

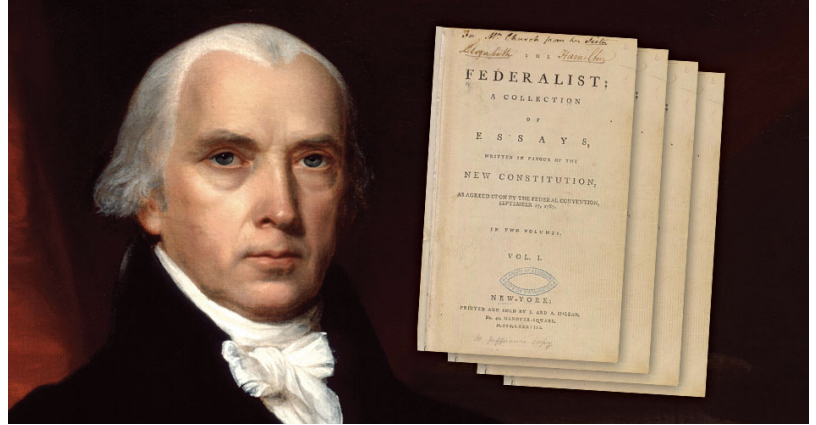


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State Nullification: An Idea Deeply Embedded in American History

In today's American history textbooks, nullification is treated as a fringe idea at best, and treasonous at worst. Yet not only did two of America's greatest Founding Fathers (James Madison, the "Father" of the Constitution, and Thomas Jefferson, the author of the Declaration of Independence) fully embrace the concept, but nullification was employed in the Northern states to restrain the federal government, as well as in the South.



United States Library of Congress

A review of American history prior to the Civil War reveals that nullification was actually a common political tool. But because of the Civil War, the practice fell into disfavor, as pro-Union propaganda portrayed just about any effort to retard the centralization of government as somehow disloyal.

Nullification is the idea that, if the federal government extends its powers beyond those found in the Constitution, a state has both a right and a duty to resist such usurpations by declaring the law or other unconstitutional action of the federal government null and void. It is important to keep in mind that both federal and *state* officials — including the members of the federal and state legislatures as well as "all executive and judicial Officers" — are bound by oath to support the U.S. Constitution, under Article VI. State officials who accept unconstitutional federal usurpations within their state borders are neglecting their oath.

In practice the concept of nullification was employed in various ways, but always with the intention of insisting that the federal government follow the Constitution and of preserving the Union. It was *not* secession, but was intended to prevent an open split among the American states.

Typically, historians begin their discussion of the doctrine of nullification with the Kentucky Resolutions (written anonymously by Jefferson) and the Virginia Resolutions (written anonymously by Madison), written in opposition to the clearly unconstitutional Sedition Act of 1798. While that was the first use of nullification, Madison had argued for its use as a tool against an out-of-control federal government even before the Constitution was ratified.

In order to win ratification of the Constitution in New York State, Alexander Hamilton, James Madison, and John Jay penned several newspaper articles, known today as *The Federalist Papers*. Writing in *The Federalist*, No. 46, Madison addressed the widespread concern that the federal government being created by the Constitution could eventually expand its powers beyond those delegated to it. Admitting that it was a possibility that the federal government could try to do so, Madison argued that the state governments "would still have the advantage in the means of defeating such encroachments."

His solution was simple. "Should an unwarrantable measure of the federal government be unpopular in particular states, which would seldom fail to be the case ... the means of opposition to it are powerful and at hand. The disquietude of the people; their repugnance and, perhaps, refusal to cooperate with



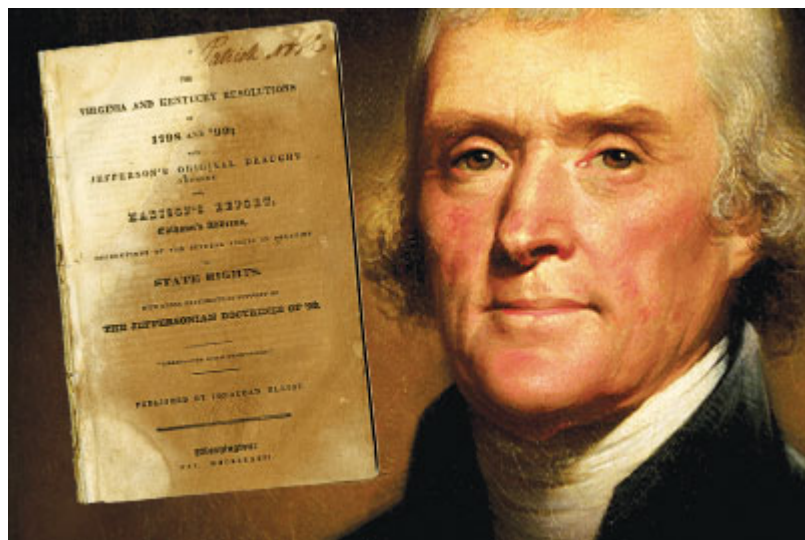
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the officers of the Union; the frowns of the executive magistracy of the state; the embarrassments created by legislative devices, which would often be added on such occasions, would oppose, in any state, difficulties not to be despised; would form, in a large state, very serious impediments; and where the sentiments of several adjoining states happened to be in unison, would present obstructions which the federal government would hardly be willing to encounter.”

It should be noted that, at the time, Madison was a leading *federalist*, strenuously arguing for a stronger central government than that found in the Articles of Confederation. These words certainly did not evoke opposition from the *anti-federalists* — those who had reservations about the Constitution, fearing it handed over too much power to the new central government. There is no record of opposition to his suggestion of nullification (although he did not use that term in *The Federalist Papers*) from supporters of the Constitution’s ratification, either.

Madison initially opposed adding a bill of rights to the Constitution, arguing that it was both unnecessary and dangerous. His reasoning was that it was unnecessary because the federal government would only have those powers delegated to it, enumerated in the Constitution. Therefore, the federal government would have no constitutional authority to infringe on rights, such as freedom of speech or of the press. He also contended it was dangerous to add a bill of rights, as some might someday argue that those specifically protected rights were the sum total of the liberties of American citizens. (This is why the Ninth Amendment makes clear that there are other rights not mentioned in the Bill of Rights.)



Using the Constitution to chain up abuses: When Congress enacted the clearly unconstitutional Sedition Act of 1798, Thomas Jefferson — the author of the Declaration of Independence — and James Madison — the “Father” of the Constitution — anonymously wrote resolutions for the Kentucky and Virginia legislatures, offering the idea of nullification to stop the law’s enforcement. (*Photo credit: United States Library of Congress*)

The Bill of Rights, largely written by Madison, was ratified by the states in 1791, including the First Amendment, which said, “Congress shall make no law ... abridging the freedom of speech, or of the press.” Despite this quite explicit language, that is exactly what Congress did in 1798, with the passage of the Sedition Act. The United States was involved in the so-called Quasi War with France at the time, essentially a naval war, and President John Adams and the Federalist Party leaders who controlled



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Congress were concerned that the French government could sow discord inside the country among Americans sympathetic to the French Revolution. (This was actually a legitimate concern, with the establishment of so-called Democratic Societies that had sprung up around the country.)

The Sedition Act Abridges Freedom of Speech & Press

But Congress overreacted, passing the Sedition Act, which provided for fines and even jail time “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 Congress of the United States, or the President of the United States, with intent to defame the said government, or either House of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States.”

Clearly this went too far: Congress had passed a bill that abridged freedom of speech and the press. President Adams reluctantly signed the bill into law. As if to emphasize the partisan nature of the law, the vice president received no protection under it. Thomas Jefferson was the vice president, and he was the clear leader of the opposition Republican Party (not to be confused with the present-day Republican Party, formed in 1854).

Congressman Matthew Lyon of Vermont wrote a letter critical of President Adams, charging him with a “thirst for a ridiculous pomp, foolish adulation, and selfish avarice.” Lyon’s words were clearly not sedition — calling for the violent overthrow of the government — but it was enough for him to be fined \$1,000 and get a four-month prison sentence. Several others endured fines or imprisonment, including a man who, upon leaving a tavern, opined that he would like to see a cannonball strike Adams in the rear-end.

Jefferson said the Sedition Act was “a nullity as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image.” He also expressed misgivings in finding relief from the judiciary. “To consider the judges of the Supreme Court as the ultimate arbiters of Constitutional questions would be a dangerous doctrine which would place us under the despotism of an oligarchy.”

Federal judges, who had taken an oath to follow the Constitution — including the First Amendment’s protections of free speech and press — routinely applied the clearly unconstitutional law. This created a troubling question for Thomas Jefferson and James Madison (who by this time were close political allies). If the judges (who were partisan Federalists, having been nominated by Adams and confirmed by a Federalist-majority Senate) were not going to follow the Constitution instead of the unconstitutional Sedition Act, what was the proper recourse?

Some Republicans called for open rebellion, but Jefferson counseled patience, arguing that the “reign of the witches would soon be over.” He could say little more than that, fearing that he could wind up in prison himself — or worse. In the toxic atmosphere of the time, Jefferson might have been charged with treason. While the Constitution carefully defines treason only as making war against the United States, or aiding its enemies, even today far too many throw around the “T” word as a response to strong political rhetoric.



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The Kentucky and Virginia Resolutions

This is why Jefferson and Madison opted to keep their roles in the Kentucky and Virginia Resolutions — in which the doctrines of nullification and interposition were proposed as a solution — secret. Jefferson crafted his resolutions condemning the Sedition Act as unconstitutional, along with his solutions, and passed them along to State Senator Wilson Cary Nicholas of Virginia. Nicholas then gave them to John Breckinridge (a member of the Kentucky Legislature and the grandfather of a future vice president of the United States), who introduced them in his state.

The 1798 Kentucky Resolutions did not use the term “nullification,” but a modified version passed the next year did. The 1798 version, adopted by the Kentucky Legislature, asserted that “the several states composing the United States of America are not united on the principle of unlimited submission to their general government; but that, by compact, under the style and title of a Constitution for the United States, and 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.”

Specifically, Kentucky said that the 1798 Sedition Act violated the First Amendment directly by abridging the freedom of the press, and was therefore “not law, but is altogether void, and of no force.”

The resolutions were then sent to Congress urging “a repeal of the aforesaid unconstitutional and obnoxious acts.” Furthermore, the Kentucky Legislature authorized and requested the governor of Kentucky to work with other states to overturn the Sedition Act. Clearly, Jefferson — and the Kentucky Legislature — was not calling for armed rebellion.

The consequences of allowing the Sedition Act to stand were also addressed, arguing 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,” and allow “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” to lay charges.

Rather than calling for the overthrow of the government, Jefferson’s Kentucky Resolutions called for following the Constitution. “In questions of power, then, let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution,” Jefferson wrote in the resolutions adopted by the Kentucky Legislature.

The Virginia Legislature soon thereafter adopted its own “Virginia Resolutions” of 1798. Somewhat milder than those of Jefferson and Kentucky, these were written secretly by Madison, and began with the assurance that the Virginia Assembly had a “warm attachment to the union of the states.” But it also declared the “powers of the federal government” were a result of “the compact to which the states are parties, as limited by the plain sense and intention of the instrument [the Constitution] constituting that compact, as no further 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,



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rights and liberties, appertaining to them.”

One would think that considering his designation as the “Father” of the Constitution due to his great influence over its wording and meaning, Madison’s opinion would have great weight. In his Virginia Resolutions, he uses the word *interposition*, which essentially means that a state should use all of its powers to protect its own citizens from the unconstitutional actions of the federal government in the state.

The Virginia Resolutions expressed fear that without the resistance found in this doctrine of interposition to such unconstitutional actions as the Sedition Act, the states would be consolidated “by degrees, into one sovereignty,” with the “inevitable result” of transforming the “republican system” into “an absolute, or, at best, a mixed monarchy.”



Protecting slaves, not slavery: It is often asserted — falsely — that nullification was a Southern doctrine used to protect slavery. Actually, it was not, as there were no laws against slavery to nullify. On the contrary, several Northern states used nullification to frustrate enforcement of the Fugitive Slave Law of 1850.

Madison’s Virginia Resolutions also noted that the Virginia Convention, which ratified the Constitution, made it clear that “the liberty of conscience and the press cannot be cancelled, abridged, restrained, or modified, by any authority of the United States.” Therefore, citing the First Amendment, the resolutions declared the Sedition Act “unconstitutional,” and encouraged the governor of Virginia to “transmit a copy of the foregoing resolutions to the executive authority of each of the other states, with a request that the same 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.”

Both the Kentucky and Virginia Resolutions, then, rather than calling for armed insurrection, were calling for cooperation from other states and urged the repeal of the Sedition Act by Congress. Hardly seditious, but that is how the Kentucky and Virginia Resolutions have been mischaracterized. Other smears against the resolutions have included insinuations that nullification and interposition were, and are, simply tools to protect slavery, but any fair reading of the historical record proves that the Kentucky and Virginia Resolutions had nothing to do with slavery.

Unfortunately, Jefferson and Madison’s resolutions found little support among the other states, and this can be attributed to two things: (1) fear of being arrested, convicted, and jailed under the Sedition Act;



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and (2) partisan politics. After all, if members of Congress, such as Congressman Lyon, could be arrested, then state legislators might be, as well. In other states, the Federalists were in agreement with the Sedition Act.

Nullification in the New England States

The Sedition Act expired early in the term of the next president, Thomas Jefferson, and was not renewed. But the idea of nullification was resurrected, surprisingly enough, in some of the very states that had not supported it in 1798. When President Jefferson tried to avoid war with Britain or France (who were at war with each other, and seizing American ships bound to the country of their enemy) by getting Congress to enact an Embargo Act — cutting off trade to both belligerents — this caused economic hardship in the New England states. While nullification wound up not being used in states such as Massachusetts, they did threaten to use it.

The Massachusetts Legislature declared that “the laying [of] an embargo on all ships and vessels in the ports and harbors of the United States” was “not warranted by the Constitution of the United States.” They added that, since “the power of prohibiting to the citizens the exercise of these rights was never delegated to the general government; ... all laws passed by that government, intended to have such an effect, are therefore, unconstitutional and void.”

Later, in the aftermath of the War of 1812, Congress considered instituting a military draft. Connecticut responded that such an effort was “not only intolerably burdensome and oppressive, but utterly subversive of the rights and liberties of the people of this state, and the freedom, sovereignty, and independence of the same, and inconsistent with the principles of the Constitution of the United States.” If the federal government did implement conscription, the legislature asserted, it would be “the duty of the legislature of this state to exert themselves to ward off a blow so fatal to the liberties of a free people.”

Daniel Webster, then serving in Congress from New Hampshire, said if such a bill were enacted by Congress, it would be the solemn duty of the state governments to *interpose* between their citizens and “arbitrary power.” In fact, Webster, who later become known as the champion of *national* power as opposed to state power, in this instance rejected the idea that the states should adopt a policy of non-resistance to usurpations of power by the federal government, calling such a policy of non-resistance “absurd, slavish, and destructive.”

There were numerous other examples, in both the North and in the South, which could be cited in which the doctrines of nullification and interposition were defended. While today it is typical to attack the idea of nullification as a tactic used by slavery-defending politicians, the fact of the matter is that defenders of slavery in the time before the Civil War never used the principle of nullification — there was nothing to nullify to defend the institution of slavery.

South Carolina Uses Nullification to Lower the Tariff

Some have made the inaccurate assertion that nullification was used to defend slavery in the tariff dispute involving South Carolina in 1832-33. The tariff was the principal source of federal revenue at the time, but many Northern states favored raising the tariff rates so as to protect the growing Northern industry from foreign competition. Since the South had little manufacturing at the time, they purchased their manufactured goods either from Northern factories or foreign sources. While the



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protective tariff helped the owners of and the workers in Northern factories, it only raised the price of such goods for Southern consumers. Thus, it was a transfer of wealth from Southern agricultural states to Northern industrializing states.

When the tariffs of 1828 and 1832 continued their protective natures — Southerners called them tariffs of abominations — South Carolina decided they had had enough, and passed a nullification bill, refusing to collect the odious tariff at their harbors. President Andrew Jackson thundered that he would hang the first man who defied federal law (and Congress passed the Force Bill to allow him to use force to collect the tariff, if need be), though behind the scenes Jackson worked with his political enemy, Henry Clay, for a compromise tariff that would lower the rates over a period of years.

Typically, this entire incident is falsely portrayed as one in which South Carolina capitulated under the threat of federal invasion, but the reality is that it was a victory for South Carolina — and the doctrine of nullification. Without South Carolina's bold stand to nullify the tariff, it is doubtful any compromise would have been reached.

Again, slavery was not an issue in the confrontation between South Carolina and the U.S. government in 1832-33 — it was all about the tariff rates.

Nullifying the Fugitive Slave Act

But slavery was an issue in another instance when nullification was used — when multiple Northern states used the method to frustrate the Fugitive Slave Law, part of the Compromise of 1850, also championed by Henry Clay. For decades, each time a new state was added to the Union, the question of whether the state would be admitted as a “free state,” in which slavery would be illegal, or as a “slave state,” a state in which slavery would be legal and protected by law, would be raised.

California became a territory of the United States in 1848 following the Mexican War. When gold was discovered, it led to the gold rush of 1849, and a rapid increase in its population, necessitating a rapid transition to statehood. Its admission as a state, however, would add another “free state” to the Union, thus giving the free states a one-state advantage. This threatened the continuation of the Union, as Southerners now feared being dominated by the North on several issues, including the tariff and slavery. This led to a series of laws put together as the Compromise of 1850.

The only part of the Compromise of 1850 that was favorable to the slave-owning interests was a new Fugitive Slave Law, which removed the requirement for a jury trial for accused runaway slaves. Additionally, Northern citizens could be impressed into service in recapturing fugitive slaves, with fines for any person who helped a slave to escape, or otherwise obstructed capture. One could make a strong case that these new provisions made this law unconstitutional.

This law was quite unpopular in the North, and Northern states quickly turned to using nullification principles first enunciated by Madison and Jefferson to thwart the law's enforcement.

One of the most famous examples of the use of nullification against the Fugitive Slave Law was in Wisconsin. Joshua Glover was arrested by a federal marshal, accused of being a fugitive slave. A local newspaper editor, Sherman Booth, distributed handbills urging the town's citizens to keep Glover from being sent back into slavery without a trial by jury.

Eventually, a mob forced its way into the jail where Glover was being held and released him. Booth was



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arrested and charged with inciting the mob, but a judge of the Wisconsin Supreme Court issued a writ of habeas corpus, ordering him released, declaring the Fugitive Slave Act was unconstitutional and void.

The U.S. Supreme Court — four years later — ordered Booth to be turned over to federal authorities, but the Wisconsin Supreme Court simply refused to obey. The next year, the Wisconsin Legislature passed a resolution approving the action, or in this case, inaction, of its supreme court. It specifically cited the Principles of '98 in which Jefferson and Madison had urged nullification and interposition in declaring that the order of the U.S. Supreme Court was “without authority, void, and of no force.”

Wisconsin’s legislature even agreed with Jefferson that the Constitution was a “compact among parties having no common judge, [with] each party [having] an equal right to judge for itself, as well of infractions as of the mode and measure of redress.” It added that, if the “general government is the exclusive judge of the extent of the powers delegated to it,” it will lead to “despotism.” The states that formed the federal union were “sovereign and independent,” the legislature’s resolution added, promising a “positive defiance” of “all unauthorized acts.”

In other words, they were nullifying both the Fugitive Slave Act *and* the decision of the U.S. Supreme Court.

Despite this history, the doctrine of nullification is variously blamed for the Civil War and criticized as a method of defending slavery. Neither is true.

Nullification was *not* at issue in the Civil War. The states that formed the Confederate States of America were not nullifying any federal laws — they were leaving the Union. The response of the federal government was to invade the seceded states, thus touching off the Civil War.

After the Civil War, it became politically incorrect — to use a modern expression — to speak of nullification, since *nationalism* was the prevailing viewpoint. Anything that even hinted at even the mildest assertion of the right of a state was seen as part of the attitude that caused the Civil War. That included nullification, or so the nationalists have claimed; the Civil War had settled the issue.

But saying that the Civil War “settled” the issue of nullification is much like saying if a 220-pound man and a 110-pound woman had a dispute and he pounded her senseless, the issue was “settled” in his favor. Might does not make right. It is true that the balance of power between the federal government and the states was altered by the Civil War — in favor of the central government — but this was not the balance envisioned by the Framers of the Constitution.

If Jefferson and Madison could see our day, in which the federal behemoth has grown far beyond the constraints placed upon it by the Constitution, they would be appalled.

Fortunately, even though the doctrines of nullification and interposition have been mostly dormant for the past century, now states are beginning to rediscover the Principles of '98, crafted by Madison and Jefferson, and are making use of those principles to challenge the out-of-control federal government. *That* would make these two giants of American history happy and proud.



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