intent to summon

the state militia to impede the efforts of John Smith, the U.S. Marshal. The militia under command of General Michael Bright guarded the house for several weeks. A federal grand jury indicted Bright for obstruction of justice. Amid fatigue, the militia abdicated their post, and Smith quietly slipped in and served process.\textsuperscript{22}

Citing the Principles of 1798, Snyder petitioned President Madison. Much to his surprise, the author of the Virginia Resolutions, was deferential to the federal court. Madison breaking with his \textit{Report of 1800}, claimed he was “unauthorized to prevent the execution of a decree sanctioned by the Supreme Court of the United States, [and] expressly enjoined, by statute, to carry into effect any such decree where opposition may be made to it.”\textsuperscript{23} He suggested that Pennsylvania pay off Olmstead’s claims with discretionary funds. Pennsylvania’s Assembly denounced the ruling, and bewailed “that no provision is made in the constitution for determining disputes between the general and state government by an impartial tribunal.” It instructed the congressional delegation from Pennsylvania “to use their influence to procure an amendment” to remedy this oversight. It then petitioned Congress to establish a Commission to facilitate peaceful negotiations toward resolving the controversy.\textsuperscript{24}

General Bright and his militiamen were convicted of treason in a federal court, but were soon pardoned by Madison. The Olmstead affair came to an end but revealed the intransigent spirit of the states to guard their perceived prerogatives.\textsuperscript{25} Pennsylvania went on the retreat, but

\textsuperscript{23} Charles Grove Haines, \textit{The Role of the Supreme Court in American Government and Politics, 1789-1835} (Los Angeles, CA: Univ. of California Press, 1944), 274.
\textsuperscript{25} \textit{A Report of the Whole Trial of Gen. Michael Bright, and Others, before Washington & Peters in the Circuit Court of the United States in and for the District of Pennsylvania in the Third Circuit, on an Indictment for Obstructing, Resisting, and Opposing the Execution of the Writ of Arrest, Issued Out of the District Court of}
the episode showed the resilience of the northern states to defend their rights.

Earlier New Hampshire agitated by encroachments on its perceived rights, adopted a resolve in February 1794 that denied federal courts possessed jurisdiction over its judicial edicts. Federal courts had reversed the ruling of its state court in 1777. The State asserted its “right to pass a law final in every way concerning the capture of vessels by this State, or citizens thereof, from the British.” Prior to ratification, the states were independent and sovereign. Efforts to disturb the proceedings of the states “will inevitably involve the States… in confusion, and will weaken, if not perhaps destroy, the National Government.” Having deemed the federal court ruling an “illegal act of power,” New Hampshire denied its authority.26

But the federal courts prevailed and ignored the state remonstrance. New Hampshire then protested more strongly, and her second remonstrance of 16 January 1795, read thus:

Can the rage for annihilating all the power of the States, and reducing this extensive and flourishing country to one domination make the administrators blind to the danger of violating all the principles of our former government, to the hazard of convulsions, in endeavoring to eradicate every trace of State power, except in the resentment of the people . . . .

Forced by events, the Legislature of New Hampshire have made the foregoing statements; and while they cheerfully acknowledge the power of Congress in cases arising under the Constitution, they equally resolve not to submit the laws made before the existence of the present government by this (then independent State) to the adjudication of any power on earth, while the freedom of the Federal Government shall afford any constitutional means of redress. Impressed with the singular merits of the present case, and deprecating the many and complicated evils which must be the necessary consequence of establishing the power claimed by the courts of the United States, and its tendency to produce disaffection to our government, the Legislature of New Hampshire rest assured that a speedy and just decision will be had, and that the rights of State Governments and the interests of their citizens will be secured against the exercise of a power of a court, or any body of men under Congress, of carrying into effect an unconstitutional decree of

Pennsylvania, in the case of Gideon Olmstead and Others Against the Surviving Executrices of David Rittenhouse, Deceased (Philadelphia, PA: Byrne, 1809); Watkins, Reclaiming the American Revolution, 85-86.  
a court instituted by a former Congress, and which, in its effects, would unsettle property and tear up the laws of the several States.²⁷

The Louisiana Purchase Controversy

In 1803, the United States received an extraordinary offer to acquire its territorial holdings west of the Mississippi from a cash-strapped France under Napoleon Bonaparte. It was an offer too good to refuse. The Louisiana Purchase included 530 million acres (828,000 sq mi) of French territory in 1803, at the cost of about 3¢ per acre totaling $15 million.²⁸ Jefferson had doubts about the constitutionality of such a purchase, believing it required an amendment. Thomas Paine tried to dispel his misgivings.²⁹ Albert Gallatin assured Jefferson that the Constitution gave sanction to the acquisition of new territory.³⁰ Jefferson was concerned about the context of any provision in his construal of the delegation of federal powers. Jefferson could broadly construe federal powers, as it concerns treaties and foreign policy, yet remain in fealty to his principles. When such powers came into conflict with the reserved rights of the states and the people, Jefferson was cautious and deferential to the states. Jefferson was a strict constructionist as regards most of Congress’ powers under Article 1, Section 8 where federal powers could conceivably preempt any state law.³¹

Federalists in New England opposed the Louisiana Purchase with fervent denunciation. Their pragmatic interest was to inhibit the growth of Jeffersonian Republicanism, believing it

²⁹ David N. Mayer, “Jefferson and the Separation of Powers,” The Presidency Then and Now, Phillip G. Henderson, ed. (Rowman & Littlefield, 2000), 27. “The cession makes no alteration in the Constitution, it only extends the principles of it over a larger territory, and this is certainly within the morality of the Constitution.”
would find a natural conduit for expansion in any newly acquired territory.\textsuperscript{32} Federalist George Cabot, a Senator from Massachusetts, identified the sectional interests compelling the Federalist position, declaring that “the influence of our part of the Union must be diminished by the acquisition of more weight at the other extremity.”\textsuperscript{33} Federalists Uriah Tracy, Roger Griswold and Timothy Pickering insisted that while the United States could legally acquire new territory, it could not be constitutionally incorporated into the Union as new states. They reasoned that since the Union was a compact among the states, then the Louisiana Purchase should simply be treated as conquered territory. It could not, however, be carved up into new states to be admitted to the Union with the same standing as the original states.\textsuperscript{34} The extreme defense of the compact theory proffered by New England Federalists is worthy of notation. But the Constitution does accord provision for the admission of new states with the consent of the governed. If two-thirds of the existing states in the Union concurred, then federal territory may enter the Union as a State with full and equal rights to all of the antecedent States in the Union.\textsuperscript{35}

On 30 April 1803, a treaty was signed by Robert Livingston, James Monroe, and Barbé Marbois at Paris. Jefferson announced the treaty to the American people on 4 July. The Senate ratified the treaty on 20 October. Congress then authorized Jefferson to secure possession of the

\textsuperscript{32} McDonald, States’ Rights and the Union, 60. “Underlying the embrace of radical states’ rights doctrine was concern about power. States carved from Louisiana Territory would be southern and western, sharing interests and prejudices with the seaboard South and isolating New York and New England. Moreover, they would almost certainly be slave states, and because of the three-fifths rule (a slave counted as a three-fifths of a person for purposes of direct taxes and representation), incorporation of the territory would give the South disproportionately greater power.”

\textsuperscript{33} George Cabot quoted in Garry Wills, Negro President: Jefferson and the Slave Power (New York, NY: Marine Books, 2005), 125.

\textsuperscript{34} Forrest McDonald, Presidency of Thomas Jefferson (Lawrence, KS: Univ. Press of Kansas, 1987), 70-71; McDonald, States’ Rights and the Union, 59-60.

\textsuperscript{35} U.S. Const. Art. IV, §3, Cl. 1; James Madison, “Federalist #43,” in The Federalist Papers, Benjamin F. Wright ed., (New York, NY: Barnes and Noble Books, 1996), 311. “The general precaution, that no new States shall be formed, without the concurrence of the federal authority, and that of the States concerned, is consonant to the principles which to govern such transactions.”
territory and establish a provisional territorial government.\textsuperscript{36}

In 1811, the political question of admitting the low-land portion of the Louisiana territory into the Union, the present State of Louisiana, arose in Congress. Massachusetts Rep. Josiah Quincy declared: “It will free the States from their moral obligation, and, as it will be the right of all, so it will be the duty of some, definitely to prepare for a separation, amicably if they can, violently if they must.”\textsuperscript{37} Nativism subsumed his suspicion, for he admitted it undesirable for the U.S. to try to assimilate aliens from France and Spain.\textsuperscript{38} When Louisiana was granted statehood in the Union on 30 April 1812, Massachusetts issued a proclamation, instructing their delegation in Congress to press for it.\textsuperscript{39} While the Massachusetts’ remonstrance may lack merit, it reflects their profound esteem for the compact view of the Union at the time.

The issue of whether new states were to be admitted as equals with existing states had played itself out before in the constitutional debates of the late 1780s.\textsuperscript{40} As Gouverneur Morris asserted, the new territories should not have equal standing with the thirteen founding states. George Mason observed “that if the western states are to be admitted [into the] Union,” necessity warranted that they be regarded as “equals” in parity with the same rights of the original thirteen states, and no degradation. He saw an omen that they would rebel otherwise, “if they are not . . .


\textsuperscript{38} James Banner, \textit{To the Hartford Convention: The Federalists and the Origins of Party Politics in Massachusetts, 1789-1815} (New York: Alfred A. Knopf, 1970), 94. Quincy held it undesirable to assimilate “a number of French and Spanish subjects, whose habits, manners, and ideas of civil government are wholly foreign to republican institutions.”


on an equal footing with their bretheren.” When the new states were admitted to the Union, they would come on the same terms as the original states.

In the early 1800s, some Federalists, fearing their loss of political power to western and southern sectional interests, began talking of secession. Senator William Plumer of New Hampshire declared that eastern states would be obliged “to establish a separate and independent empire.” Moderates like George Cabot of Massachusetts eschewed such notions and moved to quiet secession cries. New England protest of the acquisition of Louisiana was motivated by an anxiety of their reduced influence with further expansion of the Union. This worry was at the root of self-interested northeastern opposition to western expansion.

Later, in 1811, Massachusetts Representative Josiah Quincy proclaimed that a bill for the admission of Louisiana as a state in the Union, carved from the federal territory of the original Purchase, would effect the virtual dissolution of the compact. His claim was specious. With inventive invocations of states’ rights dogmas, it is apparent that New Englanders were prone to incongruous attempts to protect their interests. In time, they would push the states’ rights canon popularized by the Democratic-Republicans of the 1790s to ever further extremes. This episode proved a harbinger of things to come.

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42 Eliot, ed., Debates, 5:295; Clarence Carson, The Beginning of the Republic, 1775-1825 (Wadley, Alabama: American Textbook Committee, 1984), 106-107. Edmund Randolph declared that it was inadmissible “that a larger and more populous district of America should hereafter have less representation than a smaller and less populous district.” Madison asserted that “with regard to the Western states he was clear that no unfavorable distinctions were admissible, either in point of justice or policy.” Escanaba Co. v. Chicago, 107 U.S. 678, 689 (1883). The Supreme Court held, “Equality of constitutional right and power is the condition of all the States of the Union, old and new.”
43 McDonald, States’ Rights and the Union, 61.
45 Jefferson Davis, Rise and Fall of the Confederate Government, 6. Hawes, 198. With melodramatic flare Josiah Quincy proclaimed: “It will free the States from their moral obligation, and, as it will be the right of all, so it will be duty of some, definitely to prepare for a separation, amicably if they can, violently if they must.”
The Embargo Act

In 1807, war on the European continent ensued, and the belligerent powers often harassed the neutral powers on the high seas. Britain claimed the right to impress back into service any past associates of the British navy they found on American ships. On 22 June, the British warship *Leopold* met an American frigate *Chesapeake* off the coast of Virginia. The Americans refused to allow the British to board their ship. The *Leopold* then opened fire upon the *Chesapeake*, killing three and wounding many others. The British party then impressed four sailors. Afterwards, when news of the event spread, the cries for war began to materialize.\(^46\)

This incident became the occasion for the United States sanctioning an embargo of goods traded by the belligerent powers, then France and Great Britain. That embargo would soon prove injurious to trade. Shipbuilders and manufacturers were hard hit. Pickering alleged that the policy had been dictated by Napoleon to the cowardly Republicans, and proved tantamount to a conspiracy to impoverish New Englanders.\(^47\) Britain and France would continue to harass American transatlantic shipping, and kidnap sailors. Jefferson remained reluctant to go to war and opted instead for economic sanctions as he held war to be a perilous gambit. Jefferson persuaded the Congress to adopt the Embargo Act of 1807.\(^48\) John Randolph agreed with the measure when it was deemed a temporary expedient, but regarded it as an unconstitutional when it seemed as though it would continue indefinitely.\(^49\)

Jefferson believed the economic gains from free trade were so great that Europeans

\(^{47}\) Ibid., 1:352-354.
\(^{48}\) Jerry W. Knudson, *Jefferson and the Press: The Crucible of Liberty* (Columbia, SC: Univ. of South Carolina Press, 2006), 145. “In 1807, with Europe torn by seemingly endless conflict, Jefferson gambled that American commerce could be used as an instrument for forcing the belligerent nations to do America justice and to respect the republic’s honor.”
would soon renounce aggression and come to their senses. The embargo never measured up to his hopes. Without the reciprocal trade, the export of cotton crops and tariff revenue diminished. Traders and merchants were nearly bankrupt amid the loss of an export market. Smuggling inadvertently arose as a consequence of the embargo. American merchants’ defiance of the embargo was so unbridled that when Napoleon occupied Spain, there were 250 American ships at port. Napoleon promptly seized their cargoes. An American envoy then protested. Napoleon responded that he was helping the United States to enforce its embargo.  

But was the embargo a constitutional exercise of Congress’ power to regulate foreign trade? The issue was moot. Arguing that the embargo could be justified only by “the most liberal construction of the Constitution,” jurist Joseph Story avowed Congress did not possess authority to destroy commerce, by forbidding it with foreign nations. Mindful that it impeded their economic interests, New England held the embargo to be an illicit exercise of power.  

Rhode Island’s legislature in 1809 avowed, “The people of this State, as one of the parties to the Federal compact, have a right to express their sense of any violation of its provisions and it is the duty of the General Assembly as the organ of their sentiments and the depository of their authority, to interpose for the purpose of protecting [its citizens] from the ruinous inflictions of usurped and unconstitutional power.” Here Rhode Island spoke in the similitude of Virginia and Kentucky a decade earlier. Whereas in 1799, little Rhode Island had

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50 Mayer, The Constitutional Thought of Thomas Jefferson, 216; Thomas Jefferson, The Writings of Thomas Jefferson, Lipscomb and Bergh, eds., 12:77; Morrison, Commager, and Leuchtenburg, 355-356. “The embargo was intended to be the crowning glory of Jefferson’s second administration, as Louisiana had been of his first, but it proved a dismal failure. It neither influenced the policy of Britain or of Napoleon nor protected merchant marine. It wasted the fruit of Jefferson’s first administration: the creation of a broad, country-wide party in every state of the Union.”


52 Author’s Note – This is my inference. New Englanders were adamant that the authority to regulate commerce entailed no power to enforce the cessation of all foreign commerce with the United States, absent a Declaration of War, hence the Embargo Act was deemed unconstitutional and, thus void.

denounced the Principles of 1798, now she made them her own.\textsuperscript{54}

On 25 January 1809, Massachusetts citizens assembled in Faneuil Hall to devise a remonstrance to the offensive embargo. Their protest declared that they looked to their state legislatures to abate perceived constitutional usurpation.\textsuperscript{55} Senator Hillhouse denounced the embargo as an “unconstitutional” usurpation “to which THE PEOPLE ARE NOT BOUND TO SUBMIT.”\textsuperscript{56} Such startling pronouncements in favor of popular sovereignty and states’ rights were reminiscent of 1776 and 1798.

On 5 February 1809, Massachusetts’ assembly nullified the embargo act and condemned it as “unjust, oppressive, and unconstitutional.”\textsuperscript{57} Her neighboring states sang a similar chorus. Barent Gardenier of New York, inquired, “Why should not Massachusetts take the same stand, when she thinks herself about to be destroyed?”\textsuperscript{58} Governor Jonathan Trumball declared that when Congress oversteps “the prescribed bounds of their constitutional powers,” it was the duty of his state “to interpose their protecting shield between the rights and liberties of the people and the assumed power of the general government.”\textsuperscript{59} The Connecticut Assembly agreed, and in

\textsuperscript{54}Woods, \textit{Nullification}, 136.

\textsuperscript{55}Scott J. Hammond, Kevin R. Hardwick, Howard Leslie Lubert, eds., \textit{Classics of American Political and Constitutional Thought: Origins through the Civil War} (Indianapolis, IN: Hackett Pub., 2007), 999. “[T]hey looked only to the State Legislature, who were competent to devise relief against the unconstitutional acts… That your power (say they) is adequate to that object, is evident from the organization of the Confederacy.”

\textsuperscript{56}Thomas Hart Benton, \textit{Abridgment of the Debates of Congress, from 1789 to 1856} (New York, NY: D. Appleton & Co., 1857), 10:427; Robert Hayne, January 25, 1830, \textit{The Webster-Hayne Debate on the Nature of the Union}, Herman Belz ed. (Indianapolis, IN: Liberty Fund, 2000), 78; Warren L. McFerran, \textit{Political Sovereignty: The Supreme Authority in the United States} (Sanford, FL: Southern Liberty Press, 2005), 236. “I feel myself bound in conscience to declare, (lest the blood of those who shall fall in the execution of this measure, shall be on my head) that I consider this to be an act which directs a mortal blow at the liberties of my country—an act containing unconstitutional provisions, to which THE PEOPLE ARE NOT BOUND TO SUBMIT, and to which, in my opinion, they will not submit.”

\textsuperscript{57}Benton, \textit{Abridgment of the Debates of Congress, from 1789 to 1856}, 10:427. Declaring state sovereignty, Massachusetts added, “all citizens can find protection against outrage and injustice in the strong arm of state government.” Massachusetts declared the embargo “was not legally binding on the citizens of the state.”

\textsuperscript{58}McDonald, \textit{States’ Rights and the Union}, 64.

\textsuperscript{59}John Acton, \textit{Selected Writings and Essays by Lord Acton}, 3 Vols. J. Rufus Fears, ed. (Indianapolis, IN: Liberty Fund, 1985), 1:232-233; Bunford Samuel, \textit{Secession and Constitutional Liberty: In which is Shown the Right of a Nation to Secede From a Compact of Federation and That Such Right is Necessary to Constitutional
seven resolves it denounced the Embargo as “encroaching upon the immunities” of their state.
To uphold the reserved rights of the states, Connecticut maintained the duty of its legislature to
watch over and maintain their reserved powers. Rhode Island too denounced the Embargo.\textsuperscript{60}
The fact that these New England states had earlier chided Virginia and Kentucky in 1798 for
producing a remonstrance in the similitude of their own resolves seemed lost to New Englanders.

New England and the War of 1812

A series of diplomatic blunders culminated in a war against Great Britain. New England
Federalists saw it as an ill-tempered contest between the Republicans and Great Britain. States
east and north of Pennsylvania voted for peace except Vermont. New Englanders were grieved
by the economic injury wrought by the cessation of commerce, and they found the war averse to
their economic interests.\textsuperscript{61} On 1 June 1812, President Madison petitioned for a Declaration of
War against Great Britain whom he charged with a resolve to wipe out American shipping and to
secure for Britain domination over the transatlantic trade. The pretext for hostilities was the
British navy seizing American ships, and impressing their crews into service. Most of the sailors
were Americans citizens, which was an affront to the sovereign rights of a neutral power. On 18
June 1812, Congress declared war.\textsuperscript{62}

In July 1812, victory seemed unfavorable for the Americans when a dejected General
William Hull marched his 1,600 soldier unit into Canada, and surrendered! Cat-and-mouse

\textit{Liberty and a Surety of Union} (New York, NY: Neale Pub., 1920), 278; Thomas E. Woods, 33 \textit{Questions About
\textsuperscript{60} Simeon Davidson Fess, \textit{The History of Political Theory and Party Organization in the United States}
(New York, NY: Ginn and Co., 1910), 37. Rhode Island’s General Assembly proclaimed its duty to be “be vigilant
in guarding from usurpation and violation those powers and rights which the good people of the State have expressly
reserved to themselves and have ever refused to delegate.”
\textsuperscript{61} McDonald, \textit{States’ Rights and the Union}, 66; Richard Weaver, “Two Types of American Individualism,”
games ensued between the British and American armies. Periodic stalemates occurred. Economic injury to transatlantic commerce transpired. New Englanders impeded military operations during the course of the war. When New England militias refused to assist the federal army, a planned American invasion of Canada was thwarted. The U.S. Navy won five engagements.63

Federalists catered to anti-war sentiment and gained both federal and state seats in the election years between 1812 and 1814. New Englanders went beyond measures of mere civil resistance, and conducted a lucrative trade with the ‘enemy’ through connections in Canada.64 When word arrived from Europe that Napoleon had been defeated in Europe, it complicated matters. Beaten at the Battle of Leipzig, his days were numbered. The British would be free to shift its military to the American continent.65 Madison denounced those who profited by trading with the enemy and asked for an embargo in December 1813, having grown weary of what he perceived as unpatriotic capitulation to Great Britain. Congress obliged and an embargo bill passed. New England would now be in defiance of the law to assist or trade with Great Britain.66 Madison’s policies injured transatlantic commerce. Both private citizens and state officials refused compliance, and impeded wartime measures, and actively resisted the embargo. New England states slighted calls for federal conscription, and refused to submit its militias for service under the command of federal authorities.67

Massachusetts condemned the embargo as unconstitutional and an abuse of economic

66 McDonald, States’ Rights and the Union, 68.
67 McDonald, States’ Rights and the Union, 66.
freedom. The Massachusetts Assembly declared its right to protect its people against an illicit exercise of federal power. The Connecticut Assembly approved the actions of Governor Roger Griswold in refusing the federal summons for conscripts. Massachusetts’ remonstrance sounded analogous to the 1798 resolves of Jefferson and Madison ironically.

On 25 August, 1812, the Connecticut state assembly issued a proclamation:

But it must not be forgotten, that the State of Connecticut is a FREE SOVEREIGN and INDEPENDENT State; that the United States are a confederacy of States; that we are a confederated and not a consolidated Republic. The Governor of this State is under a high and solemn obligation, ‘to maintain the lawful rights and privileges thereof, as a sovereign, free and independent State,’ as he is ‘to support the Constitution of the United States,’ and the obligation to support the latter imposes an additional obligation to support the former. The building cannot stand, if the pillars upon which it rests, are impaired or destroyed.

When Secretary of War James Monroe proposed conscription of soldiers throughout the Union, Daniel Webster made a defiant stand. Webster argued that any federal draft overstepped the limitations on the federal use of the militia, and alleged a Napoleonic tyranny in such an

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68 Herman Ames, ed., *State Documents on Federal Relations* (Philadelphia, PA: Univ. of Pennsylvania, 1900), 2:27. “A power to regulate Commerce is abused, when employed to destroy it; and a manifest and voluntary abuse of power sanctions the right of resistance, as much as a direct and palpable usurpation. The sovereignty reserved to the States, was reserved to protect the Citizens from acts of violence by the United States, as well as for purposes of domestic regulation. We spurn the idea that free, sovereign and independent State of Massachusetts is reduced to a mere municipal corporation [under the federal government], without power to protect its people, and to defend them from oppression, from whatever quarter it comes. Whenever the national compact is violated, and the citizens of this state are oppressed by cruel and unauthorized laws, this legislature is bound to interpose its power, and rest from the oppressor his victim.”


act.\textsuperscript{72} He made note of the ‘Right of Revolution’ clause of the New Hampshire constitution. On 9 December 1814, from the floor of Congress, Webster denounced the measures as “unconstitutional and illegal,” demanding a resort to other remedies.\textsuperscript{73}

Over the course of the war, the British launched a series of coastal raids in New England and points southward. Governor Caleb Strong of Massachusetts mobilized his state militia to repel invasion. He insisted that they were subordinate to a general under his command, and not under the call of national service or at the direct disposal of the President. Connecticut initially had pledged troops to national service but recanted. On 24 August 1814, the same day the state’s regiment was recalled from national service, the British soon marched on the capitol in Washington, D.C., setting fire to it.\textsuperscript{74}

The Hartford Convention

Delegates from Massachusetts, Connecticut, Rhode Island, Vermont, and New Hampshire met in Hartford, Connecticut in assembly to deliberate a response to perceived usurpations of the Constitution by the Madison administration. Its proceedings are a testament to

\textsuperscript{72} Akhil Amar, \textit{The Bill of Rights} (New Haven, CT: Yale Univ. Press, 1998), 57-58; McDonald, \textit{States’ Rights and the Union}, 69. Webster held that the draft was an illicit attempt to raise “a standing army out of the militia by draft.” He queried, “Where is it written in the Constitution, … that you may take children from their parents, and parents from their children? … But this father or this… goes to camp. With who do you associate him? With those only who are sober and virtuous and respectable like himself? No, sir.” He admonished, “But you propose to find him companions in the worst men of the worst sort. Another bill lies on your table offering a bounty to deserters from your enemy.” Drawing comparisons to Napoleonic tyranny, he opined alleged a plot to effect “true leveling of despotism” within the ranks of the army, bringing Americans to the degradation of Europeans.

\textsuperscript{73} Walter R. Borneman, \textit{1812: The War That Forged A Nation} (New York, NY: Harper Collins, 2004), 255; McDonald, \textit{States’ Rights and the Union}, 69; Thomas E. Woods, Jr., \textit{Nullification: How To Resist Federal Tyranny In the 21st Century} (Washington, DC: Regnery Pub., 2010), 70-71; Daniel Webster, \textit{The Letters of Daniel Webster: From Documents Owned Principally by the New Hampshire Historical Society} (New York, NY: McClure, Phillips & Co., 1902), 67. “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; and their highest obligations bind them to the preservation of their own rights and the liberties of their people. I express these sentiments here sir, because I shall express them to my constituents. Both they and I leave under a Constitution which teaches us, ‘the doctrine of non-resistance to arbitrary power and oppression is slavish, absurd and destructive of the good happiness of mankind.’”

\textsuperscript{74} McDonald, \textit{States’ Rights and the Union}, 68.
the deep roots of a northern states’ rights tradition. The assumption was that the convention would issue a call for secession. For some New Englanders that was a desirable outcome. A *Boston Gazette* writer stated that the assembly, “can, if they should think proper, take for their example and the basis of their proceedings, the result of the Constitution of 1788, of which the revered Washington was President, and form a new frame of government,” which should be submitted to the legislatures of the several states in New England for approval.75 Gouverneur Morris wrote Timothy Pickering on 22 December 1814. “The traitors and madmen assembled at Hartford will, I believe, if not too tame and timid, be hailed as the patriots and sages of their day and generation.”76

On 4 January, 1815, the deliberations and efforts of the Convention were capped with a climatic report, enunciating the remedies against perceived usurpation.

The acts of Congress in violation of the Constitution are absolutely void, is an undeniable position. It does not, however, consist with respect and forbearance due from a Confederate State towards the General Government, to fly to open resistance upon every infraction of the Constitution. The mode and energy of the opposition, should always conform to the nature of the violation, the intention of its authors, the extent of the injury inflicted, the determination manifested to persist in it, and the danger of delay. But in cases of deliberate, dangerous, and palpable infractions of the Constitution, affecting the sovereignty of a State, and liberties of the people; it is not only the right but the duty of a such a State to interpose its authority for their protection, in the manner best calculated to secure that end. When emergencies occur which are either beyond the reach of the judicial tribunals, or too pressing to admit of delay incident to their forms, States which have no common umpire, must be their own judges, and execute their own decisions. It will thus be proper for the several States to await the ultimate disposal of the obnoxious measures, recommended by the Secretary of War, or pending before Congress, and so to use their power according to the character

these measures shall finally assume, as effectually to protect their own sovereignty, and the rights and liberties of their citizens.\(^77\)

After the assembly convened, Morris’ perspective had changed.\(^78\)

The War of 1812 was now climaxing towards its conclusion. On 8 January, British infantry had been repulsed at New Orleans with General Andrew Jackson in the field.\(^79\) The victory reasserted independence, and manifest that the U.S. had the will to defeat its enemies.\(^80\) On February 15, the U.S. Senate gave advice and consent to the Treaty of Ghent, which with the President’s acquiescence, brought peaceful accommodation between Great Britain and the United States. It brought a climatic end to the war without territorial concessions from either side. The British navy stopped impressments of American soldiers.\(^81\)

This culmination of events demonstrates that a viable northern states’ rights tradition existed, and at times it proved both exuberant and inventive. The appropriation of states’ rights by northerners reflected the jealous regard for the reserved rights of the states and the people. Protest, implying the propriety of state nullification, seemed to its purveyors a necessity as much as the desperate circumstances of 1798 provoked the Virginia and Kentucky legislatures to action.

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\(^78\) Gouverneur Morris to Moss Kent, 10 Jan., 1815, The Life of Gouverneur Morris with Selections from His Correspondence (Boston, MA: Gray & Bowen, 1832), 3:326-328; Gouverneur Morris to Moss Kent, 10 Jan., 1815, Documents Relating to New-England Federalism, 1800-1815, Henry Adams, ed., 421. “You will see that the Hartford Convention have been prudent… Your Democratic acquaintance will doubtless make themselves merry at the mildness of Yankee measures…” Here Morris surmised that the moderates carried the day. “You… will see in the modest propositions from Hartford matter more serious than the rattling of words. Yankees like to make what they call a fair bargain, and will, I guess, easily take up the notion of bargaining with the National Government.”


Chapter Four

The Tariff Crisis and the Debate on the Union

“Tyranny consists in the wanton and improper use of strength by the stronger; in the use of it to do things which one equal would not attempt against another. A majority is tyrannical when it forces men to contribute money to objects which they disapprove, and which the common interest does not demand.”

—JAMES BRYCE, THE AMERICAN COMMONWEALTH

The ‘American System’ and the Tariff Question

In the years after the War of 1812, many national disputations over far-reaching issues emerged. A recurring debate over the character of the Union arose in this malaise. Among the issues in dispute were the allocation of proceeds from federal land sales in the West, appropriations for internal improvements, and fiscal policy. A sectional rift developed by 1824. From the onset of John Quincy Adams’ administration, economics and politics converged to create fissures that exposed the Union to disruption. A regional sectional identity took form in northern, southern and western sections amid their divergent cultures and conflicting interests.

The earlier wartime embargo proved to be an impetus for a protectionist lobby entrenching itself in the national capitol. On the floor of the Senate, in 1810, Henry Clay tendered a plan on the support of manufacturers. His ‘American System’ offered the hope of bridging the sectional divide through a program of federally-subsidized internal improvements, protective tariffs, and a

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3 Henry Clay, The Life, Correspondence, and Speeches of Henry Clay, 6 Vols. Calvin Colton, ed. (New York, NY: A.S. Barnes, 1857), 5:10. “The domestic manufactories of the United States, fostered by government, and aided by household exertions, are fully competent to supply us with at least every necessary article of clothing. I am, therefore, sir . . . in favor of encouraging them, not to the extent which they are carried on England, but to such an extent as will redeem us entirely from dependence on foreign countries.”; Michael O’Brien, Conjectures of Order: Intellectual Life and the American South (Chapel Hill, NC: UNC Press, 2004), 2:915.
national bank.\(^4\) It aimed to tether the Union together in a harmony of interests as all citizens were consumers and producers. The difficulty remained that its spoils were dispensed disproportionately to the Northern section.\(^5\) To the South, it was legal plunder for the powerful, populous regions at the expense of their neighbors (—i.e., north over south.)\(^6\) Opponents included Jefferson, Monroe, Jackson, and other Democrats. The Democratic-Republican Party, known later simply as the Democratic Party, stood in fealty to Jeffersonian political ideals of fiscal conservatism and strict construction. To many Democrats, the ‘American System’ fomented consolidation and corruption. They held that federal subsidies to special interests unconstitutional.\(^7\) Jefferson lamented some “younger recruits” in his own party “who, having nothing in them of the feelings or principles of ’76, now look to a single splendid government of an aristocracy, founded on banking institutions, and moneyed corporations.”\(^8\) Here the memory of the feuds of the 1770s and 1790s lingered.

In 1824, in Congress, Rep. Charles Todd, House Chairman on the Committee on Manufacturers introduced a protectionist tariff bill that excited opposition. A meeting convened in Charleston in January 1824 to discuss resistance. The meeting produced a protest that decried protective tariffs as inequitable, and ended with alarm that the tariff may result in calamity for


the Union. Americans were habituated to free trade in practice as it proved mutually-beneficial to all participants in a harmony of interests. The advantages could be lost when one section attempts to jockey for patronage by subverting the government for its own interests of protection. Clay’s scheme of economic dirigisme pulled power, prestige and wealth around those who doled out the favors. To southerners, it tended towards the revival of British-style mercantilism.

Calhoun made persuasive appeals on behalf of free trade. He conceptualized the issue in populist terms, and declared that if the tariff is one-third, it is the same as the government taking fully one-third of what the producers raise in agricultural staples. This meant that one third of the toil and labor of the people of the South were co-opted to the North to prop their special interests and foster a government hostile to southern interests.

The Tariff of Abominations

The tariff controversies of 1828 and 1832 generated a great constitutional debate. The cast of characters in this drama were two tenacious men of Scots-Irish extraction, both from South Carolina at birth. Jackson had gained notoriety as an Indian fighter and as the war hero of 1812. His Vice President Calhoun held reputation as an articulate statesman in the U.S. Senate. It would seem odd that they would develop enmity, for both claimed Jeffersonian

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10 Ibid.
11 John Taylor of Caroline quoted in DiLorenzo, How Capitalism Saved America, 75. He said of the British mercantile system, it was “the best which has ever appeared for extracting money from the people; and commercial restrictions, both upon foreign and domestic commerce, are its most effectual means for accomplishing this object.”
republicanism.\textsuperscript{13}

On 19 May 1828, Congress enacted the infamous ‘Tariff of Abominations.’ It entailed burdensome tariff rates from sixty-two percent tax to ninety-two percent of all goods entering the U.S.—the highest in history. It was jerry-rigged with a confusing array of tariff schedules, and cheaper grades of woolen cloth faced a tax of nearly 200 percent. Outcry was strong in South Carolina though the clamor of protest was felt throughout the South. The South, at the time, traded cotton and other agricultural staples for British manufactured goods. Tariff proceeds went to the coffers of the Treasury, and the tariff aimed to protect industry. Spoiled by the wartime embargos, northern manufacturing interests became a sturdy lobby for protection. The South came to conceptualize it as an onerous system of legal plunder.\textsuperscript{14} Its net effect was to enrich the North at the expense of the South.\textsuperscript{15} In March 1826, Virginia’s General Assembly declared the burden of duties for the aim of protecting manufacturers, an unconstitutional exercise of power, and unfair in its application.\textsuperscript{16}

Thomas Cooper, one of the parties indicted under the Sedition Act earlier, emerged as an influential Democratic leader and President of Charleston College. Cooper laid out a rhetorical flare, which kindled secessionist sentiment at an anti-tariff assembly held in Columbia, South Carolina. He denounced the tariff as a scheme to “sacrifice the south to the north,” rendering the South into “tributaries” for “emolument” of the North by taxation “disposing of our honest

\textsuperscript{13} William J. Watkins, Jr., \textit{Reclaiming the American Revolution: The Kentucky and Virginia Resolutions and Their Legacy} (New York, NY: Palgrave MacMillan, 2004), 102. As Calhoun scholar Clyde Wilson noted, he began his career as, “and always considered himself to be a Jeffersonian Republican.”


\textsuperscript{15} Adams, \textit{Those Dirty Rotten Taxes}, 83. “A system of revenue and disbursements, in which an undue proportion of the burden of taxation has been imposed upon the South, and an undue proportion of its proceeds appropriated to the North… duties must necessarily fall mainly on the exporting States, and the South, as the great exporting portion of the Union, has in reality paid vastly more than her due proportion of the revenue”

\textsuperscript{16} Acts of Virginia, 1825-26, 114; Kilpatrick, \textit{The Sovereign States}, 175.
earnings,” obstructing commerce, “impoverishing the planter,” and otherwise aggrandizing the Northern section at its expense.\textsuperscript{17} Cooper underscored his argument, by declaring protectionist legislation an instrument of legal plunder. He closed by saying South Carolinians must “calculate the value of union; and to enquire of what use to us is this most unequal alliance.”\textsuperscript{18} To men like Jackson, one could not calculate the value of the sacred Union.

At a Walterboro, South Carolina gathering on 12 October 1828, then assumed Congressmen James Hamilton, Jr., noted, “Our reliance, then, is on the Virginia and Kentucky Resolutions of ’98—and upon these we put our citadel where no man can harm it.”\textsuperscript{19} Here the Nullifiers affirm their fealty to the Principles of 1798. Calhoun held nullification to be an indispensible tool in the states’ arsenal of defense, and useful for upholding the reserved rights of states.\textsuperscript{20}

Voices of protest arose in the Carolinas and Virginia. Governor Burton of North Carolina declared in a speech on 21 November 1827, that “the dignity and interest of the State requires that North Carolina should not be silent.” Taking a cue, on January 1828, North Carolina’s assembly adopted a report that declared tariffs of a protective character to be a direct violation of the Constitution.\textsuperscript{21} John Floyd, then governor of Virginia, marked this juncture in history as a tragic struggle to render the south subordinate to the North and dependent on the North for costly northern manufactured wares. With the scales tipped and uneven allocation of

\textsuperscript{17} Watkins, \textit{Reclaiming the American Revolution}, 98-99; Thomas E. Woods, Jr., \textit{Nullification: How To Resist Federal Tyranny In the 21st Century} (Washington, DC: Regnery Pub., 2010), 74. “[A] system, whose effect will be to sacrifice the south to the north, by converting us into colonies and tributaries—to tax us for their own emolument—to claim the right of disposing of our honest earnings—to forbid us to buy from our most valuable customers—to irritate into retaliation our foreign purchasers, and thus confine our raw material to the home market—in short to impoverish the planter and to stretch the purse of the manufacturer.”

\textsuperscript{18} Ibid.

\textsuperscript{19} Chauncy Baucher, \textit{The Nullification Controversy in South Carolina} (Chicago, IL: Univ. of Chicago Press, 1915), 33.


revenues and expenditures inequitably benefited the Northern section. Southerners placed their hopes in the presidency of Andrew Jackson to secure the repeal the “odious tariff.”

The South began to show a unified opposition of protest. The South Carolina Assembly passed resolutions on 19 December 1828 that protested the offending act of Congress as an abuse of the power of assessing and collecting taxes, duties, imposts and excises. In continuity with the principles of the Virginia and Kentucky Resolutions of 1798-99, Carolinians articulated their own doctrine of nullification. They postulated a sovereign state may interpose its authority between its citizens and the United States, and can nullify offensive federal acts. Calhoun argued that a State might set at defiance any offensive act of Congress clearly unconstitutional, and summarily repudiates any effort to allow such a measure to operate within her boundaries. A state could appeal to the other states for aid and comfort with circular letters, so as to thwart the dodgy majority in Congress. Its intended effect was to prompt the Congress to withdraw its unconstitutional assumption of power and abdicate any offensive ordinances.

In its time, the *South Carolina Exposition and Protest* became the authoritative defense

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22 Charles Henry Ambler, *The Life and Diary of John Floyd: Governor of Virginia* (Richmond, VA: Richmond Press, 1918), 96. “At this moment [1828] came the direful struggle between the great parties in Congress founded upon the calm which the majority… from the [North] made to the right to lay any tax upon the importations into the United States which was intended to act as a protection to northern manufacturers by excluding foreign fabrics of the same kind. Hence all the states to the south of the Potomac became dependent upon the [North] for a supply of whatever thing they might want, and in this way the South was compelled to sell its products low and buy from the North all articles it needed from twenty-five to one hundred and twenty-five percent higher than from France to England… At this juncture the southern party brought out Jackson.”

23 Ibid.

24 H.L. Cheek, Jr., *Calhoun and Popular Rule: The Political Theory of Disquisition and Discourse* (Columbia, MO: Univ. Press of Missouri, 2001), 38-39; Richard E. Ellis, *The Union at Risk: Jacksonian Democracy, States’ Rights and the Nullification Crisis* (New York, NY: Oxford Univ. Press, 1987), 8. “Calhoun maintained that the Constitution was a compact among the states that had delegated only specifically defined powers to the national government… [S]hould the federal government exceed its delegated powers by for example, enacting a protective tariff, a state had the power to declare such an action unconstitutional and therefore null and void within its boundaries. Should this occur, the federal government had either to accept the act of nullification and refrain from enforcing the objectionable law or it could go the difficult route of trying to… amend the Constitution and specifically grant the powers in question. Only in this way, Calhoun believed, would it be possible to protect the rights of a minority from the tyranny of the numerical majority”; Russell Kirk, *The Conservative Mind: From Burke to Eliot*, 7th ed. (Washington, DC: Regnery Publishing, 2001), 171-172.
of the doctrine of nullification. The *Exposition* had its roots in the Virginia and Kentucky Resolutions. This articulate remonstrance offered a perceptive intellectual defense of limited government and the principle of concurrent majority. The state legislature revised the document and commissioned the printing of 5,000 copies. Calhoun’s authorship remained a secret for a time, but speculation suggested his role in crafting the *Exposition.*

When tested, South Carolina put her so called *nullification theory* into practice. Calhoun wrote the *Exposition* with the benefit of anonymity, and would later disclose his authorship. He argued for the constitutional right of a state to “interpose” its authority against “the tyranny of the majority,” declaring offensive federal acts null and void. The *Exposition* lamented the capriciousness of majoritarian tyranny. Its sharp-witted Carolinian author addressed the “oppressive operation of the system of protecting duties,” and he pointed out that the Constitution authorized the taxing power to Congress for the sole purpose of raising revenue to spend on the general welfare pursuant its delegated powers. In marked contrast, levying tariffs with an overt protective character or for the purpose of promoting special interests was not among the enumerated powers in the Constitution. Calhoun denounced the principle of protective tariffs as “unconstitutional, unequal, and oppressive.”

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Recognizing unfettered majority rule to be inimical to the rights of the minority, Calhoun declared, “We are the serfs of the system, out of whose labor is raised,” and whose money is paid into the coffers of the treasury, and then disbursed for the patronage of special interests. The way in which the South “could protect” emanates from the compact character of the Union, since the states are parties to the compact, and the federal government is their agent. In theory, all powers not expressly delegated are reserved to the states. In recognizing the constraints placed on federal power, if that agent “exceeded its powers, the states had the right and duty to protect their citizens by interposing their authority between them and the United States.”

Some South Carolina Nullifiers never shared Calhoun’s emphasis on constitutional niceties and logic. These so called ‘fire-eaters’ deemed nullification a populist practical expedient, extra-constitutional, and yet valid all the same. “I will readily concede that a State cannot nullify an act of Congress by virtue of any power derived from the Constitution,” said George McDuffie in his oratory before a dinner party of Nullifiers. “It would be a perfect solecism to suppose any such powers were conferred by the Constitution. The right flows from a higher source. All that I claim for the State in this respect necessarily flows from the mere fact of sovereignty.” Yet Calhoun insisted on logic of the compact and found concurrence for his position in the proceedings that contemplated the framing and ratification of the Constitution.

In 1829, Virginia interposed in a resolution against the tariff, and its General Assembly

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declared the Union as “federative in character,” limited in its power, and owed its existence to a delegation of delimited authority and powers from the people of the several states.\(^{33}\) The final report spoke in Jeffersonian parlance, that the federal Constitution, being a compact among sovereign states, “each State has the right to construe the Compact for itself.”\(^{34}\)

The Webster-Hayne Debate on the Nature of the Union

Against the backdrop of the tariff question, on 19-27 January 1830, a rhetorical spar between Senators Daniel Webster of Massachusetts and Robert Hayne of South Carolina occurred. It would become one of the most heralded senatorial debates in history. Its occasion was a land sale proposal by Samuel Foote of Connecticut on 29 December 1829.\(^{35}\) At the time, America was a land of farmers with over two-thirds of labor employed in agriculture. Congress, in 1820, lowered the price of public lands to about $1.25 per acre, and reduced the minimum that could be bought to 80 acres. Not long thereafter a man could acquire land for less than a $1.00 per acre. Some settlers simply moved in and settled as squatters. Issues of public domain land sales and westward expansion would define the Jacksonian era.\(^{36}\)

Senator Thomas Benton charged that Foote’s Resolution amounted to a bold-faced attempt to inhibit settlement in the west by New England. Picking up where Benton left off, Hayne charged that elements within the northern section were keen to regulate the disposal of western lands so as to confine the population to the northeast, depress wages, and tie up new western settlements. They implication was that the northeastern section had an interest in


\(^{34}\) Ibid.


\(^{36}\) Carson, The Sections and the Civil War, 1826-1877, 53.
obstructing land sales by keeping land prices higher, or otherwise restricting land sales.\textsuperscript{37}

The original issue at hand was the restriction of the sale of public lands, but the debate soon turned into a full-blown inquiry into the character and nature of the federal union itself. The topic of Nullification had been broached. Hayne’s argument alluded to the \textit{Exposition}, and cited the precedent of the Virginia and Kentucky Resolutions.\textsuperscript{38} Hayne’s arguments weighed principally on two points. First, that “it is only by a strict adherence to the constitutional limitations imposed on the Federal Government, that this system works well, and can answer the great ends for which it is instituted.”\textsuperscript{39} Second, “The doctrine that it is the right of a State to judge the violations of the Constitution on the part of the Federal Government, and to protect her citizens from the operations of unconstitutional laws, was held by the enlightened citizens of Boston, who assembled in Faneuil Hall, on the 25th of January, 1809.”\textsuperscript{40} Hayne further held the notion that the federal government is the sole arbitrator of the scope of its own powers—was “utterly subversive of the sovereignty and independence of the States.”\textsuperscript{41}

Hayne spoke derisively of efforts to appropriate federal funds for special interests. He favored liberal usage of lands—homesteading and economical land sales.\textsuperscript{42} Webster gave a broadside against the strict constructionist bugbear. “Consolidation—that perpetual cry, both of terror and delusion—consolidation!” Webster extolled the benefits of a “common fund” as

\textsuperscript{37} Ibid, 34.
\textsuperscript{40} Herman Belz ed., introduction, \textit{The Webster-Hayne Debate on the Nature of the Union}, xi.
\textsuperscript{42} Robert Hayne, 25 Jan. 1830, Belz. ed., 78-79. “From the bottom of my soul do I abhor and detest the idea, that the powers of the Federal Government should ever be prostituted for such purpose… I can conceive of no policy that can possibly be pursued in relation to the public lands, none that would be more ‘for the common benefit of all the States,’ than to use them as the means of furnishing a secure asylum to that class of our fellow-citizens” from throughout the country “who… may find themselves unable to procure a comfortable subsistence by the means immediately within their reach.”
furnishing “inducements” to hold the Union together, as if consolidation (centralization) strengthened the bonds of the Union.\textsuperscript{43} The north hoped to levy exorbitant levies on land sales, and otherwise tie up extensive land tracts from immediate sale. This served the interests of manufactories to have dense masses of laborers teeming around the seaboard cities so as to keep the wages of labor low. Webster denied this charge.\textsuperscript{44}

Hayne made an error in his assertion that the states and the federal government acted as equals in the adoption of the Constitution, as if they were both parties to the compact. Calhoun would later correct this misunderstanding in his Fort Hill Address. Calhoun asserted that the people of the several states were the parties to the compact and the federal government was but their agent.\textsuperscript{45} Hayne posited a dichotomy between devotees of liberty and power: “Sir, there have existed, in every age and every country, two distinct orders of men — the lovers of freedom, and the devoted advocates of power.”\textsuperscript{46} Webster was cast among the devotees of power. The grand principles, Hayne added, modified only by fleeting fads, divided parties in republics of old just as did between the Whigs and Tories of Great Britain across the Atlantic.\textsuperscript{47} Hayne reproached New Englanders in their forgetfulness of their controversial Hartford Convention, which affirmed the compact understanding of the Union and asserted that the states

\textsuperscript{43} Daniel Webster, 20 Jan. 1830, Belz ed., 23. “Consolidation—that perpetual cry, both of terror and delusion—consolidation! Sir, when gentleman speak of the effects of a common fund, belonging to all the States, as having a tendency to consolidation, what do they mean? Do they mean, or can they mean, anything more than that the Union of the States will be strengthened, by whatever continues or furnishes inducements to the people of the States to hold together? If they mean merely this, then, no doubt the public lands as well as everything else in which we have a common interest, tends to consolidation; and to this species of consolidation every true American ought to be attached; it is neither more nor less than strengthening the Union itself. This is the sense in which the framers of the Constitution use the word consolidation; and in which sense I adopt and cherish it.”

\textsuperscript{44} Daniel Webster, 20 Jan. 1830, Belz ed., 26. “The East! The obnoxious, the rebuked, the always reproached East! We have come in, sir, on this debate, for even more than a common share of accusation and attack. If the honorable member from South Carolina was not our original accuser, he has yet recited the indictment against us, with the air and tone of a public prosecutor. He has summoned us to plead on our arraignment; and he tells us that we are charged with the crime of a narrow and selfish policy; of endeavoring to restrain emigration to the West, and, having that object in view, of maintaining a steady opposition to Western measures and Western interests.”

\textsuperscript{45} Remini, Daniel Webster, 323.

\textsuperscript{46} Daniel Webster, 20 Jan. 1830, Belz ed., 52.

\textsuperscript{47} Ibid.
possessed the right of interposition. Hayne scolded Webster for his duplicity, impugning him for a lack of patriotism during the war. Webster had been silent about upholding the Union in 1814 and implied the propriety of state interposition no less. Webster answered as if he gave no approval to the Hartford Convention as it occurred, finding the recollection of his earlier stance conveniently clouded.

One of Hayne’s forceful points entailed the charge that northern politicians had been apt to provoke disunion and undermine its harmony by selfish acts contrary to the general welfare. When they had attempted to use the Union for their own special purposes with the protective tariff, it fomented discord. “Who then… are the true friends of the Union?” queried Hayne. Those who would constrain the limits of federal power to the terms of the Constitution, he answered. Casting derision on the centralizers, he queried, ‘who are its enemies?’ He pointed to those in “favor of consolidation”; those “stealing power from the States,” who add strength to the Union by assuming “an unwarrantable jurisdiction over the States and the people,” in order to co-opt and regulate the “whole industry and capital of the country.”

Hayne lamented that Webster endeavored to cast scorn upon the idea that a state has any

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48 Robert Hayne, 25 Jan. 1830, Belz ed., 61, 67-70; Remini, Daniel Webster, 322-323. He queried as to why Webster “who now manifests so great a devotion to the Union” not “exert his great talents and acknowledged influence” then with his “deluded friends in 1814, and point out to them “the value of the Union”?
49 Graham, A Constitutional History of Secession, 202; Daniel Webster, 26 and 27 Jan. 1830, Belz ed., 121. “Supposing, as the gentleman seems to do, that the Hartford Convention assembled for any such purpose as breaking up the Union, because they thought unconstitutional laws had been passed, or to consult on that subject, or to calculate the value of the Union, — supposing this to be their purpose, or any part of it, then I say the meeting itself was disloyal, and was obnoxious to censure, whether held in time of peace or time of war, or under whatever circumstances may make it more or less aggravated case, but cannot affect the principle. I do not hold, therefore, that the Hartford Convention was pardonable even to the extent of the gentleman’s admission, if its object was really such as has been imputed to it. Sir, there never was a time, under any degree of excitement, in which the Hartford Convention, or any other convention, could have maintained itself one moment in New England, if assembled for any such purpose as the gentleman says would have been an allowable purpose. To hold conventions to decide constitutional law! To try the binding validity of statutes by votes in a convention! Sir, the Hartford Convention, I presume, would not desire that the honorable gentlemen should be their defender or advocate, if he puts their case upon such untenable and extravagant grounds.”
50 Robert Hayne, 25 Jan. 1830, Belz, ed., 72-73; Carson, The Sections and the Civil War, 35. “[Those] who would preserve the States and the people all powers not expressly delegated,” who by dispensing “justice” would “make it a blessing and not a curse.”
remedy by the exercise of its sovereign authority against a deliberate violation of the Constitution. He recalled episodes that set a powerful precedent for nullification, with direct appeals to the Virginia Resolves of 1790 and 1798.\textsuperscript{51} He cleverly noted, “the South Carolina doctrine is the republican doctrine of ‘98; that it was promulgated by the fathers of the faith [Jefferson and Madison] that it was maintained by Virginia and Kentucky in the worst of times…” that it embodied “the very pivot” on which the revolution for liberty transpired, so as to “[save] the constitution at its last gasp,” and that New England co-opted to counter perceived “unconstitutional legislation.”\textsuperscript{52} Hayne dismissed the notion that the federal government is the singular arbiter of the limits of its own powers—a notion that he deemed destructive of state sovereignty. To Hayne, regardless of whether the Congress or the Supreme Court served as an umpire made scant difference, as both lack an institutional interest to protect the reserved rights of the states.\textsuperscript{53} Hayne closed with the witty aphorism of Edmund Burke, “YOU MUST PARDON SOMETHING TO THE SPIRIT OF LIBERTY.”\textsuperscript{54} The teleocratic mandate for tax equity remained integral to the Constitution’s design, and it remained the task for the aggrieved party to point out that candid fact.

Over the next few days, Webster offered his “Second Reply to Hayne.” He challenged Hayne’s position that the states had a right to resist what they inferred as unconstitutional federal acts beyond merely appealing to the federal government itself. He contended such a right would allow the states to dissolve the Union, which could not pass the test of constitutionality. Casting his position in terms of popular sovereignty, Webster asserted the people delegated the power of

\textsuperscript{52} Ibid., 79.
\textsuperscript{53} Ibid.
\textsuperscript{54} Ibid., 80.
adjudicating disputes over the extent of federal powers to the federal government itself.55

Webster went on some odd turns, invoking the instance of the Fries’ Rebellion. He compared the actions of a rabble of tax resisters to the actions of sovereign state interposing on behalf of its people to arrest usurpation of the compact to which they were parties. The contrast was fallacious to Hayne.56 “To resist, by force, the execution of a law, generally, is treason. Can the Courts of the United States take notice of the indulgences of a State to commit treason?”57 Webster redefined the meaning of the treason, for it was historically applied to individuals and not states. He presumed the validity of any enacted federal law.58 With regards to illicit use of federal power, Webster stated Congress and Supreme Court were the proper mode of appeal to objections by states. Webster presented remonstrance and amendment as the only recourse of a sovereign people to arrest usurpations.59 Elections were no doubt assumed as well. Reminding his audience that Constitution was not “unalterable,” he implied that if the people become dissatisfied with the political arrangement, they could summon change by way of amendment.60

In a stirring bit of rhetorical persuasion, Webster climaxed with a patriotic speech.

While the Union lasts, we have high, exciting, gratifying prospects spread out before us . . . What is all this worth? Nor those other words of delusion and folly, Liberty first, and Union afterwards—but everywhere spread all over the characters of living light, blazing on all its ample folds, as they float over sea and over the land, and in every wind under the whole heavens, that other sentiment, dear to every true American heart,—Liberty and Union, now and forever, one and inseparable.61

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56 Ibid., 140.
57 Ibid., 140.
58 Ibid., 141. “The common saying, that a State cannot commit treason herself, is nothing to the purpose… Can she authorize others to do it? If John Fries had produced an act of Pennsylvania, annulling the law of Congress, would it have helped his case?” He then denounced the doctrines as a harbinger of “revolution” and “civil commotion.”
59 Ibid., 141.
60 Ibid.
61 Ibid., 143-144.
Undismayed by Webster’s appeal to patriotism, Hayne made his own comparable appeal. “Virginia and Kentucky, so far back as ’98, avowed the principles for which I have been contending—principles which have never since been abandoned; and no instance has not yet occurred, in which it has been found necessary, practically to exert the power asserted in these resolutions.”62 Hayne correlated his principles with those enunciated by Jefferson and Madison. Webster attempted to reduce Principles of 1798 to nothing more than a right of remonstrance, whereas Hayne explained the value of nullification as a deterrent.63 Hayne believed the Principles of 1798 legitimized the nullification remedy.64 His rationale was that the federal government would apprehend the possibility of nullification, and its implied threat alone could suffice at restraining abuse of federal power, compelling its internal correction of its errors, and proved beneficial since it posed “a restraining influence.”65

Hayne’s patriotic bombast is often overlooked and overshadowed by that of Webster. Professing fealty to the Union, Hayne’s climatic response is a lively bit of rhetorical flare. First, he declared South Carolina had sincere attachment to the Union, but a Union founded in the limits of the Constitution, not the consolidation Webster inferred. He added that a Union that swallows up the rights of the states is not worth preserving. He again emphasized South Carolina’s devotion to the Union, as the rationale for opposing perceived usurpations by the federal government, which would provoke the dissolution of the Union.66 His final salvo

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63 Ibid., Hayne, 179. “And if the apprehension of such an interposition by a State, should have the effect of restraining the Federal Government from acting,” in usurping the Constitution, “except in cases clearly within the limits of their authority, surely no one can doubt the beneficial operation of such a restraining influence.”
64 Herman Belz ed., introduction, The Webster-Hayne Debate on the Nature of the Union, xi. “The supporters of nullification had justified it as a form of state interposition based on the compact theory of the Union, which embodied the principles of the Kentucky and Virginia Resolutions of 1798. In the view of South Carolina politicians, nullification was a procedure for deciding the constitutionality of federal measures that would preserve the Union.”
66 Ibid., 183.
declared his state carried the “banner of the Constitution” inscribed with “Liberty,” “Constitution,” and “Union,” which he professed the hope would continue in perpetuity.\textsuperscript{67}

Webster is often credited as the victor in practical terms. But the U.S. Senate on 12 January, 1838, issued a resolution that declared a principle, which happened to be the view of the Union professed by Hayne and Calhoun. It noted that, “in the adoption of the Federal Constitution, the States severally, as free, independent, and sovereign States; and that each, for itself, by its own voluntary assent, entered the Union with the view to its increased security against all dangers.”\textsuperscript{68} Here the political theory of the Kentucky Resolutions reemerged.

Hayne divulged his fealty to the Principles of 1798. “The Virginia Resolutions of ‘98 and your admirable Report, have almost passed away from the memory of the politicians of the present day,” he explained to Madison. “It is this forgetfulness which has led to the alarming assumptions of power on the part of the federal government,” Hayne added, “and I feel an entire conviction that nothing can save us from consolidation and its inevitable consequence, the separation of the States, but the restoration of the principles of ‘98.”\textsuperscript{69} Thus we see South Carolinians conceived the link of their doctrines to the Virginia and Kentucky Resolutions. In the wake of the debates, the effort of the South to court the West lapsed. Beforehand it was the South and West in a courtship that precluded camaraderie with the North.\textsuperscript{70}

A Jefferson Day Dinner was held on 13 April, 1830. Prominent leaders, such as Jackson,

\textsuperscript{67} Ibid., 183.
\textsuperscript{68} Graham, \textit{A Constitutional History of Secession}, 203.
\textsuperscript{70} Timothy S. Huebner, \textit{The Southern Judicial Tradition: State Judges and Sectional Distinctiveness} (Athens, GA: Univ. of Georgia Press, 2008), 10. As Spencer Roane wrote James Monroe in 1820, “Let us cherish, also, the western people. They have an identity of interests with us . . . If driven to it, we can yet form with them a great nation. The influence of a southern sun has given to them a justice and generosity of character, which we look for in vain among the northern Yankees.”
Van Buren and Calhoun were in attendance. Chatter ensued about current affairs. Jackson offered a toast, “Our Union. It must be preserved!” Calhoun offered a salutary reply, raising his cup—“The Union, next to our liberty most dear!” On this auspicious point Calhoun was stating that the Union was not an end in itself, but rather a means to an end of upholding liberty. Decades earlier Patrick Henry stated, “The first thing I have at heart is American liberty,” and “the second thing is American Union.” The tension here would be an omen of future conflict.

The Nullification Crisis

Initially Calhoun remained reserved in his public affirmations as Vice President under Jackson before coming out in favor of the Nullifiers. Defending his State’s actions in the *Fort Hill Address* of 26 July, 1831, he advocated the prescriptive right of a state to interpose itself between its people and the general government. This *Address* became his first public statement of substance about his beliefs on federal-state relations. He recollected the Philadelphia Convention of 1787, where there was ample discussion as to the nature of the relationship between the states and the federal government. On the one side was “the Virginia and Kentucky Resolutions, and the Report to the Virginia legislature—and on the other, in the replies of the Legislature of Massachusetts and some of the other States.” Regardless of how the Virginians in the 1830’s viewed the Carolina Doctrine, Calhoun saw the Virginia School of constitutional interpretation—and its resolves of 1790, 1798, and that of its junior partner

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74 Ibid.
Kentucky in 1798 and 1799—as the forerunner of the principles embodied in the *Exposition* and *The Fort Hill Address*.\textsuperscript{75}

Reverting to discussion of the sectional crisis, Calhoun posited that the country had become deeply divided. He added that as power shifted, politics were more “excited.” Hinting that the South preferred to patiently endure the inconveniences of perceived usurpations, he implied their economic interests grew more threatened. He denounced the tariff as “unconstitutional, unequal, unjust, and oppressive.”\textsuperscript{76} He lamented that a remedy from the federal government itself went unheeded, and declared “now many, driven to despair, are raising their eyes to the reserved sovereignty of the States as the only refuge.”\textsuperscript{77} His answer pointed to nullification.

Governor James Hamilton, Jr. called the South Carolina legislature into a special session where it passed a measure calling for a popularly elected state convention. Just as South Carolina had ratified the Constitution with such a convention, she would address the issue of federal usurpation of the compact with such a convention as well. The Convention had been called to examine and respond to the offensive federal laws.\textsuperscript{78} Nullification had its legal basis in the notion that the Union is a compact between the states, and given that it was ratified by conventions of the thirteen states, it follows that that the states are sovereign. Sovereign in 1787, those same states must still be so in 1828. As of right, the states, each in their sovereign capacity, have the right to judge when their agent, the federal government, oversteps the bounds of its delegated powers. The created agent is by no means greater than its creators. Invoking the

\textsuperscript{75} John C. Calhoun, *The Essential Calhoun: Selections from Writings, Speeches, and Letters*, Clyde Wilson, ed. (New Brunswick, NJ: Transaction, 2000), 402. “You know that it is an axiom with me, that every revolution in favor of liberty in our system, must be effected by the South, and, I may add, the South headed by Virginia.”
\textsuperscript{76} Ibid., 331.
\textsuperscript{77} Ibid.
Principles of 1798, Calhoun brought the doctrine of nullification to it fruition. Laying the diadem of the South Carolina’s organized resistance on the Principles of 1798, Calhoun declared concerted action against the tariff, and professed his desire “to enhance the old Republican doctrines of 98, which can save the Constitution.” Popular support from Alabama, Georgia, and many in Virginia did not favor South Carolina’s stance.

Nullifiers could appeal to the 1798 resolves, which furnished the paradigm that a state could indeed veto a federal law, yet remain within the Union. But no one knew for certain whether Jefferson actually wrote the 1799 Kentucky Resolutions. It was heralded as the most forthright statement on the matter, and remained explicit in its advocacy of “nullification.” By 4 July, 1826, Jefferson, had died and could not speak further on the matter. Providence seemed to be on the side of the Nullifiers, when a copy of Jefferson’s draft of the 1799 resolutions were discovered and printed in Richmond in 1799, and evidence pointed to his authorship. Calhoun enthusiastically remarked that “had it been possible for him to have had access to the manuscript, he might well have been suspected of plagiarism.” The confirmation of Jefferson’s authorship gave the resolves an added luster of sacredness. Jefferson in his passing became a much revered figurehead of republicanism for a nation as well as his Democratic Party. This discovery buoyed their value as an authority of constitutional construction.

An elder Madison, still living on past Jefferson, became bedeviled by the invocation of his youthful precepts from 1798-1800 being deployed to nullify a tariff amid talk of disunion.

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80 Calhoun Papers, Clyde Wilson, ed., 11:553; McDonald, States’ Rights and the Union, 258.
81 Ellis, The Union at Risk, 102-140, 159.
So Madison attempted damage control. The unconstitutionality of a protectionist tariff was not as evident as the encroachments upon civil liberties embodied in the Alien and Sedition Acts. Perhaps in Madison’s concern for the Union, he pragmatically saw fit to step in, and distance himself from the Nullifiers. Instead of repudiating his earlier avowals, or admitting a change of mind, he pretended no such remedy to have been contemplated. The North American Review published Madison’s denial of the Carolina Doctrine. He lamented “the fate of the constitution” granting the action of “a small proportion of the states” attempting to “expunge parts of it particularly valued by a large majority . . .” Seizing upon the generalities of the Virginia Resolutions, disregarding the words of the Report of 1800, Madison fell back on the resolves’ intentional vagueness as a basis to disavow the notion that it lent credence to nullification. An honest effort to evaluate the Report of 1800 proves the elder Madison to be in grave error.83 In his twilight years, Madison simply could not let go of the basic idea behind his original 1787 Virginia Plan.84

On 9 May 1831, George McDuffie, a prominent South Carolina politician, gave his oration at Charleston. Rich in Biblical imagery, he let out a fiery salvo of contempt for so called

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84 James Madison, “The Virginia Plan,” The American Republic: Primary Sources, Bruce Frohnen, ed. (Indianapolis: Liberty Fund, 2002), 231-232. In his solicitude for the Union, Madison apparently fell back on the logic of his Virginia Plan that was rejected at the Philadelphia Convention, and not that of his Report of 1800, and abated endorsement of the remedy of nullification. The Virginia Plan called for a federal negative on the states.
‘submissionists’ to the hated tariff. “When a tyrannical and oppressive majority, throwing aside all the restraints of the Constitution, openly perpetrate robbery under the forms of legislation, and I am called upon to recognize this as the authority of the Union, I say, and I say in the spirit of the Decalogue, ‘I will not bow down and worship this false idol.’” He thundered that a Union susceptible to a tyrannical majority was a “foul monster” to whose idolatrous worship, only made its people “worthy of their chains.” McDuffie drew contrast between tariff backers and “the English oppressors of our ancestors.”

He urged that the resistance recall the memory of 1776, mindful of how South Carolina addressed such usurpations then. Amid the calamity, in a set off-the-table accord, Hayne resigned as U.S. Senator, and Calhoun resigned as Vice President. Hayne ran for Governor of South Carolina and succeeded James Hamilton, Jr. Then Calhoun assumed Hayne’s office in the U.S. Senate.

As Congress hammered the Tariff Bill of 1832 into law, it seemed that the opposition failed to obtain redress of the grievance for its repeal. Virginian Thomas Ritchie prophesized McDuffie, Calhoun, Hayne, and Hamilton would respond in vigor if Congress failed to grant remedial legislation scaling back the exorbitant tariff.

The South Carolina Nullification Convention assembled in Columbia on 19 November,

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85 George McDuffie, Speech at Charleston, May 19, 1831, The Nullification Era: A Documentary Record, William Freehling, ed. (New York, NY: Harper Torchbooks, 1967), 118. He further avowed “shall a freeman whose love of liberty is cherished…” fall and worship “like the wretched and deluded victim of Eastern idolatry, when the car of destruction is rolling over him and crushing him to death, breathe out his last breath in hosannas to the monster-god who rides upon the car and revels in his blood!”
86 Ibid., 117-118; Watkins, Reclaiming the American Revolution, 107.
87 Robert V. Remini, Daniel Webster, 372; Robert Remini, At the Edge of the Precipice, 23.
88 Ellis, The Union at Risk, 72; Charles Henry Ambler, Thomas Ritchie: A Study in Virginia Politics (Richmond, VA: Bell Boo, 1913), 150. On 25 June, 1832, Ritchie wrote his ally Martin Van Buren to summarize the situation: “Should Congress rise without adjusting the tariff in liberal principle, Hamilton & Hayne, Calhoun & McDuffie will help S. Carolina to adopt nullification… The whole South is indignant at the opposition & obduracy of the Tariffites. Virginia is now cool; but very excitable, and determined not to send a man or a musket to put down S. Carolina. Events may hurry us further. In fact… many of our most sagacious patriots are now beginning to tremble for the Union. It is on all hands admitted to be the most alarming state of things, which has existed since the Revolution.”
with many of the delegates wearing blue cockades signifying their stance as outright secessionists. Calhoun himself opposed any such secessionist intention. The convention promptly adopted an Ordinance of Nullification on 24 November 1832 by a vote of 136 to 20.⁸⁹

We, therefore, the people of the State of South Carolina, in convention assembled, do declare and ordain and it is hereby declared and ordained, that the several acts and parts of acts of the Congress of the United States, purporting to be laws for the imposing of duties and imposts on the importation of foreign commodities, and now having actual operation and effect within the United States, and, more especially, an act entitled “An act in alteration of the several acts imposing duties on imports,” approved on the nineteenth day of May, one thousand eight hundred and twenty-eight and also an act entitled “An act to alter and amend the several acts imposing duties on imports,” approved on the fourteenth day of July, one thousand eight hundred and thirty-two, are unauthorized by the constitution of the United States, and violate the true meaning and intent thereof and are null, void, and no law, nor binding upon this State, its officers or citizens; and all promises, contracts, and obligations, made or entered into, or to be made or entered into, with purpose to secure the duties imposed by said acts, and all judicial proceedings which shall be hereafter had in affirmance thereof, are and shall be held utterly null and void.⁹⁰

According to this ordinance, a state is to be understood as the sovereign people thereof, assembled in convention, bringing its sovereign power to bear against a perceived usurpation. It is in this vital respect to state sovereignty, consisting of the authority to make and unmake constitutions, that nullification found its legitimacy. It is incidental to the sovereign power reserved to the parties to the compact, the several states, to adjudge infractions of the supreme law of the land by means of a constitutional convention. A servant is not above its master. The federal government remained an agent of the several states, and contractually obliged to respect its reserved rights of its legislatures and citizens.⁹¹

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⁹¹ Ibid., Graham, 209.
South Carolina belated its Ordinance of Nullification to give Congress time to convene in regular session and act on the tariff should it choose to do so. The State wanted to spur Congress to action to evade the need for more radical defense of her liberties.\(^{92}\) Beginning 1 February 1833, according to the ordinance, customs duties could not be collected within the boundaries of the state by the federal officials, or such action would compel the interposition of South Carolina to prompt its arrest presumably.\(^{93}\) A perturbed Jackson sounded alarms. “Tell them that they can talk and write resolutions and print threats to their hearts’ content,” thundered Jackson. “But if one drop of blood be shed there in defiance of the laws of the United States, I will hang the first man of them I can get my hands on, to the first tree I can find.”\(^{94}\)

On 4 December, Jackson presented his annual message to Congress. He interpreted his reelection as popular approval of his policies and leadership. He continued his effort to dismantle the ‘American System,’ and insisted upon the retirement of federal debt.\(^{95}\) J.Q. Adams complained of this stance, “It recommends a total change in the policy of the Union with reference to the bank, manufactures, internal improvement, and the public lands.” Adams added, “it goes to dissolve the Union into its original elements, and is in substance a complete surrender to the Nullifiers of South Carolina.”\(^{96}\) Jackson did little to conciliate the Nullifiers, except his nominal recognition of the transitory nature of the protection principle.

Jackson issued a proclamation on 10 December, claiming that existing laws were sufficient to justify his enforcement of the tariff in South Carolina by force if necessary.

\(^{92}\) William James Cooper, *Liberty and Slavery: Southern Politics to 1860*, (Columbia, SC: Univ. of South Carolina, 2000), 174. “…Calhoun got the South Carolina Convention to delay the implementation of nullification…”


\(^{94}\) Ellis, *The Union at Risk*, 78.

\(^{95}\) Ibid., 81-83, viz. 81.

Concurrently he called on Congress for new legislation and support to buttress his enforcement power. This time he avoided the problematic debate over the origins and character of the Union. This message manifested his aversion to nullification in theory and practice. “While a forbearing spirit, and I trust will, be exercised toward the errors of our brethren… duty to the rest of the Union demands that organized resistance to the laws should not be executed with impunity,” he said. He then concluded by asking Congress to proclaim “that the constitution and the laws are the supreme and the Union indissoluble.” Thus the Union, in Jackson’s eyes, came to embody the reverence afforded to the Ark of the Covenant. It could not be threatened by the Nullifiers!

South Carolina summoned Governor Hayne to issue a counter proclamation, which he willingly obliged on 20 December. It restated the case for nullification, and stressed its firm adherence to the Jeffersonian tradition, and sounded alarms posed by the threat of consolidation and the unchecked exercise of federal power. It assailed Jackson for his betrayal of states’ rights, which he had earlier championed. Two days later, a pamphleteer laid out a patriotic barrage in opposition to the tariff—and alluded to the sentiment that liberty remained at stake, not simply the propriety of the tariff or nullification, but an issue of freedom or tyranny.

Patriotic appeals were made to Virginians, as one observer proclaimed, tribulation had arrived to test their fidelity to states rights, and as the cause of South Carolina is the cause of all,

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98 Ellis, *The Union at Risk*, 95; McDonald, *States’ Rights and the Union*, 109.
99 Ellis, *The Union at Risk*, Ellis, 96. “The great question now is not nullification and the tariff only—it is not the issue merely between Carolina and Congress—it is not only whether Carolinians, by wavering and shielding shall prove that chains are their appropriate declarations, words their only weapons, murmurs and complaints and scoundrel supplications their befitting language, and bondage their proudest condition—but it is whether the States shall preserve their individuality as sovereign, or be merged into one wide imperial realm, whether the people are hereafter to govern themselves, or be the serfs of whatever combination of politicians shall acquire sway at Washington; whether any dotard or miscreant from chance of trickery, or popular delusion may elevate to the presidential chair, may lord over us, and write his vengeance against his opponents in blood; whether the United States shall be free, sovereign and independent states, or [subservient] provinces; whether they deserve freedom. It is a question of liberty or despotism.”
Virginia and all Americans should really to her side.100 Virginia jurist Littleton Waller Tazewell assailed Jackson’s proclamation as an “audacious proposition” that “suggests that in a controversy between the parties to a covenant [under which] an agent is created, where the matter in dispute… regards the authority exerted by the agent, the decision of this controversy must be referred to the agent himself?”101 Calhoun criticized the federal government, acting as the sole arbiter in its own case as it offered no meaningful recourse for the people and the states to uphold their reserved rights under the Ninth and Tenth Amendments respectively.102

The State of South Carolina then ordered federal agents within its territory to cease collecting customs duties after February 1. Should the United States exert force, South Carolina threatened to secede. Jackson sent a message to Congress on 16 January 1833, and asked for the use of power against South Carolina. Calhoun yearned for a compromise that would abate the threat. On 21 January, the Senate Judiciary Committee reported the Force Bill. Pressure mounted, tensions flared. It seemed as though the Union was in a full-blown constitutional crisis. Jackson took it as a personal contest between the Presidency and South Carolina. In his mind, for Georgia to defy the Supreme Court over an issue related to Indians was an altogether different matter, but for South Carolina to personally challenge him on a bill he signed was a test of his honor. Jackson was defiant to the end. He sent federal troops to Charleston Harbor and nearby North Carolina. He issued a proclamation, “Every law operating injuriously upon any local interest will perhaps be thought… unconstitutional.” He added, “I consider, the power to

100 Ellis, The Union at Risk, 132.
101 Kilpatrick, The Sovereign States, 134; Littleton Waller Tazewell, A Review of the Proclamation of President Jackson: of the 10th of December, 1832 (1832, reprint, Norfolk, VA: J.D. Ghiselin, 1888), 103.
102 Kilpatrick, The Sovereign States, 193. “To confide the power to the [federal] judiciary to determine finally and conclusively what powers are delegated and what reserved, would be, in reality, to confide it to the majority, whose agents they are, and by whom they can be controlled in various ways; and, of course, to subject . . . the reserved powers of the States, with all the local and peculiar interests they were intended to protect, to the will of the very majority against which the protection was intended.”
annul a law of the United States,” assumed by South Carolina, discordant with the survival of the Union, “contradicted expressly by the letter of the Constitution, unauthorized by its spirit, inconsistent with every principle on which it was founded, and destructive of the great object for which it was formed.” He left no doubt that he would summon the full power of the United States to enforce the tariff. Jackson said with much exaggeration he had no leeway on the matter and the Constitution obliged him to act.103

Calhoun marshaled a salutary response. “Force, may, indeed, hold the parts together,” he conceded, but such a union would be like the yolk of a slave to his master—demanding obedience of one over the other.104 Neither side pushed to armed conflict. While no state came directly to the aid of South Carolina in legislative resolution, there were rumblings of concurrence. South Carolina objected based on the representations made to secure her ratification of the Constitution in 1788, that the federal government possessed no authority to coerce a sovereign state. Jackson insisted that concerted resistance to the enforcement of the laws constituted treason, and that the government was authorized to punish treason. Treason nevertheless was a crime applicable to an individual engaged in armed rebellion, and not the interposition of a sovereign state against perceived usurpation.105


105 Robert Remini, At the Edge of the Precipice: Henry Clay and the Compromise that Saved the Union (New York, NY: Perseus Book Group, 2010), 16. “Jackson girded for war. When a state attempts to nullify a constitutional law and thereby destroy the Union, he said, the ‘balance of the people composing the union have a perfect right to coerce them to obedience.’”; Nathaniel Macon to Andrew Jackson, 26 August, 1833, The Nullification Era: A Documentary Record, William Freehling, ed. (New York, NY, Harper Touchstone, 1967), 196. “Sovereign power cannot commit treason or rebellion or be subject to the laws relating to either. Hence a state, being sovereign to a certain extent, as well as the United States, cannot commit either. The people alone in our
Congress cobbled together a compromise tariff bill at the behest of Clay with the support of Calhoun. While Clay apprehended the peril of summoning a vindictive Jackson to the command of an army, he could not countenance nullification.106 Amid the deadlock, Clay urged conciliation.107 To this end, Congress would reduce tariff duties in two-year intervals until they reached a uniform rate of twenty percent. Clay is heralded for mending an offensive spoils system that he helped implement it in the first place.108

Virginia responded. Governor John Floyd avowed “the late tariff with its oppressive exaction, has been replaced by another hardly less injurious.” Speaking of federal relations, Floyd noted, “Heretofore Virginia has watched her liberty with sleepless care, and her reserved rights, the sleeping thunder of the States, with an anxiety which bespoke the inestimable value she placed upon them. Ought we to be less on our guard than at any former period.” With echoes of Patrick Henry, Floyd thundered, “Perpetual vigilance is the price we pay for liberty.

country possess unlimited sovereign power, and they delegate it to their government as they please. Forced applied to a state government as well as I recollect is not hinted at in the Constitution of the United States, because… [a state] cannot commit treason or rebellion… [The Constitution] goes on the ground that every state will perform her duty… If South Carolina would not permit the laws of the United States to be enforced within her limits, she was out of the Union and ought to have been treated as a foreign power.”
108 McDonald, States’ Rights and the Union, 109. “South Carolina’s response was defiant. The legislature enacted the nullifying convention’s ordinance. The newly installed governor, former Senator Hayne, issued a counter-proclamation defying the president again, and the legislature thumbed its nose at Jackson by electing Calhoun (who had resigned the vice presidency) to the Senate in Hayne’s place. Jackson countered by asking Congress for authority—a force bill—to use the army to collect the revenues and empower him to close any port at his discretion. Hayne advised the people of his state to arm themselves for resistance. The Jacksonian press undertook a vicious campaign to depict nullification as treason and Calhoun as the archtraitor. But actually, the issue divided both Jacksonians and National Republicans, for even Webster agreed that if Calhoun’s analysis of the origin of the Constitution was sound, the doctrine of nullification was sound. In the ensuing senatorial debates, Calhoun decisively demonstrated the soundness of his analysis, and Webster knew it. Said the aged John Randolph of Roanoke, who witnessed Calhoun’s demonstration, he saw ‘Webster die, muscle by muscle.’”
Do we not find the defenders of these violations of the Constitution increasing in numbers and in the boldness of their measures?” He concluded that Constitutions served to protect minority rights against the caprice of the majority.109

Jackson’s willingness to exceed presidential authority had rendered him dangerous to the interests of southerners, and to the vitality of constitutional government. As opposition grew, a coterie of strict constructionists emerged in Virginia, which included Governor John Floyd, Senator John Tyler, Littleton Waller Tazewell, Benjamin Watkins Leigh, Abel Parker Upshur, Thomas Walker Gilmer, and Beverly Tucker. These statesmen formed the enduring opposition to Jackson and his successor Van Buren.110 On 16 January 1833, Thomas Ritchie echoed the frustrations of Virginians with Jackson’s belligerence, and declared “this blow may prostrate us,” and he predicted his popularity would wane among friend and foe alike.111 In reality, Jackson held sway, though he tended to be either loved or hated in the polarized political climate.

The Virginia Senatorial race between John Tyler, and James McDowell, a Jackson partisan, became a political storm within Virginia. The election on 16 February resulted in 81 votes for Tyler and 62 for McDowell, not long after Tyler’s denunciation of nullification in the U.S. Senate.112 Tyler lamented the outcome of Jackson bringing force to bear upon a sovereign state.113 Of the Force Bill, Tyler inveighed that he stood against the “odious measure,” and

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109 Ellis, *The Union at Risk*, 128. “Constitutions are intended to protect the rights of the minority, by restraining the majority from doing that, which to the minority would be ruinous; but if the majority be permitted to become the interpreters of their own powers, there cease to be any limit to the Government.”
110 Ibid., 139.
111 Ibid., 138. Jackson’s “immense popularity in Virginia could not withstand the shock—Even his best friends would condemn him.”
112 Ibid.
113 Dan Monroe, *The Republican Vision of John Tyler* (College Station, TX: Texas A&M Press, 2003), 61. “If South Carolina be put down, then may each of the States yield all pretensions to sovereignty—we have a consolidated government and a master will soon arrive . . . Idle to talk of preserving a republic for any length of time, with an uncontrolled power over the military exercised at the pleasure [by] the president.”
declared it a “bloody bill” as if it were portent of state-sanctioned violence.\textsuperscript{114} On 15 February, Calhoun responded critically of the Force Bill’s recurrent grant to the President of special authority for the enforcement of duties. It sanctioned the use of the “irresistible energy” of the federal government. It proved nothing less than a full blown contest between “power and liberty.” Calhoun felt obliged to resist the former and defend the later with intellectual rigor. Therein he implied: it favored other ports at the expense of Charleston; it divested the state courts of their jurisdiction; it threatened the violent coercion of a sovereign State; and it upheld an unconstitutional protective principle.\textsuperscript{115}

For Calhoun, there was much at stake—not just the propriety of the Force Bill. Calhoun made an impassioned plea for upholding principles integral to a system of free government. He inferred that the issue at stake was whether or not South Carolina was a constituent of either a federal or unitary government. This had profound implications for “the liberty of the people, their happiness, and the place which we are destined to hold in the moral and intellectual scale of nations…”\textsuperscript{116} The persistence of the Nullifiers was not without effect. A new tariff bill passed the House on 26 February 1833, and in the Senate on 1 March 1833. It purposed the repeal of the tariff declared unconstitutional by the people of South Carolina. The practical effect of her professed willingness to utilize her sovereign power to challenge and arrest the perceived federal


\textsuperscript{115} John C. Calhoun, “Speech on the Force Bill,” 15 and 16 February 1833, H.L. Cheek, Jr. ed., 433. “The bill violates the constitution, plainly and palpably, in many of its provisions, by authorizing the President at his pleasure, to place the different ports of the Union on an unequal footing, contrary to the provision of the constitution which declares that no preference shall be given to one port over another. It also violates the constitution by authorizing him, at his discretion, to impose cash duties on one port, while credit is allowed in others; by enabling the President to regulate commerce, a power vested in Congress alone; and by drawing within the jurisdiction of the United States Courts, powers never intended to be conferred on them… This bill proceeds on the ground that the entire sovereignty of this country belongs to the American people, as forming one great community, and regards the States as mere fractions or counties, and not as integral parts of the Union; having no more right to resist encroachments of the Government than a county has to resist the authority of a States; and treating such resistance as the lawless acts of individuals, without possessing sovereignty or political rights. It has been said that the bill declares war against South Carolina. No. It declares a massacre against her citizens!”

usurpation had compelled the Congress to rescind its offending action.

The so called Force Act passed the Senate on 20 February 1833, and the House on 1 March, 1833, but not without protest. It sanctioned the use of force to uphold the collection of federal tariffs. Rep. McDuffie arose on 1 March to offer an obituary to the Constitution, as he perceived the grim specter of consolidation. He sardonically proposed to retitle the bill “An act to subvert the sovereignty of the States of this Union, to establish a consolidated government without limitation of powers, and to make the civil subordinate to military power.” His proposal was rejected, but it was a sure signal of resistance.\(^\text{117}\) Just as South Carolina proceeded to adjourn its convention, it rescinded the nullifying ordinance regarding the tariff, and then enacted an ordinance that declared the Force Bill void. With reduced rates, the protective tariff was repealed. Both sides could claim partial victory, as Jackson signed both bills into law on 2 March 1833.\(^\text{118}\) State interposition, Calhoun declared, had toppled the ‘Tariff of Abominations’ and put a temporary brake on congressional usurpation, and the efforts of parties in and out of Congress countered the misuse of presidential power.\(^\text{119}\)

As far as procedural niceties, South Carolina’s actions were likely consonant with the Virginia and Kentucky Resolutions. The State took the distinction between the legislature and a convention seriously, refusing to issue an ordinance or nullification by an ordinary enactment of her legislature. She opted to summon a special convention, analogous to that which had earlier ratified the Constitution in 1788, and capable of welding its sovereign power, to annul the

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\(^{118}\) Meacham, *American Lion*, 246; Graham, *A Constitutional History of Secession*, 215. “We have beat the Nullifiers, and things quiet for a time, declared Jackson satisfied that they had evaded a violent “struggle” or “a short civil war,” declared Jackson; Edgar, *South Carolina: A History*, 337. James Hamilton, Jr., and John C. Calhoun regarded it as a victory for South Carolina.

offensive federal acts with an ordinance of nullification. Nullification here did not rely on force of arms, as South Carolina interposed its authority to countering the usurpation by cleverly offering its aggrieved citizens relief in state courts. Only after a state judge and jury heard the case, ruling in favor of the merchant, would federal customs officials be ordered by state officials to return the goods to a merchant who refused to pay the duty.\textsuperscript{120}

Few scholars recollect the events culminating in South Carolina’s act of nullification with reference to the representations in 1788-1790 made to secure ratification of the Constitution. In consideration of the Nullifiers’ cause, those statements merit recollection. Madison wrote on 29 January 1788 in the \textit{New York Packet}, “But ambitious encroachments of the federal government, on the authority of the State governments, would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm.”\textsuperscript{121} He speculated that the states would find shared interests, and “a correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole.”\textsuperscript{122} Here state remedies to the abuse of power were presented as desirable. “The same combinations, in short, would result from an apprehension of the federal, as was produced by the dread of a foreign, yoke; and unless the projected innovations should be voluntarily renounced, the same appeal to a trial of force would be made in the one case as was made in the other.”\textsuperscript{123} Expressing disbelief, in such a future, he added, “But what degree of madness could ever drive the federal government to such an extremity.”\textsuperscript{124} South Carolina found such “madness” personified in Andrew Jackson.

As the Philadelphia Convention was unfolding, Madison declared on 31 May 1787, “The

\textsuperscript{120} Watkins, \textit{Reclaiming the American Revolution}, 117.
\textsuperscript{122} Ibid.
\textsuperscript{123} Ibid.
\textsuperscript{124} Houston, \textit{A Critical Study of Nullification in South Carolina}, 21.
use of force against a State would be more like a declaration of war, than an infliction of punishment, and would probably be considered by the party attacked, as a dissolution of all previous compacts; a union of States containing such an ingredient seemed to provide for its own destruction.”

Jackson paid no heed. But if this is the understanding of the ratifiers, it reveals that South Carolina had cause for lamenting the imprudent coercion of a sovereign state, over the tariff issue, and the federal government was overstepping the bounds of the original compact.

In the years that followed, debates surrounding the legitimacy of nullification, and the justice of South Carolina’s cause lingered on. In 1834, Calhoun observed: “State Rights and State Remedies, as interpreted by Mr. Jefferson, and as contained in the Virginia and Kentucky Resolutions, [constitute] the rock of our political salvation; he who admits the one and denies the other, exposes himself to the imputation of the want of intelligence or sincerity.” By invoking interposition, a sovereign state acted to protect its reserved powers under the Tenth Amendment. Calhoun’s theory of concurrent majority geared itself to the amendment process and affirmed that the people of a state assembled in convention were a valid arbiter of constitutional questions. If enough states concurred with the nullifying state, and no concurrent majority (three-fourths of the states) formed in favor of the power in question, then the federal government would have to abandon claims to the disputed power. The states remedy would then be secession or yielding the issue to the Union.

The question lingers as to what institution or procedure would serve the United States best. Since the nineteenth century, the Supreme Court’s role as the sole and final arbiter has

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126 John Calhoun to John Naglee, Papers, 12:298-299; Cheek, Calhoun and Popular Rule, 39.
become ascendant. Gutzman argued that this dubious notion of the Supreme Court being the final arbiter of all constitutional questions did not coincide with the intent of the framers. Watkins ascertained the controversy highlights the need for a new mechanism perhaps to settle disputes between the states and the national government. If as nationalists claim that unilateral state nullification is a disorderly remedy that would render the Union “a rope of sand,” then the defect cannot be traced to the Nullifiers as the first cause. Nullification found ample credence in the representations made to secure ratification of the Constitution. For those who take the Constitution seriously, state interposition and nullification were palatable as a means of impeding the abuse of federal power.

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Conclusion

It remains the task of the jurist and historian to examine the representations made to secure ratification of the Constitution, and judge American political developments by this standard as a matter of prudence. The varied political actors that responded to the crisis provoked by the Alien and Sedition Acts and the Tariff of 1828 had reasonable grounds for justifying their actions, on the basis of these representations, which constitute the original understanding of the Constitution as it relates to federal-state relations.

When the Founding Fathers ventured to frame a new Constitution, they did so with keen appreciation of the need for limiting federal power. Hence they dispersed power horizontally through a separation of powers among the legislative, executive and judicial branches of government, at both the federal and state level. They provided for checks and balances to thwart the concentration of power. Concomitantly they also divided federal and state powers, and the states were possessed of the means of countering perceived usurpations of their liberties.

States’ rights reflect the American character, and remain a viable part of the present-day political discourse. More to the point, its corollary doctrines of state interposition and nullification represent the outgrowth of a venerable colonial-revolutionary heritage. Under the Constitution, “the State legislatures,” Hamilton assured skeptics of the Constitution in 1787, “[will be not only] vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government….”¹ State legislatures will scrutinize the “conduct of the national rulers, and will be ready enough, if anything improper appears, to sound

the alarm to the people, and not only to be the VOICE, but, if necessary, the ARM of their discontent.”\textsuperscript{2} Such facts suggest that the people ratified with jealous solicitude for the rights of the states and the people. They adhered to an interpretation that the states could interpose their authority to arrest any encroachments upon liberty by the federal government should such a problem arise. Insofar as states’ rights upheld the rights of citizens, it may be viewed as complimentary to individual rights. The invocation of states’ rights against the Alien and Sedition Acts in 1798-1799 makes this evident.

The arm of the executive may serve as the first effectual safeguard to negate an unlawful act. Alexis de Tocqueville observed if tyrannical law is enacted the executive may protect liberty, by interposing and refusing to carry out such laws.\textsuperscript{3} But executive interposition may prove insufficient by itself, for the executive has the proclivity to illicitly grab for power for himself if left unchecked. The Presidency like the Congress has little interest in checking its own misplaced exercise of power. Next, federal judicial review may serve as a check to negate unlawful acts of the President and the Congress, but this has proven an inadequate check since the judiciary depends on the executive to give its acts sanction. So far from acting as a brake upon the expansion of illicit exercise of federal power, the judiciary has been its willing accomplice with the centralizing rulings of Chief Justice John Marshall.\textsuperscript{4} What remains is the

\textsuperscript{2} Ibid.

\textsuperscript{3} Alexis de Tocqueville,\textit{ Democracy in America}, Richard D. Heffner ed. (New York, NY: Penguin Putnam, 1956), 122. “If an oppressive law were passed,” Alexis de Tocqueville stated, “liberty would still be protected by the mode of executing that law.”

\textsuperscript{4} Alexander Hamilton, “Federalist #78, Wright, ed., 493-494, “...[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.” This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments
division between federal and state powers. Encroachment upon the reserved rights of the states as well as the coercion of a state is averse to the material representations put forward in order to secure ratification of the Constitution.

During the ratification debates, addressing the potential usurpation of state prerogatives was a serious concern of the delegates, and apprehension of potential abuse of power motivated skeptics of the proposed Constitution to oppose it. Federalists however moved to alleviate that concern by tendering a states’ rights reading of the Constitution. Hamilton asserted: “But it will not follow… that [Legislative Acts]… which are not pursuant to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the Land.” He added such acts would be regarded as acts of “usurpation,” and should be treated as contrary to the Constitution. Madison concurred.

The framers posited that the States would serve as vigilant guardians against any potential encroachments upon the compact by the general government. Should usurpation take place, the states could work in concert at establishing “committees of correspondence” to air their grievances and proposals for abating them with other sisters in order to challenge and abate

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5 Alexander Hamilton, “Federalist #33,” Wright ed., 247. May succinct inference of legislative usurpations being ‘contrary to the Constitution’ was stated in Hamilton’s words as “antithetical to the principles upon which the Constitution was to be founded.”

6 James Madison, “Federalist #46,” Wright ed., 332-333. “Were it admitted, however, that the Federal government may feel an equal disposition with the State governments to extend its power beyond the due limits, the latter would still have the advantage in the means of defeating such encroachments…¶But ambitious encroachments of the federal government, on the authority of the State governments, would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm. Every government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole. The same combinations, in short, would result from an apprehension of the federal, as was produced by the dread of a foreign, yoke; and unless the projected innovations should be voluntarily renounced, the same appeal to a trial of force would be made in the one case as was made in the other. But what degree of madness could ever drive the federal government to such an extremity.”
such affronts to the public liberty. In the First Congress, Madison reminded his colleagues, “The state legislatures will jealously and closely watch the operations of this government, and will be able to resist with more effect every assumption of power.”\(^7\) Usurpation is by no means obligatory for any of the states to stand for. Thus the states may justly interpose their authority as a counterpoise to encroachments by an overreaching, out-of-bounds federal power.

In a thoughtful apologetic for state interposition, Virginia jurist Abel Parker Upshur wrote that without the states armed with the means of guarding their reserved rights, it becomes futile to prevent federal encroachments upon the reserved rights of the states and the people. The Constitution then becomes a hollow parchment barrier. Alluding to the Tenth Amendment, Upshur continued, “I have always considered the reserved powers of the States, as the only real check upon the powers of the Federal Government; and I have always considered it, not only the right, but the imperious duty of the States, so to apply that check, as not to dissolve the Union.”\(^8\) He concluded that only “the positive refusal of the States to submit to usurpations, whilst, at the same time remaining in the Union,” could abate such usurpation when the federal authority refuses to check itself. Upshur traced the logic back to the Principles of 1798.\(^9\)

The fact that nationalists cite Madison’s *Notes on Nullification* from the 1830s in contrast to the Madison of 1798-1800 does not disavow the authority of states’ rights doctrines.\(^10\) The ratifiers understood that the federal government could not coerce a sovereign state as per the

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\(^8\) Abel Parker Upshur, *An Exposition of the Virginia Resolutions of 1798; In a Series of Essays, Addressed to Thomas Ritchie, by a distinguished citizen of Virginia, Abel Parker Upshur, under the Signature of Locke* (Philadelphia, PA: Alexander’s General Printing Office, 1833), 7. “I confess that it seems to me exceedingly clear, that our Constitution is most worthless and tyrannical, if the usurpations of those who administer it, cannot be resisted by any means short of revolution.”

\(^9\) Ibid. “They force the Federal Government back within the charter of its power... I entertain no doubt, that that doctrine is the only one upon which the States can safely repose. It is easy to show that this is the legitimate result of the Resolutions of 1798.”

The Union afforded a “double security” to the people that countenanced the authority of the states guarding against trespasses on their reserved rights, and that of their citizens, by invoking the protective shield of state interposition to abate the federal intrusion. The elder Madison’s double-mindedness on the Principles of 1798 while not inconsequential, does not overturn the original representations made to the ratifiers. The original understanding of the ratifiers is thus more authoritative, and countenanced the propriety of states’ rights, in particular nullification, in the event that liberty was endangered by an abuse of power.

Accordingly, prior to its formal adoption, the United States Constitution came with a bill of goods that included the propriety of state interposition and nullification to counter any federal abuse of power should it occur. This embrace of states’ rights and individual liberty continues to echo in the American political discourse, and owes to the reminiscence of those crucial years, 1776, 1787, and 1798. The episodes surrounding the Virginia and Kentucky Resolutions, state resistance to the Embargo Act and the Non-Intercourse Act, the Hartford Convention, and South Carolina’s attempted nullification of the Tariff of 1828, should all be contextualized in light of the representations made to secure adoption of the Constitution during 1788-1790.

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11 Hamilton, “Federalist #51,” Wright ed., 357. “In the compound republic of America, the power… is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.”
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RESOLVED, That the General Assembly of Virginia, doth unequivocably express a firm resolution to maintain and defend the Constitution of the United States, and the Constitution of this State, against every aggression either foreign or domestic, and that they will support the government of the United States in all measures warranted by the former.

That this assembly most solemnly declares a warm attachment to the Union of the States, to maintain which it pledges all its powers; and that for this end, it is their duty to watch over and oppose every infraction of those principles which constitute the only basis of that Union, because a faithful observance of them, can alone secure it’s existence and the public happiness.

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 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.

That the General Assembly doth also express its deep regret, that a spirit has in sundry instances, been manifested by the federal government, to enlarge its powers by forced constructions of the constitutional charter which defines them; and that implications have appeared of a design to expound certain general phrases (which having been copied from the very limited grant of power, in the former articles of confederation were the less liable to be misconstrued) so as to destroy the meaning and effect, of the particular enumeration which necessarily explains and limits the general phrases; and so as to consolidate the states by degrees, into one sovereignty, the obvious tendency and inevitable consequence of which would be, to transform the present republican system of the United States, into an absolute, or at best a mixed monarchy.

That the General Assembly doth particularly protest against the palpable and alarming infractions of the Constitution, in the two late cases of the “Alien and Sedition Acts” passed at the last session of Congress; the first of which exercises a power no where delegated to the federal government, and which by uniting legislative and judicial powers to those of executive,
subverts the general principles of free government; as well as the particular organization, and positive provisions of the federal constitution; and the other of which acts, exercises in like manner, a power not delegated by the constitution, but on the contrary, expressly and positively forbidden by one of the amendments thereto; a power, which more than any other, ought to produce universal alarm, because it is leveled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed, the only effectual guardian of every other right.

That this state having by its Convention, which ratified the federal Constitution, expressly declared, that among other essential rights, “the Liberty of Conscience and of the Press cannot be cancelled, abridged, restrained, or modified by any authority of the United States,” and from its extreme anxiety to guard these rights from every possible attack of sophistry or ambition, having with other states, recommended an amendment for that purpose, which amendment was, in due time, annexed to the Constitution; it would mark a reproachable inconsistency, and criminal degeneracy, if an indifference were now shewn, to the most palpable violation of one of the Rights, thus declared and secured; and to the establishment of a precedent which may be fatal to the other.

That the good people of this commonwealth, having ever felt, and continuing to feel, the most sincere affection for their brethren of the other states; the truest anxiety for establishing and perpetuating the union of all; and the most scrupulous fidelity to that constitution, which is the pledge of mutual friendship, and the instrument of mutual happiness; the General Assembly doth solemnly appeal to the like dispositions of the other states, in confidence that they will concur with this commonwealth in declaring, as it does hereby declare, that the acts aforesaid, are unconstitutional; and that the necessary and proper measures will be taken by each, for co-operating with this state, in maintaining the Authorities, Rights, and Liberties, referred to the States respectively, or to the people.

That the Governor be desired, to transmit a copy of the foregoing Resolutions to the executive authority of each of the other states, with a request that the same may be communicated to the Legislature thereof; and that a copy be furnished to each of the Senators and Representatives representing this state in the Congress of the United States.

Agreed to by the Senate, December 24, 1798.
“Draft of the Kentucky Resolutions” – October 1798

[AUTHOR: THOMAS JEFFERSON]

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 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 powers, reserving, each State to itself, the residuary mass of right to its own self-government; and that whenever 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 powers 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.

2. 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 law of nations, and no other crimes whatsoever; 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 the act of Congress, passed on the 14th day of July, 1798, and intituled “An Act in addition to the act intituled An Act for the punishment of certain crimes against the United States,” as also the act passed by them on the — day of June, 1798, intituled “An Act to punish frauds committed on the bank of the United States,” (and all their other acts which assume to create, define, or punish crimes, other than those so 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.

3. 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 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 their use should be
tolerated, rather than the use be destroyed. And thus also they guarded against all abridgment by
the United States of the freedom of religious opinions and exercises, and retained to themselves
the right of protecting the same, as this State, by a law passed on the general demand of its
citizens, had already protected them from all human restraint or interference. And that in addition
to this general principle and express declaration, another and more special provision has been
made by one of the amendments to the Constitution, which expressly declares, that “Congress
shall make no law respecting an establishment of religion, or prohibiting the free exercise
thereof, or abridging the freedom of speech or of the press:” thereby guarding in the same
sentence, and under the same words, the freedom of religion, of speech, and of the press:
insomuch, that whatever violated either, throws down the sanctuary which covers the others, and
that libels, falsehood, and defamation, equally with heresy and false religion, are withheld from
the cognizance of federal tribunals. That, therefore, the act of Congress of the United States,
passed on the 14th day of July, 1798, intituled “An Act in addition to the act intituled An Act for
the punishment of certain crimes against the United States,” which does abridge the freedom of
the press, is not law, but is altogether void, and of no force.

4. Resolved, That alien friends are under the jurisdiction and protection of the laws of the
State wherein they are: that no power over them has been delegated to the United States, nor
prohibited to the individual States, distinct from their power over citizens. 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,” the act of the Congress of the United
States, passed on the — day of July, 1798, intituled “An Act concerning aliens,” which assumes
powers over alien friends, not delegated by the Constitution, is not law, but is altogether void,
and of no force.

5. Resolved, That in addition to the general principle, as well as the express declaration,
that powers not delegated are reserved, another and more special provision, inserted in the
Constitution from abundant caution, has declared that “the migration or importation of such
persons as any of the States now existing shall think proper to admit, shall not be prohibited by
the Congress prior to the year 1808;” that this commonwealth does admit the migration of alien
friends, described as the subject of the said act concerning aliens: that a provision against
prohibiting their migration, is a provision against all acts equivalent thereto, or it would be
nugatory: that to remove them when migrated, is equivalent to a prohibition of their migration,
and is, therefore, contrary to the said provision of the Constitution, and void.

6. Resolved, That the imprisonment of a person under the protection of the laws of this
commonwealth, on his failure to obey the simple order of the President to depart out of the
United States, as is undertaken by said act intituled “An Act concerning aliens,” is contrary to the
Constitution, one amendment to which has provided that “no person shall be deprived of liberty
without due process of law;” and that another having provided that “in all criminal prosecutions
the accused shall enjoy the right to public trial by an impartial jury, to be informed of the nature
and cause of the accusation, to be confronted with the witnesses against him, to have compulsory
process for obtaining witnesses in his favor, and to have the assistance of counsel for his
defence,” the same act, undertaking to authorize the President to remove a person out of the
United States, who is under the protection of the law, on his own suspicion, without accusation,
without jury, without public trial, without confrontation of the witnesses against him, without
hearing witnesses in his favor, without defence, without counsel, is contrary to the provision also
of the Constitution, is therefore not law, but utterly void, and of no force: that transferring the
power of judging any person, who is under the protection of the laws, from the courts to the
President of the United States, as is undertaken by the same act concerning aliens, is against the
article of the Constitution which provides that “the judicial power of the United States shall be
vested in courts, the judges of which shall hold their offices during good behavior;” and that the
said act is void for that reason also. And it is further to be noted, that this transfer of judiciary
power is to that magistrate of the General Government who already possesses all the Executive,
and a negative on all legislative powers.

7. Resolved, That the construction applied by the General Government (as is evidenced
by sundry of their proceedings) to those parts of the Constitution of the United States which
deliberate to Congress a power “to lay and collect taxes, duties, imports, and excises, to pay the
debts, and provide for the common defence and general welfare of the United States,” and “to
make all laws which shall be necessary and proper for carrying into execution the powers vested
by the Constitution in the government of the United States, or in any department or officer
thereof,” goes to the destruction of all limits prescribed to their power by the Constitution: that
words meant by the instrument to be subsidiary only to the execution of limited powers, ought
not to be so construed as themselves to give unlimited powers, nor a part to be so taken as to
destroy the whole residue of that instrument: that the proceedings of the General Government
under color of these articles, will be a fit and necessary subject of revision and correction, at a
time of greater tranquillity, while those specified in the preceding resolutions call for immediate
redress.

8th. Resolved, That a committee of conference and correspondence be appointed, who
shall have in charge to communicate the preceding resolutions to the legislatures of the several
States; to assure them that this commonwealth continues in the same esteem of their friendship
and union which it has manifested from that moment at which a common danger first suggested a
common union: that it considers union, for specified national purposes, and particularly to those
specified in their late federal compact, to be friendly to the peace, happiness and prosperity of all
the States: that faithful to that compact, according to the plain intent and meaning in which it was
understood and acceded to by the several parties, it is sincerely anxious for its preservation: that
it does also believe, that to take from the States all the powers of self-government and transfer
them to a general and consolidated government, without regard to the special delegations and
reservations solemnly agreed to in that compact, is not for the peace, happiness or prosperity of
these States; and that 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 foederis,) 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: that nevertheless, this commonwealth,
from motives of regard and respect for its co-States, has wished to communicate with them on
the subject: that with them alone it is proper to communicate, they alone being parties to the
compact, and solely authorized to judge in the last resort of the powers exercised under it,
Congress being not a party, but merely the creature of the compact, and subject as to its
assumptions of power to the final judgment of those by whom, and for whose use itself and its
powers were all created and modified: that if the acts before specified should stand, these
conclusions would flow from them; that the General Government may place any act they think
proper on the list of crimes, and punish it themselves whether enumerated or not enumerated by
the Constitution as cognizable by them: that they may transfer its cognizance to the President, or
any other person, who may himself be the accuser, counsel, judge and jury, whose suspicions
may be the evidence, his order the sentence, his officer the executioner, and his breast the sole
record of the transaction: that a very numerous and valuable description of the inhabitants of
these States being, by this precedent, reduced, as outlaws, to the absolute dominion of one man,
and the barrier of the Constitution thus swept away from us all, no rampart now remains against
the passions and the powers of a majority in Congress to protect from a like exportation, or other
more grievous punishment, the minority of the same body, the legislatures, judges, governors,
and counsellors of the States, nor their other peaceable inhabitants, who may venture to reclaim
the constitutional rights and liberties of the States and people, or who for other causes, good or
bad, may be obnoxious to the views, or marked by the suspicions of the President, or be thought
dangerous to his or their election, or other interests, public or personal: that the friendless alien
has indeed been selected as the safest subject of a first experiment; but the citizen will soon
follow, or rather, has already followed, for already has a sedition act marked him as its prey: that
these and successive acts of the same character, unless arrested at the threshold, necessarily drive
these States into revolution and blood, and will furnish new calumnies against republican
government, and new pretexts for those who wish it to be believed that man cannot be governed
but by a rod of iron: that it would be a dangerous delusion were a confidence in the men of our
choice to silence our fears for the safety of our rights: that confidence is everywhere the parent of
despotism — free government is founded in jealousy, and not in confidence; it is jealousy and
not confidence which prescribes limited constitutions, to bind down those whom we are obliged
to trust with power: that our Constitution has accordingly fixed the limits to which, and no
further, our confidence may go; and let the honest advocate of confidence read the alien and
sedition acts, and say if the Constitution has not been wise in fixing limits to the government it
created, and whether we should be wise in destroying those limits. Let him say what the
government is, if it be not a tyranny, which the men of our choice have conferred on our President, and the President of our choice has assented to, and accepted over the friendly strangers to whom the mild spirit of our country and its laws have pledged hospitality and protection: that the men of our choice have more respected the bare suspicions of the President, than the solid right of innocence, the claims of justification, the sacred force of truth, and the forms and substance of law and justice. 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. That this commonwealth does therefore call on its co-States for an expression of their sentiments on the acts concerning aliens, and for the punishment of certain crimes herein before specified, plainly declaring whether these acts are or are not authorized by the federal compact. And it doubts not that their sense will be so announced as to prove their attachment unaltered to limited government, whether general or particular. And that the rights and liberties of their co-States will be exposed to no dangers by remaining embarked in a common bottom with their own. That they will concur with this commonwealth in considering the said acts as so palpably against the Constitution as to amount to an undisguised declaration that that compact is not meant to be the measure of the powers of the General Government, but that it will proceed in the exercise over these States, of all powers whatsoever: that they will view this as seizing the rights of the States, and consolidating them in the hands of the General Government, with a power assumed to bind the States, not merely as the cases made federal, (casus foederis,) but in all cases whatsoever, by laws made, not with their consent, but by others against their consent: that this would be to surrender the form of government we have chosen, and live under one deriving its powers from its own will, and not from our authority; and that the co-States, recurring to their natural right in cases not made federal, will concur in declaring these acts void, and of no force, and will each 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.

9th. Resolved, That the said committee be authorized to communicate by writing or personal conferences, at any times or places whatever, with any person or person who may be appointed by any one or more co-States to correspond or confer with them; and that they lay their proceedings before the next session of Assembly.
“Kentucky Resolutions.” — 10 December 1798.

1. **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 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 powers, reserving, each State to itself, the residuary mass of right to their own self-government; and that whenever 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 part, 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 powers 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.

2. **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 offenses against the law of nations, and no other crimes, whatsoever; 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, not prohibited by it to the States, are reserved to the States respectively, or to the people,” therefore the act of Congress, passed on the 14th day of July, 1798, and intitled “An Act in addition to the act intituled An Act for the punishment of certain crimes against the United States,” as also the act passed by them on the — day of June, 1798, intitled “An Act to punish frauds committed on the bank of the United States,” (and all their other acts which assume to create, define, or punish crimes, other than those so 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.

3. **Resolved.** That it is true as a general principle, and is also expressly declared by one of the amendments to the Constitutions, that “the powers not delegated to the United States by the Constitution, our 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 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 their use should be tolerated, rather than the use be destroyed. And thus also they guarded against all abridgment by the United States of the freedom of religious opinions and exercises, and retained to themselves the right of protecting the same, as this State, by a law passed on the general demand of its citizens, had already protected them from all human restraint or interference. And that in addition
to this general principle and express declaration, another and more special provision has been made by one of the amendments to the Constitution, which expressly declares, that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press”: thereby guarding in the same sentence, and under the same words, the freedom of religion, of speech, and of the press: insomuch, that whatever violated either, throws down the sanctuary which covers the others, and that libels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals. That, therefore, the act of Congress of the United States, passed on the 14th day of July, 1798, intituled “An Act in addition to the act intituled An Act for the punishment of certain crimes against the United States,” which does abridge the freedom of the press, is not law, but is altogether void, and of no force.

4. Resolved. That alien friends are under the jurisdiction and protection of the laws of the State wherein they are: that no power over them has been delegated to the United States, nor prohibited to the individual States, distinct from their power over citizens. 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,” the act of the Congress of the United States, passed on the — day of July, 1798, intituled “An Act concerning aliens,” which assumes powers over alien friends, not delegated by the Constitution, is not law, but is altogether void, and of no force.

5. Resolved. That in addition to the general principle, as well as the express declaration, that powers not delegated are reserved, another and more special provision, inserted in the Constitution from abundant caution, has declared that “the migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808” that this commonwealth does admit the migration of alien friends, described as the subject of the said act concerning aliens: that a provision against prohibiting their migration, is a provision against all acts equivalent thereto, or it would be nugatory: that to remove them when migrated, is equivalent to a prohibition of their migration, and is, therefore, contrary to the said provision of the Constitution, and void.

6. Resolved. That the imprisonment of a person under the protection of the laws of this commonwealth, on his failure to obey the simple order of the President to depart out of the United States, as is undertaken by said act intituled “An Act concerning aliens” is contrary to the Constitution, one amendment to which has provided that “no person shall be deprived of liberty without due progress of law”; and that another having provided that “in all criminal prosecutions the accused shall enjoy the right to public trial by an impartial jury, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense;” the same act, undertaking to authorize the President to remove a person out of the United States, who is under the protection of the law, on his own suspicion, without accusation, without jury, without public trial, without confrontation of the witnesses against him, without heating witnesses in his favor, without defense, without counsel, is contrary to the provision also of the Constitution, is therefore not law, but utterly void, and of no force: that transferring the power of judging any person, who is under the protection of the laws from the courts, to the
President of the United States, as is undertaken by the same act concerning aliens, is against the article of the Constitution which provides that “the judicial power of the United States shall be vested in courts, the judges of which shall hold their offices during good behavior”; and that the said act is void for that reason also. And it is further to be noted, that this transfer of judiciary power is to that magistrate of the general government who already possesses all the Executive, and a negative on all Legislative powers.

7. Resolved, That the construction applied by the General Government (as is evidenced by sundry of their proceedings) to those parts of the Constitution of the United States which delegate to Congress a power “to lay and collect taxes, duties, imports, and excises, to pay the debts, and provide for the common defense and general welfare of the United States,” and “to make all laws which shall be necessary and proper for carrying into execution, the powers vested by the Constitution in the government of the United States, or in any department or officer thereof,” goes to the destruction of all limits prescribed to their powers by the Constitution: that words meant by the instrument to be subsidiary only to the execution of limited powers, ought not to be so construed as themselves to give unlimited powers, nor a part to be so taken as to destroy the whole residue of that instrument: that the proceedings of the General Government under color of these articles, will be a fit and necessary subject of revisal and correction, at a time of greater tranquillity, while those specified in the preceding resolutions call for immediate redress.

8th. Resolved, That a committee of conference and correspondence be appointed, who shall have in charge to communicate the preceding resolutions to the Legislatures of the several States: to assure them that this commonwealth continues in the same esteem of their friendship and union which it has manifested from that moment at which a common danger first suggested a common union: that it considers union, for specified national purposes, and particularly to those specified in their late federal compact, to be friendly, to the peace, happiness and prosperity of all the States: that faithful to that compact, according to the plain intent and meaning in which it was understood and acceded to by the several parties, it is sincerely anxious for its preservation: that it does also believe, that to take from the States all the powers of self-government and transfer them to a general and consolidated government, without regard to the special delegations and reservations solemnly agreed to in that compact, is not for the peace, happiness or prosperity of these States; and that 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: that nevertheless, this commonwealth, from motives of regard and respect for its co States, has wished to communicate with them on the subject: that with them alone it is proper to communicate, they alone being parties to the compact, and solely authorized to judge in the last resort of the powers exercised under it, Congress being not a party, but merely the creature of the compact, and subject as to its assumptions of power to the final judgment of those by whom, and for whose use itself and its
powers were all created and modified: that if the acts before specified should stand, these conclusions would flow from them; that the general government may place any act they think proper on the list of crimes and punish it themselves whether enumerated or not enumerated by the constitution as cognizable by them: that they may transfer its cognizance to the President, or any other person, who may himself be the accuser, counsel, judge and jury, whose suspicions may be the evidence, his order the sentence, his officer the executioner, and his breast the sole record of the transaction: that a very numerous and valuable description of the inhabitants of these States being, by this precedent, reduced, as outlaws, to the absolute dominion of one man, and the barrier of the Constitution thus swept away from us all, no ramparts now remains against the passions and the powers of a majority in Congress to protect from a like exportation, or other more grievous punishment, the minority of the same body, the legislatures, judges, governors and counsellors of the States, nor their other peaceable inhabitants, who may venture to reclaim the constitutional rights and liberties of the States and people, or who for other causes, good or bad, may be obnoxious to the views, or marked by the suspicions of the President, or be thought dangerous to his or their election, or other interests, public or personal; that the friendless alien has indeed been selected as the safest subject of a first experiment; but the citizen will soon follow, or rather, has already followed, for already has a sedition act marked him as its prey: that these and successive acts of the same character, unless arrested at the threshold, necessarily drive these States into revolution and blood and will furnish new calumnies against republican government, and new pretexts for those who wish it to be believed that man cannot be governed but by a rod of iron: that it would be a dangerous delusion were a confidence in the men of our choice to silence our fears for the safety of our rights: that confidence is everywhere the parent of despotism — free government is founded in jealousy, and not in confidence; it is jealousy and not confidence which prescribes limited constitutions, to bind down those whom we are obliged to trust with power: that our Constitution has accordingly fixed the limits to which, and no further, our confidence may go; and let the honest advocate of confidence read the Alien and Sedition acts, and say if the Constitution has not been wise in fixing limits to the government it created, and whether we should be wise in destroying those limits, Let him say what the government is, if it be not a tyranny, which the men of our choice have con erred on our President, and the President of our choice has assented to, and accepted over the friendly stranger to whom the mild spirit of our country and its law have pledged hospitality and protection: that the men of our choice have more respected the bare suspicion of the President, than the solid right of innocence, the claims of justification, the sacred force of truth, and the forms and substance of law and justice. In questions of powers, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution. That this commonwealth does therefore call on its co-States for an expression of their sentiments on the acts concerning aliens and for the punishment of certain crimes herein before specified, plainly declaring whether these acts are or are not authorized by the federal compact. And it doubts not that their sense will be so announced as to prove their attachment unaltered to limited government, weather general or particular. And that the rights and liberties of their co-States will be exposed to no dangers by remaining embarked in a common bottom with their own. That they will concur with this commonwealth in considering the said acts as so palpably against the Constitution as to amount to an undisguised declaration that that compact is not meant to be the measure of the powers of the General Government, but that it will proceed in the exercise over these States, of all powers whatsoever: that they will view this as seizing the rights of the States, and consolidating them in the hands of the General Government, with a power assumed to bind
the States (not merely as the cases made federal, *casus foederis* but), in all cases whatsoever, by
laws made, not with their consent, but by others against their consent: that this would be to
surrender the form of government we have chosen, and live under one deriving its powers from
its own will, and not from our authority; and that the co-States, recurring to their natural right in
cases not made federal, will concur in declaring these acts void, and of no force, and will each
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, shalt be exercised
within their respective territories.

9th. Resolved, That the said committee be authorized to communicate by writing or
personal conference, at any times or places whatever, with any person or persons who may be
appointed by any one or more co-States to correspond or confer with them; and that they lay
their proceedings before the next session of Assembly.

[Approved 10 December 1798.]
"Kentucky Resolutions of 1799." – 3 December 1799.

**RESOLUTIONS IN GENERAL ASSEMBLY**

THE representatives of the good people of this commonwealth in general assembly convened, having maturely considered the answers of sundry states in the Union, to their resolutions passed at the last session, respecting certain unconstitutional laws of Congress, commonly called the alien and sedition laws, would be faithless indeed to themselves, and to those they represent, were they silently to acquiesce in principles and doctrines attempted to be maintained in all those answers, that of Virginia only excepted. To again enter the field of argument, and attempt more fully or forcibly to expose the unconstitutionality of those obnoxious laws, would, it is apprehended be as unnecessary as unavailing.

We cannot however but lament, that in the discussion of those interesting subjects, by sundry of the legislatures of our sister states, unfounded suggestions, and uncandid insinuations, derogatory of the true character and principles of the good people of this commonwealth, have been substituted in place of fair reasoning and sound argument. Our opinions of those alarming measures of the general government, together with our reasons for those opinions, were detailed with decency and with temper, and submitted to the discussion and judgment of our fellow citizens throughout the Union. Whether the decency and temper have been observed in the answers of most of those states who have denied or attempted to obviate the great truths contained in those resolutions, we have now only to submit to a candid world. Faithful to the true principles of the federal union, unconscious of any designs to disturb the harmony of that Union, and anxious only to escape the fangs of despotism, the good people of this commonwealth are regardless of censure or calumniation.

Least however the silence of this commonwealth should be construed into an acquiescence in the doctrines and principles advanced and attempted to be maintained by the said answers, or least those of our fellow citizens throughout the Union, who so widely differ from us on those important subjects, should be deluded by the expectation, that we shall be deterred from what we conceive our duty; or shrink from the principles contained in those resolutions: therefore.

RESOLVED, That this commonwealth considers the federal union, upon the terms and for the purposes specified in the late compact, as 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, agreeable 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, annihilation of the state governments, and the erection 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; 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 colour of that instrument, is the rightful remedy: That this commonwealth does upon the most deliberate reconsideration declare, that the said alien and sedition laws, are in their opinion, palpable violations of the said constitution; and
however cheerfully it may be disposed to surrender its opinion to a majority of its sister states in matters of ordinary or doubtful policy; yet, in momentous regulations like the present, which so vitally wound the best rights of the citizen, it would consider a silent acquiescence as highly criminal: That although this commonwealth as a party to the federal compact; will bow to the laws of the Union, yet it does at the same time declare, that it will not now, nor ever hereafter, cease to oppose in a constitutional manner, every attempt from what quarter soever offered, to violate that compact:

AND FINALLY, in order that no pretexts or arguments may be drawn from a supposed acquiescence on the part of this commonwealth in the constitutionality of those laws, and be thereby used as precedents for similar future violations of federal compact; this commonwealth does now enter against them, its SOLEMN PROTEST.

[Approved 3 December 1799.]

The third resolution is in the words following:

That this Assembly doth explicitly and peremptorily declare that it views the powers of the Federal Government as resulting from the compact to which the states are parties, as limited by the plain sense and intention of the instrument constituting that compact; as no farther valid than 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.

On this resolution, the committee have bestowed all the attention which its importance merits: They have scanned it not merely with a strict, but with a severe eye; and they feel confidence in pronouncing that in its just and fair construction, it is unexceptionably true in its several positions, as well as constitutional and conclusive in its inferences.

The resolution declares, first, that “it views the powers of the Federal Government as resulting from the compact to which the states are parties,” in other words, that the federal powers are derived from the Constitution, and that the Constitution is a compact to which the states are parties… .

The committee satisfy themselves here with briefly remarking that in all the co-temporary discussions and comments which the Constitution underwent, it was constantly justified and recommended on the ground that the powers not given to the government were withheld from it; and that if any doubt could have existed on this subject, under the original text of the Constitution, it is removed as far as words could remove it by the [tenth] amendment, now a part of the Constitution, which expressly declares “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.”

The other position involved in this branch of the resolution, namely, “that the states are parties to the Constitution or compact,” is in the judgment of the committee equally free from objection. It is indeed true that the term “States” is sometimes used in a vague sense, and sometimes in different senses, according to the subject to which it is applied. Thus it sometimes means the separate sections of territory occupied by the political societies within each; sometimes the particular governments established by those societies; sometimes those societies as organized into those particular governments; and lastly, it means the people composing those political societies in their highest sovereign capacity. Although it might be wished that the perfection of language admitted less diversity in the signification of the same words, yet little inconveniency is produced by it where the true sense can be collected with certainty from the different applications. In the present instance, whatever different constructions of the term “States” in the resolution may have been entertained, all will at least concur in that last mentioned; because in that sense the Constitution was submitted to the “States”: In that sense the “States” ratified it; and in that sense of the term “States,” they are consequently parties to the pact from which the powers of the Federal Government result.

The next position is that the General Assembly views the powers of the Federal Government “as limited by the plain sense and intention of the instrument constituting that
compact,” and “as no farther valid than they are authorized by the grants therein enumerated.” It does not seem possible that any just objection can lie against either of these clauses. The first amounts merely to a declaration that the compact ought to have the interpretation plainly intended by the parties to it; the other, to a declaration that it ought to have the execution and effect intended by them. If the powers granted be valid, it is solely because they are granted; and if the granted powers are valid because granted, all other powers not granted must not be valid.

The resolution, having taken this view of the federal compact, proceeds to infer “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.”

It appears to your committee to be a plain principle, founded in common sense, illustrated by common practice, and essential to the nature of compacts, that where resort can be had to no tribunal superior to the authority of the parties, the parties themselves must be the rightful judges in the last resort whether the bargain made has been pursued or violated. The Constitution of the United States was formed by the sanction of the states, given by each in its sovereign capacity. It adds to the stability and dignity as well as to the authority of the Constitution that it rests on this legitimate and solid foundation. 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.

It does not follow, however, that because the states as sovereign parties to their constitutional compact must ultimately decide whether it has been violated, that such a decision ought to be interposed either in a hasty manner or on doubtful and inferior occasions. Even in the case of ordinary conventions between different nations, where, by the strict rule of interpretation, a breach of a part may be deemed a breach of the whole, every part being deemed a condition of every other part and of the whole, it is always laid down that the breach must be both wilful and material to justify an application of the rule. But in the case of an intimate and constitutional union, like that of the United States, it is evident that the interposition of the parties in their sovereign capacity can be called for by occasions only deeply and essentially affecting the vital principles of their political system.

The resolution has accordingly guarded against any misapprehension of its object by expressly requiring for such as interposition “the case of a deliberate, palpable and dangerous breach of the Constitution, by the exercise of powers not granted by it.” It must be a case, not of a light and transient nature, but of a nature dangerous to the great purposes for which the Constitution was established. It must be a case, moreover, not obscure or doubtful in its construction, but plain and palpable. Lastly, it must be a case not resulting from a partial consideration or hasty determination, but a case stamped with a final consideration and deliberate adherence. It is not necessary, because the resolution does not require, that the question should be discussed how far the exercise of any particular power ungranted by the Constitution would justify the interposition of the parties to it. As cases might easily be stated which none would contend ought to fall within that description, cases, on the other hand, might, with equal ease, be stated, so flagrant and so fatal as to unite every opinion in placing them within the description.
But the resolution has done more than guard against misconstruction by expressly referring to cases of a deliberate, palpable, and dangerous nature. It specifies the object of the interposition which it contemplates to be solely that of arresting the progress of the evil of usurpation and of maintaining the authorities, rights and liberties appertaining to the states, as parties to the Constitution.

From this view of the resolution, it would seem inconceivable that it can incur any just disapprobation from those who, laying aside all momentary impressions and recollecting the genuine source and object of the federal constitution, shall candidly and accurately interpret the meaning of the General Assembly. If the deliberate exercise of dangerous powers, palpably withheld by the Constitution, could not justify the parties to it in interposing even so far as to arrest the progress of the evil, and thereby to preserve the Constitution itself as well as to provide for the safety of the parties to it, there would be an end to all relief from usurped power, and a direct subversion of the rights specified or recognized under all the state constitutions, as well as a plain denial of the fundamental principle on which our independence itself was declared.

But it is objected that the judicial authority is to be regarded as the sole expositor of the Constitution in the last resort; and it may be asked for what reason the declaration by the General Assembly, supposing it to be theoretically true, could be required at the present day and in so solemn a manner.

On this objection it might be observed, first, that there may be instances of usurped power which the forms of the Constitution would never draw within the control of the judicial department; secondly, that if the decision of the judiciary be raised above the authority of the sovereign parties to the Constitution, the decisions of the other departments, not carried by the forms of the Constitution before the judiciary, must be equally authoritative and final with the decisions of that department. But the proper answer to the objection is, that the resolution of the General Assembly relates to those great and extraordinary cases in which all the forms of the Constitution may prove ineffectual against infractions dangerous to the essential rights of the parties to it. The resolution supposes that dangerous powers not delegated may not only be usurped and executed by the other departments, but that the judicial department also may exercise or sanction dangerous powers beyond the grant of the Constitution; and consequently that the ultimate right of the parties to the Constitution to judge whether the compact has been dangerously violated must extend to violations by one delegated authority as well as by another, by the judiciary as well as by the executive or the legislature.

However true therefore it may be that the judicial department is, in all questions submitted to it by the forms of the Constitution, to decide in the last resort, this resort must necessarily be deemed the last in relation to the authorities of the other departments of the government; not in relation to the rights of the parties to the constitutional compact, from which the judicial as well as the other departments hold their delegated trusts. On any other hypothesis, the delegation of judicial power would annul the authority delegating it; and the concurrence of this department with the others in usurped powers might subvert forever, and beyond the possible reach of any rightful remedy, the very Constitution which all were instituted to preserve.

The truth declared in the resolution being established, the expediency of making the declaration at the present day may safely be left to the temperate consideration and candid judgment of the American public. It will be remembered that a frequent recurrence to fundamental principles is solemnly enjoined by most of the state constitutions, and particularly
by our own, as a necessary safeguard against the danger of degeneracy to which republics are liable, as well as other governments, though in a less degree than others. And a fair comparison of the political doctrines not unfrequent at the present day with those which characterized the epoch of our Revolution, and which form the basis of our republican constitutions, will best determine whether the declaratory recurrence here made to those principles ought to be viewed as unseasonable and improper or as a vigilant discharge of an important duty. The authority of constitutions over governments, and of the sovereignty of the people over constitutions, are truths which are at all times necessary to be kept in mind; and at no time perhaps more necessary than at the present.

The fourth resolution stands as follows:—

That the General Assembly doth also express its deep regret that a spirit has in sundry instances been manifested by the Federal Government to enlarge its powers by forced constructions of the constitutional charter which defines them; and that indications have appeared of a design to expound certain general phrases (which, having been copied from the very limited grant of powers in the former Articles of Confederation were the less liable to be misconstrued) so as to destroy the meaning and effect of the particular enumeration which necessarily explains and limits the general phrases; and so as to consolidate the states by degrees into one sovereignty, the obvious tendency and inevitable result of which would be to transform the present republican system of the United States into an absolute, or at best a mixed monarchy.

The first question to be considered is whether a spirit has in sundry instances been manifested by the Federal Government to enlarge its powers by forced constructions of the constitutional charter.

The General Assembly having declared their opinion merely by regretting in general terms that forced constructions for enlarging the federal powers have taken place, it does not appear to the committee necessary to go into a specification of every instance to which the resolution may allude. The Alien and Sedition Acts being particularly named in a succeeding resolution are of course to be understood as included in the allusion. Omitting others which have less occupied public attention, or been less extensively regarded as unconstitutional, the resolution may be presumed to refer particularly to the bank law, which from the circumstances of its passage as well as the latitude of construction on which it is founded, strikes the attention with singular force; and the carriage tax, distinguished also by circumstances in its history having a similar tendency. Those instances alone, if resulting from forced construction and calculated to enlarge the powers of the Federal Government, as the committee cannot but conceive to be the case, sufficiently warrant this part of the resolution. The committee have not thought it incumbent on them to extend their attention to laws which have been objected to rather as varying the constitutional distribution of powers in the Federal Government than as an absolute enlargement of them; because instances of this sort, however important in their principles and tendencies, do not appear to fall strictly within the text under review.

The other questions presenting themselves are—1. Whether indications have appeared of a design to expound certain general phrases copied from the “Articles of Confederation” so as to destroy the effect of the particular enumeration explaining and limiting their meaning. 2. Whether this exposition would by degrees consolidate the states into one sovereignty. 3. Whether the tendency and result of this consolidation would be to transform the republican system of the United States into a monarchy.
1. The general phrases here meant must be those “of providing for the common defense and general welfare.”

In the “Articles of Confederation,” the phrases are used as follows, in article VIII. “All charges of war, and all other expenses that shall be incurred for the common defense and general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury.”…

In the existing Constitution, they make the following part of section 8. “The Congress shall have power, to lay and collect taxes, duties, imposts and excises to pay the debts, and provide for the common defense and general welfare of the United States.”

This similarity in the use of these phrases in the two great federal charters might well be considered as rendering their meaning less liable to be misconstrued in the latter; because it will scarcely be said that in the former they were ever understood to be either a general grant of power or to authorize the requisition or application of money by the old Congress to the common defense and general welfare except in the cases afterwards enumerated which explained and limited their meaning; and if such was the limited meaning attached to these phrases in the very instrument revised and remodelled by the present Constitution, it can never be supposed that when copied into this Constitution, a different meaning ought to be attached to them.

That notwithstanding this remarkable security against misconstruction, a design has been indicated to expound these phrases in the Constitution so as to destroy the effect of the particular enumeration of powers by which it explains and limits them, must have fallen under the observation of those who have attended to the course of public transactions. Not to multiply proofs on this subject, it will suffice to refer to the debates of the federal legislature in which arguments have on different occasions been drawn with apparent effect from these phrases in their indefinite meaning.

To these indications might be added, without looking farther, the official report on manufactures by the late Secretary of the Treasury, made on the 5th of December, 1791; and the report of a committee of Congress in January 1797 on the promotion of agriculture. In the first of these it is expressly contended to belong “to the discretion of the national legislature to pronounce upon the objects which concern the general welfare and for which, under that description, an appropriation of money is requisite and proper. And there seems to be no room for a doubt that whatever concerns the general interests of learning, of agriculture, of manufactures, and of commerce are within the sphere of the national councils, as far as regards an application of money.” The latter report assumes the same latitude of power in the national councils and applies it to the encouragement of agriculture, by means of a society to be established at the seat of government. Although neither of these reports may have received the sanction of a law carrying it into effect, yet, on the other hand, the extraordinary doctrine contained in both has passed without the slightest positive mark of disapprobation from the authority to which it was addressed.

Now, whether the phrases in question be construed to authorize every measure relating to the common defense and general welfare, as contended by some, or every measure only in which there might be an application of money, as suggested by the caution of others, the effect must substantially be the same, in destroying the import and force of the particular enumeration of powers which follow these general phrases in the Constitution. For it is evident that there is not a single power whatever which may not have some reference to the common defense or the
general welfare, nor a power of any magnitude which in its exercise does not involve or admit an
application of money. The government therefore which possesses power in either one or other of
these extents is a government without the limitations formed by a particular enumeration of
powers; and consequently the meaning and effect of this particular enumeration is destroyed by
the exposition given to these general phrases.

This conclusion will not be affected by an attempt to qualify the power over the “general
welfare” by referring it to cases where the general welfare is beyond the reach of separate
provisions by the individual states; and leaving to these their jurisdictions in cases to which their
separate provisions may be competent. For as the authority of the individual states must in all
cases be incompetent to general regulations operating through the whole, the authority of the
United States would be extended to every object relating to the general welfare which might by
any possibility be provided for by the general authority. This qualifying construction therefore
would have little, if any, tendency to circumscribe the power claimed under the latitude of the
terms “general welfare.”

The true and fair construction of this expression, both in the original and existing federal
compacts, appears to the committee too obvious to be mistaken. In both, the Congress is
authorized to provide money for the common defense and general welfare. In both is subjoined
to this authority an enumeration of the cases to which their powers shall extend. Money cannot
be applied to the general welfare otherwise than by an application of it to some particular
measure conducive to the general welfare. Whenever, therefore, money has been raised by the
general authority, and is to be applied to a particular measure, a question arises whether the
particular measure be within the enumerated authorities vested in Congress. If it be, the money
requisite for it may be applied to it; if it be not, no such application can be made. This fair and
obvious interpretation coincides with, and is enforced by, the clause in the Constitution which
declares that “no money shall be drawn from the treasury, but in consequence of appropriations
by law.” An appropriation of money to the general welfare would be deemed rather a mockery
than an observance of this constitutional injunction.

2. Whether the exposition of the general phrases here combated would not, by degrees,
consolidate the states into one sovereignty, is a question concerning which the committee can
perceive little room for difference of opinion. To consolidate the states into one sovereignty,
nothing more can be wanted than to supercede their respective sovereignties in the cases reserved
to them by extending the sovereignty of the United States to all cases of the “general welfare,”
that is to say, to all cases whatever.

3. That the obvious tendency and inevitable result of a consolidation of the states into one
sovereignty would be to transform the republican system of the United States into a monarchy is
a point which seems to have been sufficiently decided by the general sentiment of America. In
almost every instance of discussion relating to the consolidation in question, its certain tendency
to pave the way to monarchy seems not to have been contested. The prospect of such a
consolidation has formed the only topic of controversy. It would be unnecessary, therefore, for
the committee to dwell long on the reasons which support the position of the General Assembly.
It may not be improper however to remark two consequences evidently flowing from an
extension of the federal powers to every subject falling within the idea of the “general welfare.”

One consequence must be to enlarge the sphere of discretion allotted to the executive
magistrate. Even within the legislative limits properly defined by the Constitution, the difficulty
of accommodating legal regulations to a country so great in extent, and so various in its circumstances, has been much felt; and has led to occasional investments of power in the executive which involve perhaps as large a portion of discretion as can be deemed consistent with the nature of the executive trust. In proportion as the objects of legislative care might be multiplied, would the time allowed for each be diminished, and the difficulty of providing uniform and particular regulations for all be increased. From these sources would necessarily ensue a greater latitude to the agency of that department which is always in existence, and which could best mold regulations of a general nature so as to suit them to the diversity of particular situations. And it is in this latitude, as a supplement to the deficiency of the laws, that the degree of executive prerogative materially consists.

The other consequence would be that of an excessive augmentation of the offices, honors, and emoluments depending on the executive will. Add to the present legitimate stock all those of every description which a consolidation of the states would take from them and turn over to the Federal Government, and the patronage of the executive would necessarily be as much swelled in this case as its prerogative would be in the other.

This disproportionate increase of prerogative and patronage must, evidently, either enable the chief magistrate of the union, by quiet means, to secure his reelection from time to time, and finally to regulate the succession as he might please; or, by giving so transcendent an importance to the office, would render the elections to it so violent and corrupt that the public voice itself might call for an hereditary in place of an elective succession. Whichever of these events might follow, the transformation of the republican system of the United States into a monarchy, anticipated by the General Assembly from a consolidation of the states into one sovereignty, would be equally accomplished; and whether it would be into a mixed or an absolute monarchy might depend on too many contingencies to admit of any certain foresight.

The resolution next in order is contained in the following terms:

That the General Assembly doth particularly protest against the palpable and alarming infractions of the Constitution in the two late cases of the “Alien and Sedition Acts,” passed at the last session of Congress; the first of which exercises a power nowhere delegated to the Federal Government, and which by uniting legislative and judicial powers to those of executive, subverts the general principles of a free government, as well as the particular organization and positive provisions of the federal constitution; and the other of which acts exercises in like manner a power not delegated by the Constitution, but on the contrary, expressly and positively forbidden by one of the amendments thereto; a power which, more than any other, ought to produce universal alarm, because it is leveled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right…

All [the] principles of the only preventive justice known to American jurisprudence are violated by the Alien Act. The ground of suspicion is to be judged of, not by any judicial authority, but by the executive magistrate alone; no oath or affirmation is required; if the suspicion be held reasonable by the President, he may order the suspected alien to depart the territory of the United States without the opportunity of avoiding the sentence by finding pledges for his future good conduct; as the President may limit the time of departure as he pleases, the benefit of the writ of habeas corpus may be suspended with respect to the party, although the Constitution ordains that it shall not be suspended unless when the public safety may require it in...
case of rebellion or invasion, neither of which existed at the passage of the act: And the party being, under the sentence of the President, either removed from the United States, or being punished by imprisonment or disqualification ever to become a citizen on conviction of not obeying the order of removal, he cannot be discharged from the proceedings against him and restored to the benefits of his former situation, although the highest judicial authority should see the most sufficient cause for it… .

One argument offered in justification of this power exercised over aliens is that the admission of them into the country being of favor not of right, the favor is at all times revocable…. .

But it cannot be a true inference that because the admission of an alien is a favor, the favor may be revoked at pleasure. A grant of land to an individual may be of favor not of right; but the moment the grant is made, the favor becomes a right, and must be forfeited before it can be taken away. To pardon a malefactor may be a favor, but the pardon is not, on that account, the less irrevocable. To admit an alien to naturalization is as much a favor as to admit him to reside in the country, yet it cannot be pretended that a person naturalized can be deprived of the benefit, any more than a native citizen can be disfranchised.

Again it is said that aliens not being parties to the Constitution, the rights and privileges which it secures cannot be at all claimed by them.

To this reasoning also, it might be answered that, although aliens are not parties to the Constitution, it does not follow that the Constitution has vested in Congress an absolute power over them. The parties to the Constitution may have granted, or retained, or modified the power over aliens without regard to that particular consideration.

But a more direct reply is that it does not follow, because aliens are not parties to the Constitution as citizens are parties to it, that whilst they actually conform to it, they have no right to its protection. Aliens are not more parties to the laws than they are parties to the Constitution; yet it will not be disputed that, as they owe on one hand a temporary obedience, they are entitled in return to their protection and advantage…. .

The second object against which the resolution protests is the Sedition Act.

Of this act it is affirmed: 1. That it exercises in like manner a power not delegated by the Constitution. 2d. That the power, on the contrary, is expressly and positively forbidden by one of the amendments to the Constitution. 3d. That this is a power which more than any other ought to produce universal alarm because it is leveled against that right of freely examining public characters and measures, and of free communication thereon, which has ever been justly deemed the only effectual guardian of every other right.

I. That it exercises a power not delegated by the Constitution.

Here, again, it will be proper to recollect that the Federal Government being composed of powers specifically granted, with a reservation of all others to the states or to the people, the positive authority under which the Sedition Act could be passed must be produced by those who assert its constitutionality. In what part of the Constitution then is this authority to be found?

Several attempts have been made to answer this question, which will be examined in their order. The committee will begin with one which has filled them with equal astonishment and apprehension; and which, they cannot but persuade themselves, must have the same effect on all
who will consider it with coolness and impartiality, and with a reverence for our Constitution in
the true character in which it issued from the sovereign authority of the people. The committee
refer to the doctrine lately advanced as a sanction to the Sedition Act: “that the common or
unwritten law,” a law of vast extent and complexity, and embracing almost every possible
subject of legislation, both civil and criminal, “makes a part of the law of these states, in their
united and national capacity.” …

Prior to the Revolution, it is certain that the common law under different limitations made
a part of the colonial codes. But whether it be understood that the original colonists brought the
law with them or made it their law by adoption, it is equally certain that it was the separate law
of each colony within its respective limits, and was unknown to them as a law pervading and
operating through the whole, as one society.

It could not possibly be otherwise. The common law was not the same in any two of the
colonies; in some, the modifications were materially and extensively different. There was no
common legislature by which a common will could be expressed in the form of a law; nor any
common magistracy by which such a law could be carried into practice. The will of each colony
alone and separately had its organs for these purposes.

This stage of our political history furnishes no foothold for the patrons of this new
doctrine.

Did, then, the principle or operation of the great event which made the colonies
independent states imply or introduce the common law as a law of the union?

The fundamental principle of the revolution was that the colonies were co-ordinate
members with each other, and with Great-Britain, of an Empire united by a common Executive
Sovereign, but not united by any common Legislative Sovereign. The legislative power was
maintained to be as complete in each American Parliament as in the British Parliament. And the
royal prerogative was in force in each colony by virtue of its acknowledging the King for its
executive magistrate, as it was in Great-Britain by virtue of a like acknowledgment there. A
denial of these principles by Great-Britain, and the assertion of them by America, produced the
revolution… .

Such being the ground of our revolution, no support nor color can be drawn from it for
the doctrine that the common law is binding on these states as one society. The doctrine, on the
contrary, is evidently repugnant to the fundamental principle of the revolution.

The Articles of Confederation are the next source of information on this subject.

In the interval between the commencement of the revolution and the final ratification of
these Articles, the nature and extent of the union was determined by the circumstances of the
crisis rather than by any accurate delineation of the general authority. It will not be alledged that
the “common law” could have had any legitimate birth as a law of the United States during that
state of things. If it came as such into existence at all, the charter of confederation must have
been its parent.

Here again, however, its pretensions are absolutely destitute of foundation. This
instrument does not contain a sentence or syllable that can be tortured into a countenance of the
idea that the parties to it were with respect to the objects of the common law to form one
community. No such law is named or implied, or alluded to, as being in force, or as brought into
force by that compact. No provision is made by which such a law could be carried into operation;
whilst on the other hand, every such inference or pretext is absolutely precluded by article 2d, which declares “that each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.”

Is this exclusion revoked, and the common law introduced as a national law, by the present Constitution of the United States? This is the final question to be examined.

It is readily admitted that particular parts of the common law may have a sanction from the Constitution, so far as they are necessarily comprehended in the technical phrases which express the powers delegated to the government; and so far, also, as such other parts may be adopted as necessary and proper for carrying into execution the powers expressly delegated. But the question does not relate to either of these portions of the common law. It relates to the common law beyond these limitations.

The only part of the Constitution which seems to have been relied on in this case is the 2d sect. of art. III. “The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority.”

It has been asked what cases distinct from those arising under the laws and treaties of the United States can arise under the Constitution other than those arising under the common law; and it is inferred that the common law is accordingly adopted or recognized by the Constitution.

Never perhaps was so broad a construction applied to a text so clearly unsusceptible of it. … Rather than resort to a construction affecting so essentially the whole character of the government, it would perhaps be more rational to consider the expression as a mere pleonasm or inadvertence. But it is not necessary to decide on such a dilemma. The expression is fully satisfied, and its accuracy justified, by two descriptions of cases to which the judicial authority is extended, and neither of which implies that the common law is the law of the United States. One of these descriptions comprehends the cases growing out of the restrictions on the legislative power of the states. For example, it is provided that “no state shall emit bills of credit,” or “make any thing but gold and silver coin a tender in payment of debts.” Should this prohibition be violated, and a suit between citizens of the same state be the consequence, this would be a case arising under the Constitution before the judicial power of the United States. A second description comprehends suits between citizens and foreigners, or citizens of different states, to be decided according to the state or foreign laws; but submitted by the Constitution to the judicial power of the United States; the judicial power being, in several instances, extended beyond the legislative power of the United States… .

To this explanation of the text, the following observations may be added.

The expression, cases in law and equity, is manifestly confined to cases of a civil nature; and would exclude cases of criminal jurisdiction. Criminal cases in law and equity would be a language unknown to the law… .

It is further to be considered, that even if this part of the Constitution could be strained into an application to every common law case, criminal as well as civil, it could have no effect in justifying the Sedition Act; which is an exercise of legislative, and not of judicial power: and it is the judicial power only of which the extent is defined in this part of the Constitution… .
In aid of these objections, the difficulties and confusion inseparable from a constructive introduction of the common law would afford powerful reasons against it.

Is it to be the common law with or without the British statutes?

If without the statutory amendments, the vices of the code would be insupportable.

If with these amendments, what period is to be fixed for limiting the British authority over our laws?

Is it to be the date of the eldest or the youngest of the colonies?

Or are the dates to be thrown together and a medium deduced?

Or is our independence to be taken for the date?

Is, again, regard to be had to the various changes in the common law made by the local codes of America?

Is regard to be had to such changes, subsequent, as well as prior, to the establishment of the Constitution?

Is regard to be had to future as well as past changes?

Is law to be different in every state, as differently modified by its code; or are the modifications of any particular state to be applied to all?

And on the latter supposition, which among the state codes would form the standard?

Questions of this sort might be multiplied with as much ease as there would be difficulty in answering them.

The consequences flowing from the proposed construction furnish other objections equally conclusive….

If it be understood that the common law is established by the Constitution, it follows that no part of the law can be altered by the legislature; such of the statutes already passed as may be repugnant thereto would be nullified, particularly the “Sedition Act” itself which boasts of being a melioration of the common law; and the whole code with all its incongruities, barbarisms, and bloody maxims would be inviolably saddled on the good people of the United States.

Should this consequence be rejected, and the common law be held, like other laws, liable to revision and alteration by the authority of Congress, it then follows that the authority of Congress is co-extensive with the objects of common law; that is to say, with every object of legislation: For to every such object does some branch or other of the common law extend. The authority of Congress would therefore be no longer under the limitations marked out in the Constitution. They would be authorized to legislate in all cases whatsoever….

The consequence of admitting the common law as the law of the United States on the authority of the individual states is as obvious as it would be fatal. As this law relates to every subject of legislation, and would be paramount to the constitutions and laws of the states, the admission of it would overwhelm the residuary sovereignty of the states and by one constructive operation new model the whole political fabric of the country.

From the review thus taken of the situation of the American colonies prior to their independence; of the effect of this event on their situation; of the nature and import of the
Articles of Confederation; of the true meaning of the passage in the existing Constitution from which the common law has been deduced; of the difficulties and uncertainties incident to the doctrine; and of its vast consequences in extending the powers of the Federal Government and in superceding the authorities of the state governments; the committee feel the utmost confidence in concluding that the common law never was, nor by any fair construction, ever can be, deemed a law for the American people as one community; and they indulge the strongest expectation that the same conclusion will finally be drawn by all candid and accurate inquirers into the subject. It is indeed distressing to reflect that it ever should have been made a question whether the Constitution, on the whole face of which is seen so much labor to enumerate and define the several objects of federal power, could intend to introduce in the lump, in an indirect manner, and by a forced construction of a few phrases, the vast and multifarious jurisdiction involved in the common law; a law filling so many ample volumes; a law overspreading the entire field of legislation; and a law that would sap the foundation of the Constitution as a system of limited and specified powers. A severer reproach could not in the opinion of the committee be thrown on the Constitution, on those who framed, or on those who established it, than such a supposition would throw on them.

The argument then drawn from the common law, on the ground of its being adopted or recognized by the Constitution, being inapplicable to the Sedition Act, the committee will proceed to examine the other arguments which have been founded on the Constitution.

They will waste but little time on the attempt to cover the act by the preamble to the Constitution; it being contrary to every acknowledged rule of construction to set up this part of an instrument in opposition to the plain meaning expressed in the body of the instrument. A preamble usually contains the general motives or reasons for the particular regulations or measures which follow it; and is always understood to be explained and limited by them. In the present instance, a contrary interpretation would have the inadmissible effect of rendering nugatory or improper every part of the Constitution which succeeds the preamble.

The paragraph in art. I, sect. 8, which contains the power to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare, having been already examined, will also require no particular attention in this place. It will have been seen that in its fair and consistent meaning, it cannot enlarge the enumerated powers vested in Congress.

The part of the Constitution which seems most to be recurred to in defense of the “Sedition Act,” is the last clause of the above section, empowering Congress “to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.”

The plain import of this clause is that Congress shall have all the incidental or instrumental powers necessary and proper for carrying into execution all the express powers; whether they be vested in the government of the United States more collectively or in the several departments or officers thereof. It is not a grant of new powers to Congress, but merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those otherwise granted are included in the grant.

Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is whether the power be expressed in the Constitution. If it be, the
question is decided. If it be not expressed, the next inquiry must be whether it is properly an incident to an express power, and necessary to its execution. If it be, it may be exercised by Congress. If it be not, Congress cannot exercise it.

Let the question be asked, then, whether the power over the press exercised in the “Sedition Act” be found among the powers expressly vested in the Congress? This is not pretended.

Is there any express power for executing which it is a necessary and proper power?

The power which has been selected, as least remote, in answer to this question, is that of “suppressing insurrections”; which is said to imply a power to prevent insurrections, by punishing whatever may lead or tend to them. But it surely cannot, with the least plausibility, be said that a regulation of the press and a punishment of libels are exercises of a power to suppress insurrections. The most that could be said would be that the punishment of libels, if it had the tendency ascribed to it, might prevent the occasion of passing or executing laws necessary and proper for the suppression of insurrections.

Has the Federal Government no power, then, to prevent as well as to punish resistance to the laws?

They have the power which the Constitution deemed most proper in their hands for the purpose. The Congress has power, before it happens, to pass laws for punishing it; and the Executive and Judiciary have power to enforce those laws when it does happen.

It must be recollected by many, and could be shown to the satisfaction of all, that the construction here put on the terms “necessary and proper” is precisely the construction which prevailed during the discussions and ratifications of the Constitution. It may be added, and cannot too often be repeated, that it is a construction absolutely necessary to maintain their consistency with the peculiar character of the government, as possessed of particular and defined powers only; not of the general and indefinite powers vested in ordinary governments. For if the power to suppress insurrections includes a power to punish libels; or if the power to punish includes a power to prevent, by all means that may have that tendency; such is the relation and influence among the most remote subjects of legislation that a power over a very few would carry with it a power over all. And it must be wholly immaterial whether unlimited powers be exercised under the name of unlimited powers or be exercised under the name of unlimited means of carrying into execution limited powers.

This branch of the subject will be closed with a reflection which must have weight with all; but more especially with those who place peculiar reliance on the judicial exposition of the Constitution as the bulwark provided against undue extensions of the legislative power. If it be understood that the powers implied in the specified powers have an immediate and appropriate relation to them, as means necessary and proper for carrying them into execution, questions on the constitutionality of laws passed for this purpose will be of a nature sufficiently precise and determinate for judicial cognizance and control. If, on the other hand, Congress are not limited in the choice of means by any such appropriate relation of them to the specified powers; but may employ all such means as they may deem fitted to prevent as well as to punish crimes subjected to their authority; such as may have a tendency only to promote an object for which they are authorized to provide; every one must perceive that questions relating to means of this sort must
be questions of mere policy and expediency; on which legislative discretion alone can decide, and from which the judicial interposition and control are completely excluded.

II. The next point which the resolution requires to be proved is that the power over the press exercised by the Sedition Act is positively forbidden by one of the amendments to the Constitution.

The amendment stands in these words—"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

In the attempts to vindicate the "Sedition Act" it has been contended, 1. That the "freedom of the press" is to be determined by the meaning of these terms in the common law. 2. That the article supposes the power over the press to be in Congress, and prohibits them only from abridging the freedom allowed to it by the common law.

Although it will be shown, in examining the second of these positions, that the amendment is a denial to Congress of all power over the press; it may not be useless to make the following observations on the first of them… .

The freedom of the press under the common law is, in the defenses of the Sedition Act, made to consist in an exemption from all previous restraint on printed publications, by persons authorized to inspect and prohibit them. It appears to the committee that this idea of the freedom of the press can never be admitted to be the American idea of it: since a law inflicting penalties on printed publications would have a similar effect with a law authorizing a previous restraint on them. It would seem a mockery to say that no law should be passed preventing publications from being made, but that laws might be passed for punishing them in case they should be made.

The essential difference between the British government and the American constitutions will place this subject in the clearest light.

In the British government, the danger of encroachments on the rights of the people is understood to be confined to the executive magistrate. The representatives of the people in the legislature are not only exempt themselves from distrust, but are considered as sufficient guardians of the rights of their constituents against the danger from the executive. Hence it is a principle that the parliament is unlimited in its power; or in their own language, is omnipotent. Hence, too, all the ramparts for protecting the rights of the people, such as their magna charta, their bill of rights, etc. are not reared against the parliament, but against the royal prerogative. They are merely legislative precautions against executive usurpations. Under such a government as this, an exemption of the press from previous restraint by licensers appointed by the king is all the freedom that can be secured to it.

In the United States, the case is altogether different. The people, not the government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitations of power. Encroachments are regarded as possible from the one as well as from the other. Hence in the United States, the great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative; but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt, not only from previous restraint by the executive, as in Great Britain; but from
legislative restraint also; and this exemption, to be effectual, must be an exemption, not only from the previous inspection of licensers, but from the subsequent penalty of laws.

The state of the press, therefore, under the common law, cannot in this point of view, be the standard of its freedom in the United States.

But there is another view under which it may be necessary to consider this subject. It may be alledged that although the security for the freedom of the press be different in Great Britain and in this country; being a legal security only in the former, and a constitutional security in the latter; and although there may be a further difference in an extension of the freedom of the press, here, beyond an exemption from previous restraint to an exemption from subsequent penalties also; yet that the actual legal freedom of the press, under the common law, must determine the degree of freedom which is meant by the terms and which is constitutionally secured against both previous and subsequent restraints.

The committee are not unaware of the difficulty of all general questions which may turn on the proper boundary between the liberty and licentiousness of the press. They will leave it therefore for consideration only how far the difference between the nature of the British government and the nature of the American governments, and the practice under the latter, may show the degree of rigor in the former to be inapplicable to, and not obligatory in, the latter.

The nature of governments elective, limited, and responsible in all their branches may well be supposed to require a greater freedom of animadversion than might be tolerated by the genius of such a government as that of Great Britain. In the latter, it is a maxim that the king, a hereditary, not a responsible magistrate, can do no wrong; and that the legislature, which in two-thirds of its composition is also hereditary, not responsible, can do what it pleases. In the United States, the executive magistrates are not held to be infallible, nor the legislatures to be omnipotent; and both being elective, are both responsible. Is it not natural and necessary under such different circumstances that a different degree of freedom in the use of the press should be contemplated?

Is not such an inference favored by what is observable in Great Britain itself? Notwithstanding the general doctrine of the common law on the subject of the press, and the occasional punishment of those who use it with a freedom offensive to the government; it is well known that with respect to the responsible members of the government, where the reasons operating here become applicable there; the freedom exercised by the press, and protected by the public opinion, far exceeds the limits prescribed by the ordinary rules of law. The ministry, who are responsible to impeachment, are at all times animadverted on by the press, with peculiar freedom; and during the elections for the House of Commons, the other responsible part of the government, the press is employed with as little reserve towards the candidates.

The practice in America must be entitled to much more respect. In every state, probably, in the union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing, the freedom of the press has stood; on this footing it yet stands. And it will not be a breach either of truth or of candor to say that no persons or presses are in the habit of more unrestrained animadversions on the proceedings and functionaries of the state governments than the persons and presses most zealous in vindicating the act of Congress for punishing similar animadversions on the government of the United States.
The last remark will not be understood as claiming for the state governments an immunity greater than they have heretofore enjoyed. Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the states that it is better to leave a few of its noxious branches to their luxuriant growth than, by pruning them away, to injure the vigor of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, checkered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficent source, the United States owe much of the lights which conducted them to the rank of a free and independent nation; and which have improved their political system into a shape so auspicious to their happiness. Had “Sedition Acts,” forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press; might not the United States have been languishing at this day under the infirmities of a sick confederation? Might they not possibly be miserable colonies, groaning under a foreign yoke?

To these observations one fact will be added which demonstrates that the common law cannot be admitted as the universal expositor of American terms which may be the same with those contained in that law. The freedom of conscience and of religion are found in the same instruments which assert the freedom of the press. It will never be admitted that the meaning of the former, in the common law of England, is to limit their meaning in the United States.

Whatever weight may be allowed to these considerations, the committee do not, however, by any means, intend to rest the question on them. They contend that the article of amendment, instead of supposing in Congress a power that might be exercised over the press, provided its freedom be not abridged, was meant as a positive denial to Congress of any power whatever on the subject.

To demonstrate that this was the true object of the article, it will be sufficient to recall the circumstances which led to it, and to refer to the explanation accompanying the article.

When the Constitution was under the discussions which preceded its ratification, it is well known that great apprehensions were expressed by many lest the omission of some positive exception from the powers delegated of certain rights, and of the freedom of the press particularly, might expose them to the danger of being drawn by construction within some of the powers vested in Congress; more especially of the power to make all laws necessary and proper for carrying their other powers into execution. In reply to this objection, it was invariably urged to be a fundamental and characteristic principle of the Constitution; that all powers not given by it were reserved; that no powers were given beyond those enumerated in the Constitution and such as were fairly incident to them; that the power over the rights in question, and particularly over the press, was neither among the enumerated powers nor incident to any of them; and consequently that an exercise of any such power would be a manifest usurpation. It is painful to remark how much the arguments now employed in behalf of the Sedition Act are at variance with the reasoning which then justified the Constitution, and invited its ratification.

From this posture of the subject resulted the interesting question in so many of the conventions whether the doubts and dangers ascribed to the Constitution should be removed by any amendments previous to the ratification, or be postponed, in confidence that as far as they might be proper, they would be introduced in the form provided by the Constitution. The latter
course was adopted; and in most of the states, the ratifications were followed by propositions and instructions for rendering the Constitution more explicit and more safe to the rights not meant to be delegated by it. Among those rights, the freedom of the press, in most instances, is particularly and emphatically mentioned. The firm and very pointed manner in which it is asserted in the proceedings of the convention of this state will be hereafter seen.

In pursuance of the wishes thus expressed, the first Congress that assembled under the Constitution proposed certain amendments which have since, by the necessary ratifications, been made a part of it; among which amendments is the article containing, among other prohibitions on the Congress, an express declaration that they should make no law abridging the freedom of the press.

Without tracing farther the evidence on this subject, it would seem scarcely possible to doubt that no power whatever over the press was supposed to be delegated by the Constitution as it originally stood; and that the amendment was intended as a positive and absolute reservation of it.

But the evidence is still stronger. The proposition of amendments made by Congress is introduced in the following terms: “The Conventions of a number of the states having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstructions or abuse of its powers, that further declaratory and restrictive clauses should be added; and as extending the ground of public confidence in the government, will best ensure the beneficent ends of its institution.”

Here is the most satisfactory and authentic proof that the several amendments proposed were to be considered as either declaratory or restrictive; and whether the one or the other, as corresponding with the desire expressed by a number of the states, and as extending the ground of public confidence in the government.

Under any other construction of the amendment relating to the press than that it declared the press to be wholly exempt from the power of Congress, the amendment could neither be said to correspond with the desire expressed by a number of the states, nor be calculated to extend the ground of public confidence in the government.

Nay more; the construction employed to justify the “Sedition Act” would exhibit a phenomenon without a parallel in the political world. It would exhibit a number of respectable states as denying first that any power over the press was delegated by the Constitution; as proposing next, that an amendment to it should explicitly declare that no such power was delegated; and finally, as concurring in an amendment actually recognizing or delegating such a power.

Is then the Federal Government, it will be asked, destitute of every authority for restraining the licentiousness of the press, and for shielding itself against the libellous attacks which may be made on those who administer it?

The Constitution alone can answer this question. If no such power be expressly delegated, and it be not both necessary and proper to carry into execution an express power; above all, if it be expressly forbidden by a declaratory amendment to the Constitution, the answer must be that the Federal Government is destitute of all such authority.

And might it not be asked in turn, whether it is not more probable, under all the circumstances which have been reviewed, that the authority should be withheld by the
Constitution than that it should be left to a vague and violent construction: whilst so much pains were bestowed in enumerating other powers, and so many less important powers are included in the enumeration.

Might it not be likewise asked, whether the anxious circumspection which dictated so many peculiar limitations on the general authority would be unlikely to exempt the press altogether from that authority? The peculiar magnitude of some of the powers necessarily committed to the Federal Government; the peculiar duration required for the functions of some of its departments; the peculiar distance of the seat of its proceedings from the great body of its constituents; and the peculiar difficulty of circulating an adequate knowledge of them through any other channel; will not these considerations, some or other of which produced other exceptions from the powers of ordinary governments, all together, account for the policy of binding the hand of the Federal Government from touching the channel which alone can give efficacy to its responsibility to its constituents; and of leaving those who administer it to a remedy for injured reputations under the same laws and in the same tribunals which protect their lives, their liberties, and their properties.

But the question does not turn either on the wisdom of the Constitution or on the policy which gave rise to its particular organization. It turns on the actual meaning of the instrument; by which it has appeared that a power over the press is clearly excluded from the number of powers delegated to the Federal Government.

III. And in the opinion of the committee well may it be said, as the resolution concludes with saying, that the unconstitutional power exercised over the press by the “Sedition Act” ought “more than any other, to produce universal alarm; because it is leveled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.”

Without scrutinizing minutely into all the provisions of the “Sedition Act” it will be sufficient to cite so much of section 2. as follows: “And be it further enacted, that 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 an intent to defame the said government, or either house of the said Congress, or the 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, etc. 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.”

On this part of the act the following observations present themselves.

1. The Constitution supposes that the President, the Congress, and each of its houses, may not discharge their trusts, either from defect of judgment or other causes. Hence, they are all made responsible to their constituents at the returning periods of election; and the President, who is singly entrusted with very great powers, is, as a further guard, subjected to an intermediate impeachment.
2. Should it happen, as the Constitution supposes it may happen, that either of these branches of the government may not have duly discharged its trust; it is natural and proper that, according to the cause and degree of their faults, they should be brought into contempt or disrepute, and incur the hatred of the people.

3. Whether it has, in any case, happened that the proceedings of either or all of those branches evinces such a violation of duty as to justify a contempt, a disrepute or hatred among the people, can only be determined by a free examination thereof, and a free communication among the people thereon.

4. Whenever it may have actually happened that proceedings of this sort are chargeable on all or either of the branches of the government, it is the duty as well as right of intelligent and faithful citizens to discuss and promulge them freely, as well to control them by the censorship of the public opinion as to promote a remedy according to the rules of the Constitution. And it cannot be avoided that those who are to apply the remedy must feel, in some degree, a contempt or hatred against the transgressing party.

5. As the act was passed on July 14, 1798, and is to be in force until March 3, 1801, it was of course that during its continuance, two elections of the entire House of Representatives, an election of a part of the Senate, and an election of a President were to take place.

6. That consequently, during all these elections, intended by the Constitution to preserve the purity or to purge the faults of the administration, the great remedial rights of the people were to be exercised, and the responsibility of their public agents to be screened, under the penalties of this act.

May it not be asked of every intelligent friend to the liberties of his country whether, the power exercised in such an act as this ought not to produce great and universal alarm? Whether a rigid execution of such an act, in time past, would not have repressed that information and communication among the people which is indispensable to the just exercise of their electoral rights? And whether such an act, if made perpetual and enforced with rigor, would not, in time to come, either destroy our free system of government or prepare a convulsion that might prove equally fatal to it.

In answer to such questions, it has been pleaded that the writings and publications forbidden by the act are those only which are false and malicious, and intended to defame; and merit is claimed for the privilege allowed to authors to justify, by proving the truth of their publications, and for the limitations to which the sentence of fine and imprisonment is subjected.

To those who concurred in the act under the extraordinary belief that the option lay between the passing of such an act and leaving in force the common law of libels, which punishes truth equally with falsehood, and submits the fine and imprisonment to the indefinite discretion of the court, the merit of good intentions ought surely not to be refused. A like merit may perhaps be due for the discontinuance of the corporal punishment which the common law also leaves to the discretion of the court. This merit of intention, however, would have been greater, if the several mitigations had not been limited to so short a period; and the apparent inconsistency would have been avoided between justifying the act at one time by contrasting it with the rigors of the common law otherwise in force; and at another time by appealing to the nature of the crisis as requiring the temporary rigor exerted by the act.
But whatever may have been the meritorious intentions of all or any who contributed to the Sedition Act; a very few reflections will prove that its baneful tendency is little diminished by the privilege of giving in evidence the truth of the matter contained in political writings.

In the first place, where simple and naked facts alone are in question, there is sufficient difficulty in some cases, and sufficient trouble and vexation in all, of meeting a prosecution from the government with the full and formal proof necessary in a court of law.

But in the next place, it must be obvious to the plainest minds that opinions, and inferences, and conjectural observations are not only in many cases inseparable from the facts, but may often be more the objects of the prosecution than the facts themselves; or may even be altogether abstracted from particular facts; and that opinions and inferences and conjectural observations cannot be subjects of that kind of proof which appertains to facts before a court of law.

Again, it is no less obvious that the intent to defame or bring into contempt or disrepute or hatred, which is made a condition of the offense created by the act, cannot prevent its pernicious influence on the freedom of the press. For omitting the inquiry how far the malice of the intent is an inference of the law from the mere publication, it is manifestly impossible to punish the intent to bring those who administer the government into disrepute or contempt without striking at the right of freely discussing public characters and measures: because those who engage in such discussions must expect and intend to excite these unfavorable sentiments so far as they may be thought to be deserved. To prohibit therefore the intent to excite those unfavorable sentiments against those who administer the government, is equivalent to a prohibition of the actual excitement of them; and to prohibit the actual excitement of them, is equivalent to a prohibition of discussions having that tendency and effect; which, again, is equivalent to a protection of those who administer the government if they should at any time deserve the contempt or hatred of the people against being exposed to it by free animadversions on their characters and conduct. Nor can there be a doubt, if those in public trust be shielded by penal laws from such strictures of the press as may expose them to contempt or disrepute or hatred, where they may deserve it, that in exact proportion as they may deserve to be exposed will be the certainty and criminality of the intent to expose them, and the vigilance of prosecuting and punishing it; nor a doubt that a government thus entrenched in penal statutes against the just and natural effects of a culpable administration will easily evade the responsibility which is essential to a faithful discharge of its duty.

Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust; and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively. It has been seen that a number of important elections will take place whilst the act is in force; although it should not be continued beyond the term to which it is limited. Should there happen, then, as is extremely probable in relation to some or other of the branches of the government, to be competitions between those who are and those who are not members of the government; what will be the situations of the competitors? Not equal; because the characters of the former will be covered by the “Sedition Act” from animadversions exposing them to disrepute among the people; whilst the latter may be exposed to the contempt and hatred of the people without a violation of the act. What will be the situation of the people? Not free; because they will be compelled to make their election between
competitors whose pretensions they are not permitted by the act equally to examine, to discuss, and to ascertain. And from both these situations, will not those in power derive an undue advantage for continuing themselves in it; which by impairing the right of election, endangers the blessings of the government founded on it.

It is with justice, therefore, that the General Assembly hath affirmed in the resolution as well that the right of freely examining public characters and measures, and of free communication thereon, is the only effectual guardian of every other right; as that this particular right is leveled at by the power exercised in the “Sedition Act.”

The act of ratification by Virginia … stands in the ensuing form.

We, the Delegates of the people of Virginia, duly elected in pursuance of a recommendation from the General Assembly, and now met in Convention, having fully and freely investigated and discussed the proceedings of the federal convention, and being prepared as well as the most mature deliberation hath enabled us, to decide thereon; DO, in the name and in behalf of the people of Virginia, declare and make known, that the powers granted under the Constitution, being derived from the people of the United States, may be resumed by them whenever the same shall be perverted to their injury or oppression; and that every power not granted thereby remains with them and at their will. That therefore, no right of any denomination can be cancelled, abridged, restrained or modified, by the Congress, by the Senate or House of Representatives acting in any capacity, by the President, or any department or officer of the United States, except in those instances in which power is given by the Constitution for those purposes; and, that among other essential rights, the liberty of conscience and of the press, cannot be cancelled, abridged, restrained or modified by any authority of the United States.

Here is an express and solemn declaration by the convention of the state that they ratified the Constitution in the sense that no right of any denomination can be cancelled, abridged, restrained or modified by the government of the United States or any part of it, except in those instances in which power is given by the Constitution; and in the sense particularly, “that among other essential rights, the liberty of conscience and freedom of the press cannot be cancelled, abridged, restrained or modified, by any authority of the United States.”

Words could not well express in a fuller or more forcible manner the understanding of the convention that the liberty of conscience and the freedom of the press were equally and completely exempted from all authority whatever of the United States.

Under an anxiety to guard more effectually these rights against every possible danger, the convention, after ratifying the Constitution, proceeded to prefix to certain amendments proposed by them a declaration of rights, in which are two articles providing, the one for the liberty of conscience, the other for the freedom of speech and of the press.

Similar recommendations having proceeded from a number of other states, and Congress, as has been seen, having in consequence thereof, and with a view to extend the ground of public confidence, proposed among other declaratory and restrictive clauses, a clause expressly securing the liberty of conscience and of the press; and Virginia having concurred in the ratifications which made them a part of the Constitution; it will remain with a candid public to decide whether it would not mark an inconsistency and degeneracy if an indifference were now shown to a palpable violation of one of those rights, the freedom of the press; and to a precedent therein, which may be fatal to the other, the free exercise of religion...
It has been said that it belongs to the judiciary of the United States, and not to the state legislatures, to declare the meaning of the Federal Constitution.

But a declaration that proceedings of the Federal Government are not warranted by the Constitution is a novelty neither among the citizens nor among the legislatures of the states; nor are the citizens or the legislature of Virginia singular in the example of it.

Nor can the declarations of either, whether affirming or denying the constitutionality of measures of the Federal Government; or whether made before or after judicial decisions thereon, be deemed, in any point of view, an assumption of the office of the judge. The declarations in such cases are expressions of opinion, unaccompanied with any other effect than what they may produce on opinion, by exciting reflection. The expositions of the judiciary, on the other hand, are carried into immediate effect by force. The former may lead to a change in the legislative expression of the general will; possibly to a change in the opinion of the judiciary: the latter enforces the general will whilst that will and that opinion continue unchanged.

And if there be no impropriety in declaring the unconstitutionality of proceedings in the Federal Government, where can be the impropriety of communicating the declaration to other states and inviting their concurrence in a like declaration? What is allowable for one must be allowable for all; and a free communication among the states, where the Constitution imposes no restraint, is as allowable among the state governments as among other public bodies or private citizens. This consideration derives a weight that cannot be denied to it from the relation of the state legislatures to the federal legislature, as the immediate constituents of one of its branches.

The legislatures of the states have a right, also, to originate amendments to the Constitution, by a concurrence of two thirds of the whole number, in applications to Congress for the purpose. When new states are to be formed by a junction of two or more states, or parts of states, the legislatures of the states concerned are, as well as Congress, to concur in the measure. The states have a right, also, to enter into agreements or compacts with the consent of Congress. In all such cases, a communication among them results from the object which is common to them.

It is lastly to be seen, whether the confidence expressed by the resolution that the necessary and proper measures would be taken by the other states for cooperating with Virginia in maintaining the rights reserved to the states, or to the people, be in any degree liable to the objections which have been raised against it.

If it be liable to objection, it must be because either the object or the means are objectionable.

The object being to maintain what the Constitution has ordained is in itself a laudable object.

The means are expressed in the terms “the necessary and proper measures.” A proper object was to be pursued, by means both necessary and proper.

To find an objection, then, it must be shown that some meaning was annexed to these general terms which was not proper; and for this purpose, either that the means used by the General Assembly were an example of improper means, or that there were no proper means to which the terms could refer.
In the example given by the state of declaring the Alien and Sedition Acts to be unconstitutional, and of communicating the declaration to the other states, no trace of improper means has appeared. And if the other states had concurred in making a like declaration, supported too by the numerous applications flowing immediately from the people, it can scarcely be doubted that these simple means would have been as sufficient as they are unexceptionable.

It is no less certain that other means might have been employed, which are strictly within the limits of the Constitution. The legislatures of the states might have made a direct representation to Congress, with a view to obtain a rescinding of the two offensive acts; or they might have represented to their respective senators in Congress their wish that two thirds thereof would propose an explanatory amendment to the Constitution; or two thirds of themselves, if such had been their option, might, by an application to Congress, have obtained a convention for the same object.

These several means, though not equally eligible in themselves, nor probably to the states, were all constitutionally open for consideration. And if the General Assembly, after declaring the two acts to be unconstitutional, the first and most obvious proceeding on the subject, did not undertake to point out to the other states a choice among the farther measures that might become necessary and proper, the reserve will not be misconstrued by liberal minds into any culpable imputation.

These observations appear to form a satisfactory reply to every objection which is not founded on a misconception of the terms employed in the resolutions. There is one other, however, which may be of too much importance not to be added. It cannot be forgotten that among the arguments addressed to those who apprehended danger to liberty from the establishment of the general government over so great a country, the appeal was emphatically made to the intermediate existence of the state governments between the people and that government, to the vigilance with which they would descry the first symptoms of usurpation, and to the promptitude with which they would sound the alarm to the public. This argument was probably not without its effect; and if it was a proper one, then, to recommend the establishment of the constitution; it must be a proper one now, to assist in its interpretation.

The only part of the two concluding resolutions that remains to be noticed is the repetition in the first of that warm affection to the union and its members and of that scrupulous fidelity to the Constitution which have been invariably felt by the people of this state. As the proceedings were introduced with these sentiments, they could not be more properly closed than in the same manner. Should there be any so far misled as to call in question the sincerity of these professions, whatever regret may be excited by the error, the General Assembly cannot descend into a discussion of it. Those who have listened to the suggestion can only be left to their own recollection of the part which this state has borne in the establishment of our national independence; in the establishment of our national constitution; and in maintaining under it the authority and laws of the union, without a single exception of internal resistance or commotion. By recurring to these facts, they will be able to convince themselves that the representatives of the people of Virginia must be above the necessity of opposing any other shield to attacks on their national patriotism than their own consciousness and the justice of an enlightened public; who will perceive in the resolutions themselves the strongest evidence of attachment both to the Constitution and to the union, since it is only by maintaining the different governments and departments within their respective limits that the blessings of either can be perpetuated. The
extensive view of the subject thus taken by the committee has led them to report to the house, as the result of the whole, the following resolution.

Resolved, That the General Assembly, having carefully and respectfully attended to the proceedings of a number of the states, in answer to their resolutions of December 21, 1798, and having accurately and fully re-examined and reconsidered the latter, find it to be their indispensable duty to adhere to the same, as founded in truth, as consonant with the Constitution, and as conducive to its preservation; and more especially to be their duty, to renew, as they do hereby renew, their protest against “the Alien and Sedition Acts,” as palpable and alarming infractions of the Constitution.