The States’ Rights Tradition Nobody Knows

by Thomas E. Woods, Jr.

In 1798, the legislatures of Virginia and Kentucky approved resolutions that affirmed the states’ right to resist federal encroachments on their powers. If the federal government has the exclusive right to judge the extent of its own powers, warned the resolutions’ authors (James Madison and Thomas Jefferson, respectively), it will continue to grow – regardless of elections, the separation of powers, and other much-touted limits on government power. The Virginia Resolutions spoke of the states’ right to "interpose" between the federal government and the people of the state; the Kentucky Resolutions (in a 1799 follow-up to the original resolutions) used the term "nullification" – the states, they said, could nullify unconstitutional federal laws.

These ideas became known as the "Principles of ’98." Their subsequent impact on American history, according to the standard narrative, was pretty much confined to South Carolina’s nullification of the tariffs of 1828 and 1832. That is demonstrably false, as I shall show below. But it isn’t just that these ideas are neglected in the usual telling; as I discovered not long ago, these principles are positively despised by neconservatives like Max Boot and the leftists at the New York Times (or do I repeat myself?). Neither one, in their reviews of The Politically Incorrect Guide to American History, so much as mentioned Jefferson’s name in connection with the Principles of ’98. It is hard to view such an omission as anything but deliberate. To mention Jefferson’s name is to lend legitimacy to ideas that nationalists of left and right alike detest, so they simply leave him out of the picture.

Jefferson once wrote, "When all government, domestic and foreign, in little as in great things, shall be drawn to Washington as the center of all power, it will render powerless the checks provided of one government on another, and will become as venal and oppressive as the government from which we separated." To resist this centralizing trend, the sage of Monticello was convinced, the states needed some kind of corporate defense mechanism.

Our betters have already told us that the only reason anyone might wish to vindicate the cause of states’ rights is for the purpose of defending slavery or upholding some lesser form of local oppression. What follows is the tip of the iceberg of the history that, by what I shall assume is an entirely well-meaning and innocent oversight, these great scholars of American history consistently fail to acknowledge.

The Embargo of 1807–1809

In retaliation against British and French depredations against American neutral rights on the seas, the federal government under Thomas Jefferson in late 1807 declared an embargo, according to which no American ship could depart for any foreign port anywhere in the world. (The rationale was that trade with the U.S. was a key ingredient in British and French prosperity, and thus that economic pressure might persuade them to change their policies.) The U.S. Navy was granted the power to stop and search any ship within U.S. jurisdiction if its officers had "reason to suspect" the ship was violating the embargo. Likewise, customs officials were "authorized to detain any vessel...whenever in their opinions the intention is to violate or evade any provisions of the acts laying an embargo." Such standards fell far short of the "probable cause" requirement that generally governed the issuing of warrants for searches.
New England was especially hard hit by the embargo because so many of its people were employed either directly in foreign commerce or in proximate fields, and it was there that opposition to the policy was concentrated. In 1808 a federal district court, in the case of United States v. The William, ruled the embargo constitutional. The Massachusetts legislature begged to differ. Both houses declared the embargo acts to be "in many particulars, unjust, oppressive, and unconstitutional." "While this State maintains its sovereignty and independence, all the citizens can find protection against outrage and injustice in the strong arm of the State government," they said. The embargo, furthermore, was "not legally binding on the citizens of this State."

In the midst of the crisis, a New York congressman, giving his explicit sanction to the Virginia and Kentucky Resolutions, said, "Why should not Massachusetts take the same stand, when she thinks herself about to be destroyed?" "If any State Legislature had believed the Act to be unconstitutional," asked a Connecticut congressman, "would it not have been their duty not to comply?" He added that the state legislatures, "whose members are sworn to support the Constitution, may refuse assistance, aid or cooperation" if they regarded an act as unconstitutional, and so could state officials.

Connecticut governor Jonathan Trumbull shared these views. "Whenever our national legislature is led to overleap the prescribed bounds of their constitutional powers, on the State legislatures, in great emergencies, devolves the arduous task – it is their right – it becomes their duty, to interpose their protecting shield between the right and liberty of the people, and the assumed power of the General Government." Connecticut's General Assembly passed a resolution that, among other things, directed all executive officials in the State not to afford "any official aid or co-operation in the execution of the act aforesaid."

The General Assembly furthermore declared: "Resolved, that to preserve the Union, and support the Constitution of the United States, it becomes the duty of the Legislatures of the States, in such a crisis of affairs, vigilantly to watch over, and vigorously to maintain, the powers not delegated to the United States, but reserved to the States respectively, or to the people; and that a due regard to this duty, will not permit this Assembly to assist, or concur in giving effect to the aforesaid unconstitutional act, passed, to enforce the embargo."

Rhode Island, when the embargo was at its end, declared that her legislature possessed the duty "to interpose for the purpose of protecting [the people of Rhode Island] from the ruinous inflictions of usurped and unconstitutional power."

Interposition – the language of the Principles of '98.

**The War of 1812**

During the War of 1812, Massachusetts and Connecticut were ordered to call out their respective militias for the purpose of defending the coast. The call derived from the federal government’s authority to call the state militias into service "to execute the Laws of the Union, suppress Insurrections and repel invasions."

Massachusetts Governor Caleb Strong, however, maintained that the states reserved the power to determine whether any of these three conditions held. At Strong’s request, the Massachusetts Supreme Court offered its opinion. That court agreed with the governor: "As this power is not delegated to the United States by the Federal Constitution, nor prohibited by it to the states, it is reserved to the states, respectively; and from the nature of the power, it must be exercised by those with whom the states have respectively entrusted the chief command of the militia."
Connecticut followed suit:

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.

Thus if the militia were called out for any purpose but those listed in the Constitution, it "would be not only the height of injustice to the militia…but a violation of the constitution and laws of this state, and of the United States." The president had no authority to call upon the militia of Connecticut "to assist in carrying on an offensive war" (some New Englanders were convinced that the war was aimed primarily at the annexion of Canada). Connecticut would not comply with the federal order until New England should be threatened "by an actual invasion of any portion of our territory."

From a political point of view, the War of 1812 would wind up essentially a draw, and the Treaty of Ghent signed in December 1814 reestablished the status quo ante bellum. From a military point of view, though, it was a British rout. As a result, Congress seriously entertained the prospect of military conscription.

Here is where Daniel Webster, so often a villain in American history, emerges as positively heroic. With his usual eloquence he spoke out against military conscription as incompatible with both the Constitution and the principles of a free society. "Where is it written in the Constitution," he asked, "in what article or section is it contained, that you may take children from their parents, and parents from their children, and compel them to fight the battles of any war in which the folly or the wickedness of government may engage it?" (Predictable quarters can now be expected to call Daniel Webster – than whom there was no greater or more eloquent defender of the federal Union – an unpatriotic, America-hating leftist.)

What did Webster think should be done if the conscription bill should pass? In that case, he said, it would 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." Interposition – the language, once again, of the great resolutions of '98.

In December 1813 a new and more obnoxious embargo than that of 1807-1809 was instituted. The Massachusetts legislature found itself inundated with petitions and statements of grievances. A special committee, headed by William Lloyd, was established to devise a response to the situation. The Massachusetts General Court approved the committee’s report early the following year. It read, in part:

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 the free, sovereign and independent State of Massachusetts is reduced to a mere municipal corporation, 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 wrest from the oppressor its victim.
Need we point out yet again the language of the Principles of ’98?

**Fugitive Slave Laws**

At a time when the federal government was using its police powers to enforce the capture of runaway slaves, it was the state governments, expressly recalling the Principles of ’98, that determined to resist. (See Mark Thornton [here](#) on how the federal government socialized the costs of slaveholding.) Although the Constitution did, unfortunately, contain a clause calling for the return of runaways, some Northern states resorted to the argument that that document spelled out no particular enforcement mechanism behind that requirement.

In addition, the Fugitive Slave Act of 1850 was especially obnoxious and repugnant. It placed all fugitive slave cases under federal jurisdiction. Fugitives were denied jury trials and the right to testify in their own defense. Special commissioners were empowered to determine the guilt or innocence of the accused, and according to the terms of the act were to be paid $10 if they found the accused fugitive guilty and only $5 if they found him innocent. Still more obnoxious features included the right to force bystanders to participate in the capture of a fugitive and stiff penalties for sheltering or obstructing the capture of a fugitive.

Several Northern states simply refused to comply. Especially interesting is this 1859 statement of the Wisconsin Supreme Court – taken, in parts word for word, from the Kentucky Resolutions of 1798:

Resolved, That the government formed by the Constitution of the United States was not the exclusive or final judge of the extent of the powers delegated to itself; but that, as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress.

Resolved, that the principle and construction contended for by the party which now rules in the councils of the nation, 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 which formed that instrument, being sovereign and independent, have the unquestionable right to judge of its infractions; and that a positive defiance of those sovereignties, of all unauthorized acts done or attempted to be done under color of that instrument, is the rightful remedy.

Many more examples of the ongoing relevance of the Principles of ’98 could be cited. In the midst of a dispute with the federal government over the Second Bank of the United States, the Ohio legislature voted to affirm the Principles of ’98. In 1825, Kentucky’s governor said: "When the general government encroaches upon the rights of the State, is it a safe principle to admit that a portion of the encroaching power shall have the right to determine finally whether an encroachment has been made or not? In fact, most of the encroachments made by the general government flow through the Supreme Court itself, the very tribunal which claims to be the final arbiter of all such disputes. What chance for justice have the States when the usurpers of their rights are made their judges? Just as much as individuals when judged by their oppressors. It is therefore believed to be the right, as it may hereafter become the duty of the State governments, to protect themselves from encroachments, and their citizens from oppression, by refusing obedience to the unconstitutional mandates of the federal judges."
These are facts. They are facts that constitute a central part of antebellum American history. Yet to say that the standard American history text does not trace the influence of the Principles of ’98 over the course of the ensuing years, as I have done all too briefly here, would be the understatement of the century. The profession at large has essentially ignored the issue; other than Bill Watkins’ excellent study, you’d be hard-pressed to find a single book-length treatment of the Virginia and Kentucky Resolutions of 1798 over the past hundred years.

Thus when I resurrected these long-neglected ideas in chapter four of The Politically Incorrect Guide to American History, did this inclusion merit the praise of your average scholar? To the contrary, the general complaint was that I hadn’t spent more time on subjects people already know inside and out. As for the Principles of ’98 themselves, discussing them with left- or right-wing nationalists is like waving garlic before Dracula.

Not that raising the issue makes them clam up entirely. To the contrary, they’ll find some silly photos of you (which, I confess, exist in embarrassing abundance), or dredge up something you did or said a dozen years ago, or generally suggest you’re a bad person. (Everyone who’s ever met me knows I’m just a great big meanie.)

They may behave this way because they think doing so will make me shut up (no such luck there), but it’s also a lot easier than cracking a book on a subject they don’t seem to know the first thing about.

Note

1. In his exposition of the Virginia Resolutions in 1833, Virginia legal thinker Abel Upshur argued very precisely that the Virginia Resolutions did in fact call for nullification, Madison’s later protests to the contrary notwithstanding. Prof. Kevin Gutzman writes, "The distinction so often drawn between Jefferson's strident and Madison's moderate tone seems strained; there is no difference between 'null, void, and of no force or effect' and 'invalidity,' between 'nullifying' a statute and 'interpos[ing] to prevent its enforcement." Kevin R. Gutzman, "A Troublesome Legacy: James Madison and 'the Principles of '98,'" Journal of the Early Republic 15 (Winter 1995): 581. Again: "[O]ne of Madison's most notable 'tactical adjustments' had been his campaign, as a retired former president, to becloud the events of 1798 by denying they had meant what they plainly had meant." K.R. Constantine Gutzman, "Oh, What a Tangled Web We Weave…`: James Madison and the Compound Republic," Continuity 22 (Spring 1998): 22.

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