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*1 KENTUCKY AND THE CONSTITUTION: LESSONS FROM THE 1790S FOR THE 1990S

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When most people hear the word "Kentucky," they think of Daniel Boone, kindly Colonels, bourbon and branchwater, and, of course, the Derby. But constitutional scholars-or at least some of us-are an odd lot. When I hear the word "Kentucky," the first things I think of are the 1798 Virginia and Kentucky Resolves. [\[FN1\]](#) In fact, in recent months, I've been thinking a lot about the Virginia and Kentucky Resolves. Let me tell you why.

I. The Resolves

But first, let me refresh your recollection of the Resolves themselves. The American Revolution, of course, was a war of colonial liberation. *2 Organized by their respective colonial governments-which in 1776 became the governments of free and independent states-the people of America fought to throw off the yoke of an imperial, oligarchic, corrupt, out-of-touch government that threatened to rule their lives from way off in London. The battle cry of the Revolution-"No taxation without representation!"-sounded in both liberty and localism, freedom and federalism, individual rights and states rights: state and local governments could tax Americans, since these governments did represent Americans, actually and virtually.

But within a decade of the great victory at Yorktown, the Philadelphia Convention proposed to create a new and mighty central government, spanning the continent and headquartered in a new capital city. Many Revolutionaries were nervous. Their state governments were familiar and time-tested-the Virginia House of Burgesses was already over 150 years old!-but Madison's proposed federal government was altogether novel and untested. Would Washington, D.C., become a new London-corrupt, bloated, imperialistic, out-of-touch, and too far removed (both literally and figuratively) from the lives of ordinary folk? Could a small clump of sixty-five men, drawn from a vast continent, possess enough

local knowledge and enough confidence from their constituents, to govern sensibly in a single continent-wide Congress? Would the Constitution's new- fangled Presidency quickly degenerate into a monarchy? Could democracy truly be made to work over such a vast geographic expanse-from the Saint Lawrence to the Gulf of Mexico, from the Atlantic to the Pacific (or even to the Ohio)?

These were the momentous questions of the late 1780s and they set the scene for the high drama that unfolded in the late 1790s. High-Federalist supporters of President John Adams passed a series of repressive federal laws-the now- infamous Alien and Sedition Acts. [\[FN2\]](#) The so-called Alien Friends Act gave President John Adams vast power to deport any alien whose ideas Adams considered dangerous, and the Sedition Act has been described by distinguished historians as "one of the most repressive measures ever directed against political activity in the *3 United States." [\[FN3\]](#) In effect, the Act made it a crime for Americans to criticize the President or the Congress.

To attack such Acts in the newspaper press was of course to risk prosecution under the Sedition Act itself, and so opponents of the Act- libertarians and localists-borrowed a page from pre-Revolution patriots. Just as Americans had used colonial assemblies to articulate and mobilize opposition to imperial oppression, so now Americans could use state legislatures to sound the alarm against federal tyranny. And that is just what happened with the Virginia and Kentucky Resolves of 1798 and 1799, in which the Virginia and Kentucky legislatures famously voiced their opposition to the Alien and Sedition Acts.

And the rest, as they say, is history. The Virginia and Kentucky Resolves became banners under which the loyal opposition mobilized, and these banners helped define the debate in the election of 1800. In that election, Thomas Jefferson (the author of the Kentucky Resolves) captured the Presidency from John Adams (the man who had signed and enforced the Acts). Jefferson's friends swept to victories in the House and Senate, too, on a campaign platform sharply opposed to the repressive Acts. Once in office, Jefferson and his fellow Republicans kept their "Contract with America" by allowing the repressive measures to expire.

II. The Present

What, you might ask, does any of this mean for us here and now, two centuries later? I suggest that if we listen carefully, we can still hear distinct echoes of the Virginia and Kentucky Resolves resounding off the walls in key corridors of power, and elsewhere, too.

Consider first the Supreme Court. Last term, for the first time in a half- century, the Court struck down an Act of Congress regulating citizen behavior on the simple ground that the Act lay beyond the scope of Congress's enumerated powers. [\[FN4\]](#) The holding of the Lopez case is, I believe, quite narrow, but the case powerfully reminds us that, in principle, ours is still a federal government of enumerated and limited powers. This is, of course, one of the central themes of the Virginia and Kentucky Resolves. The Sedition Act, the Resolves argued, was doubly unconstitutional. It violated rights that trumped admitted federal power, but it also simply fell beyond Congress's enumerated powers. Congress simply had no

Article I power to adopt the Sedition Act, Virginia and *4 Kentucky argued, and so the Act violated the Tenth Amendment as well as the First. [FN5] Indeed, the Resolves read the First through a Tenth Amendment lens: the First Amendment's first words-"Congress shall make no law"-implied that Congress simply lacked Article I enumerated power to adopt the Sedition Law. In other words, the First Amendment did not so much cut across, or trump, admitted enumerated power; it simply marked the boundary of that power, glossing the similar words of the necessary and proper clause: "Congress shall have power . . . to make all laws" [FN6] The Lopez Court, of course, has a much broader view of federal power, but it likewise reminds us that there are some things Congress can't do for federalism reasons- in other words, there are things Congress can't do, but states can.

And what is Lopez's underlying theory of federalism-of why the Constitution safeguards federalism as a fundamental value? In the Chief Justice's opinion of the Court, he "start(s) with first principles. . . . (Federalism) 'was adopted by the Framers to ensure protection of our fundamental liberties.' . . . 'Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.'" [FN7] In a concurring opinion, Justices Kennedy and O'Connor repeat this passage virtually verbatim. [FN8]

What sorts of things might the Justices have in mind when they speak of state governments reducing the risk of tyranny from the federal government? Things like the Virginia and Kentucky Resolves, I submit. The Alien and Sedition Acts posed a great threat to liberty-and they were successfully resisted by state governments peacefully articulating objections and sounding a national alarm.

When we move from the Court to Congress, we see a similar interest these days in federalism. We hear leading Senators and Representatives wondering if certain now-federal programs should be scaled down or eliminated in favor of state programs. The phrase "enumerated powers" seems to be staging a come-back; and the majority leader of the Senate claims that, wherever he goes, he always carries a copy of the Tenth *5 Amendment in his pocket. [FN9] The majority leader is of course also the de facto Republican nominee for the Presidency.

And speaking of the Presidency, let us note how it, too, lives in the shadow of the 1790s Resolves. We have a two-party system today-but that very system was born in the aftermath of the Virginia and Kentucky Resolves, and the election of 1800. The state-by-state electoral count was critical in the election of 1800, and remains so today. (As of March 1996, President Clinton has made twenty-three trips to California while in office. [FN10] Can you spell "fifty-four electoral votes, winner-take-all"?) And if you are an opponent of an incumbent President and the ruling party in Congress, you can continue to use state government to articulate opposition and prove to the people that you offer a "better way." In a unitary, non-federal regime, opponents of the ruling party can make speeches; but in America, they can do more than this. They can use state governments to prove their competence, leadership and vision. Three of our last four Presidents-Carter, Reagan, and Clinton-were state governors while the other party controlled the White House. And the fourth-Bush-won against yet another governor-Dukakis-in part by arguing to the American people that the governor's record in his state was not so hot after all.

III. The Near Future

Since this is a Presidential election year-and of course a Congressional election year, too-I cannot resist concluding with some quick thoughts on a few issues that may loom large in the national debate over the next eight months. You will, by now, not be surprised to hear that, once again, the Virginia and Kentucky Resolves can speak to us across the centuries.

Consider first the hot topic of term limits: should the Constitution be amended to limit the terms of the members of the House and Senate? Many have framed the choice as follows: do we want amateur, rotating citizen/legislators, or do we want more seasoned, professional politician/statesmen? But perhaps congressional term limits would result in both rotation and professionalism: professional politicians might rotate among various offices, in a constitutional variant of musical chairs. And *6 so bisecting the amateur/professional axis we should plot a localist/centralist axis. Today, state and local politicians often aspire to move up to House and Senate seats in Washington; but members of Congress covet state office much less. With congressional term limits, however, more Senators might dream of being Governor, and the roads between state capitals and Congress would feature more traffic in the reverse-commute lane. This dynamic, of course, might lead more sitting members of Congress to think sympathetically about the concerns of state governments-to heed more carefully all the various messages now being sent from state capitals following a tradition exemplified by the Virginia and Kentucky Resolves.

Consider next the vital issue of campaign finance reform. The lessons of the 1790s here are, I think, two-fold: beware incumbent self-entrenchment, and beware partisanship. The Sedition Act made it a crime for challengers to criticize incumbents, but not for incumbents to criticize challengers. It made it a crime to criticize the Federalist President and the Federalist-dominated Congress, but not to criticize the Republican Vice President. [\[FN11\]](#) And the Act, suspiciously, was designed to expire after the next election. [\[FN12\]](#) Incumbents have a tendency to entrench themselves, and political parties often seek partisan advantage.

Let us also note how the Virginia and Kentucky Resolves broke the Federalists' attempted chokehold of the media, by sidestepping newspapers. Since editorializing in newspapers might risk prosecution, opponents editorialized in legislative assemblies, which were political sanctuaries. Today the newspapers and electronic media are free in one sense, but not free in another. They are free from Sedition-Act-like censorship, but access to them is hardly free: it costs big bucks. And so clever candidates *7 try to break the economic chokehold by staging events generating free publicity-legislative hearings, informal debates, and the like. In short, if the newspapers are closed to you, try to do something else to get attention. If this sounds familiar, it should: it is a modern adaptation of the strategy represented by the Virginia and Kentucky resolves.

But of course the events "staged" in the 1790s were supported by taxpayer dollars in Virginia and Kentucky. And so the lesson here is, perhaps, that taxpayers should fund events-or require television coverage-so that candidates may speak directly to fellow citizens free from the formal censorship of government or the informal censorship of large contributors.

Immigration may also become an issue in 1996. It's hard to argue with those who ask that existing laws be enforced, but I do wonder about those who seek to cut off or radically curtail legal immigration, to protect "right-thinking" Americans from "foreign" ideas. This sounds a bit too much like the so-called Alien Friends Act for my taste. If we must beware of incumbent entrenchment and partisanship, we must also beware of isolationism and scapegoating. Since Pat Buchanan has of late taken to analogizing himself to Thomas Jefferson, let me remind you of what Mr. Jefferson had to say, in the Kentucky Resolves of 1798, on the "alien" question: "(T)he friendless alien has indeed been selected as the safest subject of a first experiment (in repression); but the citizen will soon follow" [\[FN13\]](#)

Lest this last comment seem a bit too partisan, let me close on a more unifying note. The election that looms before us may get nasty: some would say it already has gotten pretty vicious, and the year is young. But the years 1798-1800 were probably far more nasty, and divisive. One party came close to criminalizing its main competitor, and the Kentucky Resolves of 1799 responded with rather reckless language about nullification, [\[FN14\]](#) language whose subsequent career in America has often been ugly. And when Thomas Jefferson ascended to the Presidency in 1801, many wondered whether he in turn, would try to criminalize his opponents. Today, we might find these worries hard to understand. But heads were quite literally rolling in France at this time, and so some genuinely feared an American Reign of Terror. In the wake of all this Thomas Jefferson reminded his countrymen that we are all Americans: *8 "We are all republicans: we are all federalists." [\[FN15\]](#) And this is a message- from the author of the Kentucky Resolves-we would do well to remember today.

[\[FNa\]](#). Southmayd Professor of Law, Yale Law School. What follows are remarks delivered in Lexington, Kentucky, on March 16, 1996, as the Keynote Address to the Forty-Second National Conference of Law Reviews.

[\[FN1\]](#) The Kentucky Resolves were adopted on Nov. 10, 1798, and Nov. 14, 1799. For the full text, see 5 *The Founders' Constitution* 131-35 (Phillip B. Kurland & Ralph Lerner eds., 1987). The Virginia Resolves were adopted on Dec. 21, 1798. For the full text, see *id.* at 135-36.

[\[FN2\]](#) What are commonly referred to as the Alien and Sedition Acts are four different acts passed over a few weeks: Act of June 18, 1798, ch. 54, 1 Stat. 566 (Naturalization Act); Act of June 25, 1798, ch. 58, 1 Stat. 570 (Alien Friends Act); Act of July 6, 1798, ch. 66, 1 Stat. 577 (Alien Enemies Act); Act of July 14, 1798, ch. 74, 1 Stat. 596 (Sedition Act). For more information on the Alien and Sedition Acts, see generally James M. Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* (1956).

[\[FN3\]](#) John M. Blum et al., *The National Experience* 151 (3d ed. 1973).

[\[FN4\]](#) See [United States v. Lopez, 115 S. Ct. 1624 \(1995\)](#).

[FN5] See Kentucky Resolves of Nov. 10, 1798, acae 1, 3-4; Virginia Resolves of Dec. 21, 1798, acae 3-4.

[FN6] U.S. Const. art. I, S 8.

[FN7] [Lopez, 115 S. Ct. at 1626](#) (quoting [Gregory v. Ashcroft, 501 U.S. 452, 458 \(1991\)](#)).

[FN8] See [id. at 1638](#).

[FN9] Dole Uses Senate to Campaign, GOP Leader Stakes Out Differences with Clinton, *The Cincinnati Post*, Mar. 21, 1996, at A5.

[FN10] NBC Nightly News: President Clinton's Courting of California (NBC television broadcast, Mar. 26, 1996).

[FN11] Act of July 14, 1798, ch. 74, 1 Stat. 596. The Sedition Act states in part:
(I)f 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 the congress of the United States, or the president of the United States, with intent to defame . . . or to bring them . . . into contempt or disrepute, or to excite against them . . . the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein for opposing or resisting any law of the United States . . . or to resist, oppose, or defeat any such law or act . . . then such person being thereof convicted . . . shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.
Id. S 2.

[FN12].Id. S 4.

[FN13]. Kentucky Resolves of Nov. 10, 1798, 9.

[FN14]. See Kentucky Resolves of Nov. 14, 1799 ("That a nullification, by those sovereignties, of all unauthorized acts done under color of that instrument, is the rightful remedy") (emphasis in original).

[\[FN15\]](#). Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), in Dumas Malone, 4 Jefferson and His Time: Jefferson the President: First Term, 1801- 1805, 20 (1970).

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