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Nullification: The Jeffersonian Brake on Government

by Thomas E. Woods Jr.

Thinkers in the classical-liberal tradition, to the extent that they support a coercive state at all, speak routinely of the importance of keeping government strictly limited. To that end, the United States has a written Constitution, which enumerates the relatively brief list of tasks entrusted to the federal government and whose Tenth Amendment makes clear that any power not granted to the federal government resides in the states, the authors of the federal compact.

That is all well and good, but how does a theoretically limited government remain so? Some have argued that it is impossible to restrain a government over time.[1] The framers of the Constitution, for their part, were well aware of the tendency for power to concentrate and expand. Thomas Jefferson spoke of the calamity that would result if all power were vested in the federal government. To be sure, the Constitution was something of a barrier to such tendencies, but any constitution is, after all, only a piece of paper and cannot enforce itself. Checks and balances among the executive, legislative, and judicial branches, a prominent feature of the Constitution, also provide little guarantee of limited government, since these three federal branches can simply unite against the independence of the states and the reserved rights of the people. That is precisely what Jefferson warned William Branch Giles was already happening in 1825: "[I]t is but too evident, that the three ruling branches of [the Federal government] are in combination to strip their colleagues, the State authorities, of the powers reserved by them, and to exercise themselves all functions foreign and domestic."[2]

What is necessary, therefore, is some mechanism whereby the federal government may be kept limited and unconstitutional measures frustrated and overthrown. In 1798 Jefferson believed he had identified such a mechanism: the constitutional remedy known as nullification.

First, some historical background. Amidst the naval skirmishes and diplomatic tension associated with what historians refer to as the Quasi-War with France, the Federalists managed to enact legislation that would become notorious: the Alien and Sedition Acts. The prohibition of seditious libel concerned them most.

For Jefferson, the objection wasn't only that the prohibition would be enforced in a partisan way—though of course it was, with

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many Republican newspapers and spokesmen targeted for harassment, fines, and even jail time. (Correspondence between Jefferson and Madison at the time includes complaints about mail tampering.[3]) It wasn't that seditious libel could be arbitrarily or loosely defined—although, again, in practice it was: one poor soul who expressed the fond wish that the presidential saluting cannon would "hit [President John] Adams in the ass," was fined $100.[4] It wasn't even the curbing of free speech per se, although Jefferson based part of his objection on what he considered the acts' violation of the First Amendment. (At the time, however, the consensus appears to have been that "the punishment of a seditious libeler did not abridge the proper or lawful freedom of the press."[5])

The cornerstone of Jefferson's objection was that the acts violated the Tenth Amendment, which to him was the foundation of the entire Constitution. Nowhere had the states delegated any authority to the federal government to pass legislation pertaining to the freedom of speech or press. In doing so, then, the federal government had encroached on a state prerogative. For Jefferson, who spoke of binding men by the chains of the Constitution, immediate action was necessary lest such federal usurpations begin to multiply.

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Thomas Jefferson (1743–1826)

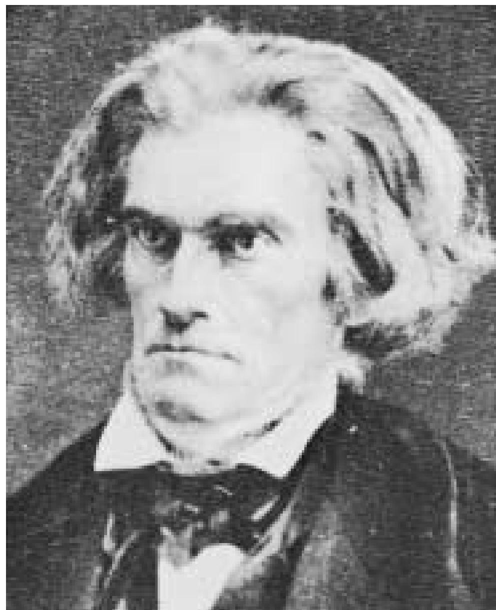
Remedy Short of Revolution

Was there a constitutional remedy—that is, a solution short of the extreme measures of secession or violent revolution?[6] Figures like Daniel Webster and Joseph Story (and later Abraham Lincoln) thought not. Since they subscribed to what might be called the nationalist theory of the Union, whereby the U.S. Constitution had been adopted by the entire American people in the aggregate rather than as a compact among sovereign states, what will be described below as "nullification" appeared to them to be an unlawful revolt by an arbitrary portion of the people rather than as an exercise of sovereignty by a sovereign body.

James Kilpatrick put the question this way: "Are the alternatives two only: submission, or arms? Is the choice truly confined to an acceptance of tyranny on the one hand, or a resort to the sword on the other? Every consideration of reason, common sense, and constitutional theory demonstrate that in a civilized an enlightened society, disputes are not to be so resolved."[7] Jefferson agreed.

Certainly the federal government, which was merely the agent of the states, could not be permitted to have the exclusive authority to make commanding judgments about the Constitution, since the obvious long-term consequence would be the eventual concentration of power as it consistently handed down rulings in favor of itself. The states had to be able to make their own interpretations of the Constitution count for something. Even Alexander Hamilton had envisioned a role for the states in restraining the federal government, arguing in Federalist 28 that "the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority."

As far as Jefferson could see, the only way a state could both remain in the Union and retain its liberties in the face of an unconstitutional act by the federal government was for that state to declare the federal action null and void and refuse to enforce it. This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John Caldwell Calhoun (1782–1850)

was not a recourse to which a state should resort except in the most dire circumstances, of course. It is also a recourse that at first may well sound extreme and possibly unworkable. But the skeptic is invited to suggest another mechanism by which the "rights" of the states may be secured and the federal government kept in check. If the federal government has all the power to interpret the Constitution and the states none, no one has a right to be surprised when the states, as in our own day, are totally eclipsed.

There is, obviously, no provision in the Constitution that explicitly authorizes nullification. That was not Jefferson's point. He, and later John C. Calhoun, suggested that it was in the nature of compacts that no one side could have the exclusive right of interpreting its terms. This was especially true in the case of the federal compact, since Jefferson and Calhoun contended that the federal government *was not a party to it*, having itself been brought into being by the joint action of the states in creating a compact among themselves. Since the federal government was merely the agent of the states, it could hardly presume to tell the states, with no room for disagreement or appeal, what their own Constitution meant.

An anonymous Jefferson (who was vice president at the time, it is useful to recall) penned what became known as the Kentucky Resolutions of 1798, which spelled out the objectionable aspects of the Alien and Sedition Acts as well as the states' rightful response: nullification. (No state actually nullified these acts; the crisis with France came to an end, and the acts were slated to expire in early 1801 in any case.) James Madison penned similar resolutions that were approved by the Virginia legislature.

Let us recall some of Jefferson's most potent words, ratified by the Kentucky legislature:

> Resolved, that the several States composing the United States of America, are not united on the principles of unlimited submission to their General Government; but that by compact under the style and title of a Constitution for the United States and of amendments thereto, they constituted a General Government for special purposes, delegated to that Government certain definite powers, reserving each State to itself, the residuary mass of right to their own self Government; and that whensoever the General Government assumes undelegated powers, its acts are unauthoritative, void, and of no force: That to this compact each State acceded as a State, and is an integral party, its co-States forming as to itself, the other party: That the Government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself, since that would have made its discretion, and not the Constitution, the measure of its powers; but that as in all other cases of compact among parties having no common Judge, each party has an equal right to judge of itself, as well of infractions as of the mode and measure of redress.[8]

The great theorist of nullification was Calhoun, one of the most brilliant and creative political thinkers in American history. The Liberty Press edition of Calhoun's writings, *Union and Liberty*, is indispensable for any-

one interested in this subject—especially his Fort Hill Address, a concise and elegant case for nullification. Calhoun imagined a state holding a special nullification convention, much like the ratifying conventions the states had held when debating the Constitution, and settling the matter there. This is how it worked in practice in the great standoff between South Carolina and Andrew Jackson: when South Carolina nullified a protective tariff in 1832 (its argument being that the Constitution authorized the tariff power for the purpose of revenue only, not to encourage manufactures or to profit one section of the country at the expense of another—a violation of the general-welfare clause), it held just such a nullification convention.

Madison's Last Word?

That Madison indicated in 1830 that he had never meant to propose either nullification or secession either in his work on the Constitution or in his Virginia Resolutions of 1798 is frequently taken as the last word on the subject.[9] But Madison's frequent change of position is well known.[10] Albert Taylor Bledsoe was blunt: "The truth seems to be, that Mr. Madison was more solicitous to preserve the integrity of the Union, than the coherency of his own thoughts."[11]

It is true that, at the time, Virginia and Kentucky found little support among the other states for their resolutions (since some of those states were strongly Federalist, they frankly supported the anti-sedition legislation) and South Carolina was all alone in 1832–33. But actions speak louder than words, and if Northern states sharply criticized the nullification of the Tariffs of 1828 and 1832, on the other hand they lifted entire phrases from the Virginia and Kentucky Resolutions of 1798 when themselves nullifying the fugitive slave laws.[12]

The most common argument against nullification is that it would produce chaos, with a bewildering array of states constantly nullifying a bewildering array of federal laws. Given the character of the vast majority of federal legislation over the past several decades (and longer), it is difficult to imagine a libertarian viewing this as an especially grave difficulty.

Having said that, there is little reason to believe that chaos would actually ensue. Consider the historical record. That Americans generally acknowledged the right of a state to secede from the Union—a far more extreme remedy, surely, than nullification—is evident from the number of cases in which states threatened to exercise this option.[13] Abolitionist and pro-slavery spokesman, protectionist and free trader, all at one time or another counseled secession. Yet was the Union overwhelmed with acts of secession before 1860? Most people have little desire to endure a state of crisis for frivolous reasons. But there can be no doubt that the ever-present threat that an oppressed state might withdraw had the salutary effect of restraining the federal government's exercise of power.

Moreover, to the fear that nullification would lead to intolerable disorder, James Kilpatrick reminds us of the disorder that characterizes the present system: "If power-hungry federal judges may impose one unconstitutional mandate, they may impose a thousand, each more oppressive than the one before." Is this not its own kind of disorder? "But if the Constitution is over the [Supreme] Court, who or what finally is over the Constitution? *It can only be the States*, who under Article V alone have the power to amend or rewrite it." The theory that the Supreme Court's interpretation of the Constitution must necessarily be the final word effectively concedes to that body the right substantively to amend the Constitution to mean what the Court says it means. But the right to amend clearly rests with the states. "How, then," Kilpatrick wonders, "may it be urged that the States 'unequivocally surrendered' the control of their most fundamental rights, in the last resort, to a Court they themselves created?"[14]

It is hard to find fault with Kilpatrick's reasoning. In my experience, however, the squeamish always seem to fall back on some hard case that allegedly renders nullification impracticable, even dangerous. Thus, one

might argue, even if the doctrine of nullification did not degenerate into general confusion in peacetime, what should happen if a state or group of states should invoke it during war, potentially threatening the nation's security? Most proponents of nullification have correctly noted that it is precisely in such situations that we would logically expect the interests of the states to be most consonant and their allegiance to the federal government most secure. More to the point, one might well wonder what a group of states was doing in the same union in the first place if a portion of them actually desired to sabotage the prosecution of a just war.

The main point that nullification aims to address is that a government allowed to determine the scope of its own powers cannot remain limited for long. This is a lesson we should have learned by now. Moreover, since piecemeal solutions to reducing federal power have accomplished nothing, we can hardly afford to dismiss out of hand the idea of nullification, a remedy that is at once creative and intelligent, and recommended by some of the greatest political thinkers in American history. □

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1. Thus see Hans-Hermann Hoppe, "On the Impossibility of Limited Government and the Prospects for a Second American Revolution," in *Reassessing the Presidency*, ed. John V. Denson (Auburn, Ala.: Ludwig von Mises Institute, 2001), pp. 667–96.

2. Thomas Jefferson to William B. Giles, December 26, 1825; http://etext.lib.virginia.edu/jefferson/quotations/jeff1060.htm.

3. Cited in William J. Watkins, Jr., "The Kentucky and Virginia Resolutions: Guideposts of Limited Government," *Independent Review*, Winter 1999, p. 391.

4. Paul Johnson, *A History of the American People* (New York: HarperCollins, 1997), pp. 240–41.

5. Leonard W. Levy, *Constitutional Opinions: Aspects of the Bill of Rights* (New York: Oxford University Press, 1986), pp. 165ff.

6. Although one can make a fairly substantial constitutional case for secession, and thus in a sense secession *is* a constitutional remedy, what Jefferson was seeking was a solution in which a state could remain in the Union while at the same time resisting an act of federal oppression.

7. James J. Kilpatrick, *The Sovereign States: Notes of a Citizen of Virginia* (Chicago: Henry Regnery, 1957), p. 190.

8. Virginia Commission on Constitutional Government, *We the States: An Anthology of Historic Documents and Commentaries thereon, Expounding the State and Federal Relationship* (Richmond, Va.: William Byrd Press, 1964), pp. 143–44.

9. James Madison to Edward Everett, August 28, 1830; reprinted in *North American Review*, October 1830, p. 537.

10. Professor Constantine Gutzman of Western Connecticut State University, who has written extensively on Madison and his role in (and later recollections and interpretation of) the events of 1798, is particularly scathing on this point: "[Madison] could have listened to the wisdom of the leading men of his state, but he chose first to denigrate them, then to ignore them, and, once his own cohort had died off, to distort their and his own record." K.R. Constantine Gutzman, "'Oh, What a Tangled Web We Weave. . .': James Madison and the Compound Republic," *Continuity,* Spring 1998, p. 28. Gutzman argues that despite his later protestations, Madison certainly appeared to be calling for nullification in 1798; see Kevin Raeder Gutzman, "From Interposition to Nullification: Peripheries and Center in the Thought of James Madison," *Essays in History* 36 (1994), pp. 89–113.

11. Albert Taylor Bledsoe, *Is Davis a Traitor? or Was Secession a Constitutional Right Previous to the War of 1861?* (Richmond, Va.: Hermitage Press, 1907), p. 174.

12. Kilpatrick, pp. 214–15.

13. Thus see Thomas J. DiLorenzo, "Yankee Confederates: New England Secession Movements Prior to the War Between the States," in *Secession, State and Liberty*, ed. David Gordon (New Brunswick, N.J.: Transaction, 1998).

14. Kilpatrick, p. 194.

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