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Nullification: The Founders' Solution to Federal Overreach

Honest observers of our nation's governmental system must agree on one point: The federal government has far exceeded its constitutional limitations. From regularly violating Americans' God-given rights (including gun control and vaccine mandates) to exercising powers not delegated to it (including education policy and the Federal Reserve), the federal government is blatantly ignoring the U.S. Constitution.



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State governments have an obligation to resist this federal overreach, but they cannot do so by just any means they choose — they must use the correct method. Some in the conservative movement are promoting an Article V Convention as the solution to an out-of-control federal government. However, this is a false solution that only threatens the Constitution and the God-given rights it protects.

Instead, rather than seeking to change the Constitution, state officials ought to enforce it — and the way to enforce it is by nullifying unconstitutional laws. In addition to being constitutionally sound, nullification has been, and is still being, successfully used to push back against federal overreach.

What Is Nullification?

Nullification refers to the principle that, when the federal government usurps power not delegated to it by the Constitution, states can act to ensure those usurpations are not enforced and, by extension, are null and void.

Nullification is firmly grounded in the text of the U.S. Constitution, specifically Article VI. It states, "This Constitution, and the Laws of the United States *which shall be made in Pursuance thereof* ... shall be the supreme Law of the Land." (Emphasis added.) This clearly implies that laws not in accordance with the Constitution are null and void.

Additionally, the Constitution delegates only specific, enumerated powers to the federal government. The states, by contrast, retain the vast majority of powers, something James Madison affirms in *The Federalist*, No. 45. This is further cemented by the 10th Amendment, which makes clear that all powers not granted by the Constitution to the federal government are reserved to the states and to the people.

When the federal government usurps its power, state nullification under Article VI is a duty, not just an option. Article VI also declares that state legislators, executive officials, and judges "shall be bound by Oath or Affirmation, to support this Constitution." In the face of federal overreach, which state official is faithful to his oath: the one who acquiesces to the usurpation, or the one who resists? Clearly the latter.

Nullification stretches back to the Founding Fathers themselves. For example, Madison, writing in *The Federalist*, No. 46, stated, "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.”

Nullification was first used just over 10 years later, in the Kentucky and Virginia Resolutions, written by Thomas Jefferson in 1798 and Madison in 1799, respectively. These resolutions condemned the Alien and Sedition Acts — which imposed criminal penalties on individuals who published criticism of the U.S. government — as unconstitutional. Furthermore, they asserted that state governments had authority to nullify, or interpose, the acts along with any other unconstitutional law, and they urged cooperation with other states to resist the acts’ provisions. Although no other state joined Kentucky and Virginia, this was largely due to state legislators fearing arrest under the Alien and Sedition Acts and to many states being controlled by the Federalist Party, which supported the acts. Nonetheless, this incident illustrates the sturdy historical and constitutional basis for state nullification.

The Rightful Remedy

Not only is nullification constitutionally sound, but it is “the rightful remedy,” as Thomas Jefferson put it, for countering federal-government overreach. The most obvious reason is that nullification attempts to enforce — not change — the Constitution, a document enshrining a federal government with *limited* powers.

Of course, the federal government currently operates far outside its constitutional limitations, having grown far beyond what the Founding Fathers could have imagined. However, this massive growth was not *because* of the Constitution or any of its provisions, but rather from officials *ignoring or misinterpreting* it. Indeed, if the Constitution were fully enforced, the federal government would shrink by at least 80 percent. A Constitutional Convention, or Con-Con, ignores this important fact in its push to change the Constitution. But, especially in today’s political and cultural climate, any changes to the Constitution will surely authorize a far-larger federal government than the current Constitution permits.

Additionally, nullification has an immediate effect, as opposed to a Con-Con, which could take decades or longer to be concluded. For example, the movement to achieve a so-called Balanced Budget Amendment via an Article V Convention began in earnest in the 1970s. A half-century later, BBA advocates still have not succeeded in calling a convention. Similarly, the first Convention of States (COS) resolution was passed in early 2014. More than eight years later, COS is only about halfway toward reaching the 34-state threshold for calling a convention.



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Not secession: Although detractors of nullification often conflate it with secession and defending slavery, such claims have no basis. In fact, Wisconsin and other Northern states used nullification against the Fugitive Slave Act of 1850, effectively assisting runaway slaves. (*Photo credit: Eastman Johnson*)

If federal-government overreach is such a serious problem — and it is — the convention process is far too slow, and far too dependent on multiple states acting in unison, for it to be a serious solution. (Of course, the purpose of Article V is to correct potential errors in the Constitution, *not* to rein in the federal government.) By contrast, nullification legislation can take effect immediately upon a state legislature's passage or governor's signing. Its implementation is not dependent on the actions of 33 other states or approval by the federal judiciary.

For nullification to succeed, state officials must be bold and courageous. Any state acting to enforce the Constitution and prevent the implementation of unconstitutional edicts will likely face significant opposition from the federal government, judiciary, media, big business, and others. Reining in the federal government will not come without a fight. However, if our leaders are bold and courageous, nullification — unlike an Article V Convention — can immediately and effectively push back against unconstitutional federal actions.

Nullification vs. Secession

Opponents of nullification sometimes conflate it with secession — the act of leaving the Union — or claim it will lead to national destabilization. Such claims have even come from COS Action. In early 2021, for example, a regional director of the organization, David Schneider, spoke out against a nullification bill in South Dakota. Among other statements, he claimed that nullification helped cause the Civil War and stated, "Wholesale nullifying leads to anarchy and nullification of the Constitution itself."

Such claims, however, have no basis in reality. First, nullification under Article VI only targets those federal edicts with no constitutional basis, while constitutional federal actions are upheld under this principle. In other words, nullification upholds the Constitution; it cannot, as Schneider claims, "[nullify] the Constitution."

Nullification and secession are very different principles. Rather than leaving the Union or rejecting the



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Constitution's authority, nullification upholds both the Constitution and the Union in the way the Founding Fathers intended. In this way — particularly since a Con-Con threatens limited government as well as the Constitution and the God-given freedoms it protects — secession and a Con-Con resemble each other far more closely than secession and nullification.



Still used today: State and local governments are currently using nullification to counter federal usurpations. For example, 15 states and counting have enacted measures preventing the enforcement of federal gun control, while hundreds of counties have done the same. *(Photo credit: artas/ iStock / Getty Images Plus)*

Unlike secession, nullification had no role in causing the Civil War, nor was it used to defend slavery. In fact, opponents of slavery — most prominently in Wisconsin — used nullification to prevent the enforcement of the Fugitive Slave Act of 1850, a law that unconstitutionally infringed upon individual freedom and state sovereignty. Not only this, but when the U.S. Supreme Court ordered Wisconsin to obey the law, the state's legislature and supreme court nullified *that* decision. The conflation of nullification and secession does not hold up under scrutiny.

Nullification in Action

Nullification has been successfully used multiple times throughout U.S. history, with the Kentucky and Virginia Resolutions and the nullification of the Fugitive Slave Act among the most prominent examples. However, nullification is not just a thing of the past; it is still being used today to push back against federal usurpations.

For example, state and local governments are employing nullification to counter federal gun-control efforts. Already, 15 states — either through legislation or gubernatorial executive orders — have enacted measures preventing, to various degrees, the enforcement of federal gun control. Additionally, counties are taking their own steps; by mid-2021, 61 percent of all U.S. counties had passed “Second Amendment sanctuary” measures, and that percentage continues to grow. While many of these measures are symbolic resolutions, some counties have enacted substantive ordinances.

One of the strongest of these measures is Missouri's Second Amendment Preservation Act, enacted in mid-2021. Among other provisions, it catalogs a wide-ranging list of unconstitutional “federal acts, laws, executive orders, administrative orders, court orders, rules, and regulations,” which effectively include



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the 1934 National Firearms Act and the 1968 Gun Control Act. The act then declares that such policies “shall be invalid to this state, shall not be recognized by this state, shall be specifically rejected by this state, and shall not be enforced by this state.” It also includes enforcement mechanisms to ensure its provisions are followed.

State governments have also recently enacted legislation taking steps to bypass the unconstitutional Federal Reserve, thus nullifying it and enforcing the Constitution’s monetary provisions. For example, 42 states have abolished taxes on precious metals such as gold and silver, while three have affirmed their validity as legal tender, thus encouraging their use. Meanwhile, Texas has taken the step of creating a state precious-metals depository, further reducing state dependence on the Fed.

Nullification is not confined to conservative-leaning states. For example, to date, 19 states have fully legalized marijuana in the face of a federal ban, and many more have legalized it for medical use. Regardless of one’s views about marijuana use, the federal government’s prohibition is unconstitutional under the 10th Amendment. Accordingly, state governments have authority to nullify this ban, and they have done so with great effect.

Many other pro-nullification bills have been enacted by state governments in recent years, and many more such bills have been introduced in state legislatures. The latter include legislation to nullify federal vaccine mandates, pro-abortion court rulings, unconstitutional federal deployments of state National Guard units, and unconstitutional federal spending, and to create formal processes for nullifying any unconstitutional federal action.

Nullification is already being used effectively, and many other promising bills and initiatives exist. However, it is imperative that state legislators enact the remaining measures, and that all state officials courageously enforce the Constitution in the face of heavy opposition. Accordingly, patriots must actively educate these officials and the general public about the benefits of nullification and the dangers of a Con-Con. By taking such action, we can significantly rein in the federal government.



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