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Reclaiming the American Revolution **by George C. Leef**

Reclaiming the American Revolution: The Kentucky and Virginia Resolutions and Their Legacy by William J. Watkins Jr. (Independent Institute, 2004); 236 pages; \$39.95.

How do you devise a system of limited government that actually works? It is easy enough to put words on paper that purport to accomplish that task, but where has that (or any other) approach worked in the long run? Certainly not in the United States, where the Founders' design for a limited and highly decentralized system of government came apart at the seams in the 20th century.

What is very little known, even among those few Americans who have an understanding of the Constitution and our early history, is how quickly the stitching began to fray. The new nation was not even a decade old when the federal government engaged in an astounding, unconstitutional usurpation of power by passing the Alien and Sedition Acts of 1798. In *Reclaiming the American Revolution*, legal scholar William J. Watkins Jr. has written a book on a fascinating but overlooked episode in our history, namely the battle over the enforcement of the Alien and Sedition Acts. The book, however, is more than just history. Watkins shows why a battle to restrain the expansion of federal power more than two centuries ago is still an important controversy.

Shortly after winning the election of 1796, John Adams found his presidency beset with foreign troubles, particularly from the government of revolutionary France. After a series of diplomatic slights from France, Adams delivered a "war message" to Congress in March 1798. Congress did not declare war on France, but the Federalist-dominated Congress approved measures to strengthen the army and navy. Opinion in the United States was sharply divided between the generally pro-British Federalists, led by Adams, and the generally pro-French Democratic Republicans, led by Thomas Jefferson. Of those measures, Jefferson wrote,

We see a new instance of the inefficacy of Constitutional guards. We had relied with great security on that provision which requires two-thirds of the Legislature to declare war. But this is completely eluded by a majority's taking war measures which will be sure to produce war.

The Federalists, stung by sharp criticism of their bellicose path, passed the Alien and Sedition Acts in the spring and summer of 1798. The Alien Act allowed the federal government to arrest and deport aliens without due process of law. Mere suspicion of wrongdoing was enough. The Sedition Act made it a crime to criticize the national government. Watkins comments,

As is so often the case with war measures, the national government's threat to domestic liberty in 1798 far exceeded the machinations of foreign foes.

A political and constitutional firestorm

Naturally, the Alien and Sedition Acts ignited a political firestorm that mainly followed party lines. John Marshall, who was not yet on the Supreme Court, wrote that the laws were entirely proper and justified. Other Federalists defended the laws by saying that freedom of speech and press meant that people could say or publish what they wanted, so long as they didn't "offend against the laws," a formula that rendered the First Amendment perfectly useless. The laws were, on the other hand, denounced by Democrats as blatant attempts to crush the freedom of the people, often with the suggestion that the Federalists intended to pave the way for monarchy.

The constitutionality of the laws was hotly debated, with Federalist defenders resorting to such spurious arguments as that the Constitution's General Welfare Clause conferred on Congress the power to enact any legislation that it thought would enhance the general welfare. Students of our constitutional history will realize that the argument that the General Welfare Clause is a sweeping grant of additional power to Congress did not succeed until the Supreme Court employed it to uphold New Deal legislation in the 1930s. It was quite clear in 1798 that the drafters of the Constitution meant that clause to further *restrict* the exercise of the powers of Congress enumerated in Article I, Section 8, not to give Congress carte blanche. That the Federalists should have made the "whatever Congress thinks is good" argument when Madison and other drafters were still alive displays amazing nerve.

Prosecutions under the Sedition Act, of which there were many, brought the controversy to a boil. The most famous case was that of Rep. Matthew Lyon of Vermont. Lyon was arrested in the fall of 1798 for having written a letter in which he accused Adams of sacrificing the public good "in a continual grasp for power." Lyon was convicted of sedition and sentenced to four months in prison and given a fine of \$1,000 — a huge sum in those days. He was reelected to Congress while serving his sentence.

Opposing the Acts

Unless freedom of speech and press were to be erased from the Constitution, something had to be done — but what? The Constitution said nothing about the course to be taken when a branch of the federal government usurped powers and acted illegally. How were the people's liberties to be protected? Jefferson and Madison took up the pen to draft documents contending that, when the federal government acted unconstitutionally, it was up to the state governments to protect the separation of powers. Jefferson helped to draft the Kentucky Resolves and Madison the Virginia Resolves, both expressing the views of the legislators in those states that the Alien and Sedition Acts were illegal and unenforceable.

In the Kentucky Resolves, Jefferson argued persuasively that the Alien and Sedition Acts were outside the authority granted to Congress and that state legislatures could take the steps necessary to prevent unconstitutional laws from being enforced within their borders. In the Virginia Resolves, Madison was somewhat less adamant that state officials had the power to nullify unconstitutional acts to protect their citizens. Watkins explains:

Though the two sets of Resolves share much in common, the differences are critical. First, under Jefferson's compact theory, each state contracted with every other state in forming the Constitution, whereas Madison viewed the compact as resulting from the collective action of the several states. This distinction becomes important in a consideration of nullification. Jefferson's draft of the Kentucky Resolution was clear that a state acting alone could nullify an unconstitutional act of Congress.... The Virginia Resolutions are more vague on this subject, but it certainly appears that Madison anticipated collective action of the states.

State nullification of federal laws

Thus, Jefferson thought that any state government could nullify unconstitutional acts by the federal government, whereas Madison felt that the states needed to act in concert to do so. The crucial point is that they both regarded the states, not the courts, as the bulwark of the people's liberties. It is highly instructive that, five years before the concept of judicial review was born in *Marbury v. Madison*, many Americans, including the author of the Declaration of Independence and the Father of the Constitution, looked to state governments as the remedy to federal usurpation of power.

The Kentucky and Virginia Resolves sparked a heated national debate: Was state nullification the right answer when Congress exceeded its authority? To the disappointment of Jefferson and Madison, no other states supported their position. Several of the northern states "in High Federalist fashion," Watkins writes, "rebuked Virginia and Kentucky for daring to criticize

the national government.” Other state legislatures expressed the fear that the principle of nullification was “inflammatory and divisive.” So, of course, were the Alien and Sedition Acts.

In the end, state nullification was never put to the test. The election of 1800 led to the defeat of the Federalists and the Alien and Sedition Acts expired at midnight on March 3, 1801, just prior to Jefferson’s assumption of the presidency. (Apparently, this was the first instance of “sunsetting” legislation in the United States.) The Kentucky and Virginia Resolves were now moot. Or were they?

Watkins points out that the early 19th century was filled with disputes over the proper extent of federal power and what to do about it when Washington began to intrude upon individual rights or state authority. When those disputes erupted, people had once again to consider whether the states could or should act to thwart an overreaching federal government.

Among those disputes were the battles over tariffs, pitting the northern manufacturing states against the agrarian states of the South. In 1824, Congress steeply increased import duties, a measure that Southerners correctly saw as a means of exploiting them. The tariffs would drive up the cost of buying manufactured goods they needed and simultaneously fill the Treasury with money that would be spent largely on “internal improvements,” such as canals in the North. The 1824 tariff prompted South Carolina to pass a resolution declaring it “an unconstitutional exercise of power on the part of Congress to lay and collect duties to protect domestic manufacturers.” Virginia’s legislature reaffirmed the 1798 Resolves and denied that Congress had any power to use high tariffs to benefit some Americans at the expense of others. Neither state, however, took action to prevent collection of the duties.

Four years later, Congress passed a new tariff bill that further increased import duties — the “Tariff of Abominations” to the South. South Carolina again led the opposition and threatened to nullify the tariff. The authority for nullification cited by South Carolina was the Kentucky Resolves. John C. Calhoun argued that the people should not have to look to the Supreme Court and judicial review as their only defense against abuses of federal power; state legislatures were constitutionally competent to perform that role, and also more reliable. History once again denied the nation an opportunity to test the theory of the Resolves. South Carolina backed down when President Jackson threatened to use force if it interfered with the enforcement of federal law.

The legacy of federal power

The Jefferson/Madison idea that state governments have any role to play in upholding the Constitution is today a historical curiosity. Watkins notes that the passage of the Seventeenth Amendment, which requires direct election of U.S. senators, further weakened the role of state governments. Prior to that amendment, senators were chosen by state legislatures and the Senate at least in theory could act as a brake on the aggrandizement of federal power. We now have to look exclusively to the Supreme Court for protection against unconstitutional legislation, a

regrettable state of affairs, since the Court has for many decades been dominated by jurists favorably disposed to the expansion of federal power as the solution to all manner of social and economic ills. The consequence of the defeat of the Virginia and Kentucky Resolves approach to constitutional maintenance more than two centuries ago has been largely unchecked power for the federal government to ignore the limits to its power that are supposed to exist.

It is fascinating to speculate on how much different our lives would be if the Jefferson/Madison argument had prevailed and states could “just say No.” Would such modern abominations as Social Security exist at all? Would there be states where Americans could go if they wanted the freedom to run their lives without the heavy hand of federal control? Undoubtedly the course of American history would have been dramatically different if state governments had been allowed to block enforcement of unconstitutional federal acts. The original concept that “the United States *are*” — as opposed to the modern idea that “the United States *is*” — was probably the only way of preventing the centralization of power that now so ensnares us.

If we can’t undo two centuries of federal usurpation of power, at least we can consider changes that might put the brakes on the growth of power in Washington. To that end, Watkins advocates the “creation of an institution accountable to the state legislative sovereigns and the people, to serve as final arbiter of the Constitution.” He spells out his proposal in detail, but realizes that such a change would be nearly impossible in today’s political climate. “Like the Americans who supported the unconstitutional Acts of the Federalists, modern Americans have been ‘dupes’ in forging their own chains,” he writes, citing a comment of Jefferson’s regarding the Alien and Sedition Acts. So long as the spirit of liberty remains in a deep slumber, we will continue to be governed in the same arrogant and authoritarian fashion as people were in the days of the British monarchy.

My only argument with the author is a minor one — whether the Supreme Court’s so-called substantive due-process cases (most famously, *Lochner v. New York*) should be regarded as federal usurpation of state prerogatives. In *Lochner*, under the Fourteenth Amendment the Court struck down a New York statute that limited the number of hours bakers were allowed to work in a day. Watkins includes this and similar cases among the lamentable aggrandizement of federal power that might have been prevented had the position of Jefferson and Madison prevailed. In my view, for the Supreme Court to tell state legislatures that they may not interfere with the right of individuals to decide for themselves how many hours of labor they wish to put in is entirely different from unconstitutional, freedom-reducing measures such as the Alien and Sedition Acts or Social Security.

Reclaiming the American Revolution is an enlightening work on an important aspect of American history and government that has been almost forgotten. If you’re interested in our history, and particularly the history of our attempt to restrain government power, you’ll want to read this book.

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This article was originally published in the September 2005 edition of *Freedom Daily*.