



Written by [Gary Benoit](#) on February 20, 2024

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Secession? Why Not Nullification?

The current showdown on the border between the Biden administration and the state of Texas seems to have caused much more heightened interest in the issue of secession than in nullification.

It should be just the opposite.

Texas is not engaging in a secessionist act by exercising its right to protect its border and its people. True enough, it is defying a U.S. Supreme Court order, but this order is not the law of the land. In fact, by defying the order to allow the feds to remove the razor wire at Eagle Pass, Texas is upholding the Constitution and putting into practice a principle known as *nullification*.



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Secession and nullification are often conflated to mean essentially the same thing. Yet they are very different. In the context of the American system of government, *secession* occurs when one or more states secede from the Union, and *nullification* occurs when one or more states refuse to abide by unconstitutional federal acts. Any state that secedes is no longer under the Constitution; any state that nullifies unconstitutional federal laws, orders, or rulings is upholding the Constitution.

Though both secession and nullification have been recommended by various voices in the freedom movement to rein in federal overreach, secession is by far the riskier of the two approaches, since it means leaving behind the Constitution that created our federal system of government to start anew, either as a single state or perhaps in a new compact with a handful of states.

But how, it is reasonable to ask, could a state be upholding the Constitution by defying the federal government via nullification? And how could nullification be employed by the states to stop federal overreach? To answer these questions, it is important to understand the nature of the American system of government under the Constitution.

The American System

When the Founding Fathers drafted the Constitution, they did not create a unitary central government exercising supreme authority over the states. The states ratifying the Constitution did not become subservient to the new national government; they retained sovereignty, and may govern as they wish in accord with their own state constitutions except in a few specified areas. This is made abundantly clear in the U.S. Constitution's 10th Amendment, which states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Of course, the same principle applies to states that have joined the United States since the Constitution's adoption in 1788.

This novel principle of dividing governmental powers between the national government and state



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governments, as opposed to creating a unitary state, became known as *federalism*, and its advocates were called Federalists. During 1787 and 1788, when ratification of the Constitution was being debated, three Federalists — James Madison, Alexander Hamilton, and John Jay — wrote a series of 85 essays originally published in New York state newspapers under the pseudonym Publius arguing in favor of ratification. Collectively known as *The Federalist Papers*, or [The Federalist](#), these essays shed tremendous light on the intent of the Founders in creating the new federal government, including the principle of dividing governmental powers among the national government and the states.

For example, in *The Federalist* No. 45, Madison, who became known to history as the “Father of the Constitution,” wrote, “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.” In *The Federalist* No. 14, Madison wrote, “The general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any.” And in *The Federalist* No. 32, Hamilton explained, “An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them would be altogether dependent on the general will. But as the plan of the [constitutional] convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States.” (Emphasis in original.)

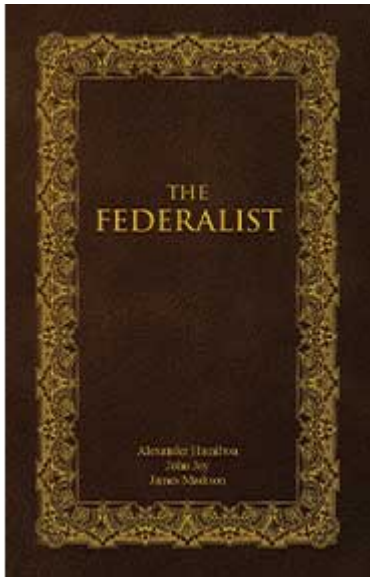
Even the “few and defined” powers that were delegated to the national government by the Constitution were not entrusted to a single national authority, but were instead further subdivided among the three branches of that national government. Why? As Madison warned in *The Federalist* No. 47, “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” Moreover, a brilliant system of checks and balances was interwoven into the Constitution with the intent of blocking any branch from overstepping its delegated authority or intruding on the delegated authority of the other branches.

Under the Constitution, the president is by no means an elected dictator, but may exercise only those powers delegated to his branch. As Hamilton explained in *The Federalist* No. 69, regarding war powers in particular, “The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature.” (Emphasis in original.)



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As is the case with the executive branch, the Congress and federal judiciary too may exercise only those powers specifically granted to them. Regarding Congress, even though it possesses “all legislative authority” granted by the Constitution, it may not make any law it chooses, but may make only those laws that are constitutional.

The system of government the Founding Fathers created was not a democracy (majority rule). It was instead a republic (a government of law), where the law limits and defines governmental powers and protects the rights of the people. The word “democracy” does not appear in the Constitution, but Article IV, Section 4, states, “The United States shall guarantee to every State in this Union a Republican Form of Government.” If the U.S. government truly were a democracy, as is so often claimed, then the people’s representatives in Congress would be empowered to make whatever laws the majority of the people want (or more precisely, whatever laws the legislators claim the people want), without regard to any constitutional restraints. Yet this is decidedly not the case.

Consider the First Amendment to the U.S. Constitution: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” And the Second Amendment: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” Under the Constitution, the national government is not only prohibited from exercising those powers that are expressly prohibited (as in the case of the above examples), it is also prohibited from exercising *any* powers that are not enumerated in the Constitution.

The Founding Fathers feared that just as a monarch could violate the rights of the people, so too could a popular government acting in the name of the people. They recognized that rights do not come from government, for if they did then government could on a whim properly limit or abolish whatever rights it may decide to grant from time to time. Rights instead come from our Creator, and government’s role is to protect those God-given rights. These “self-evident” truths were eloquently described in the Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”



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Thus, the Founding Fathers built into their new system of government safeguards intended to limit government to its proper role of protecting God-given rights, and to prevent government from becoming so powerful that it could consume the very rights it was instituted to protect.

Those safeguards, as explained above, include multiple state governments as well as the national government. Madison summarized the wisdom of this federalist approach to governance, as opposed to the unitary approach, in *The Federalist* No. 51: “In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.”

The Case for Nullification

What if, despite the safeguards, the federal government breaks loose from what Thomas Jefferson called “the chains of the Constitution” and intrudes upon the rights of the states and of the people? What then? Of course, the question is not theoretical, since the national government broke out of its constitutional chains long ago, and the train of federal abuses has gotten worse over time. Moreover, the Founding Fathers addressed this very eventuality.

Alexander Hamilton called unconstitutional acts by the federal government “usurpation” and said they were “void.” In *The Federalist* No. 33, he wrote, “Acts ... *not pursuant* to its constitutional powers ... will be merely acts of usurpation, and will deserve to be treated as such.” (Emphasis in original.) And in *The Federalist* No. 78, he said, “There is no position which depends on clearer principles, than that every act of a delegated authority contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.”

Hamilton’s emphasis on the phrase “not pursuant” in *The Federalist* No. 33 is significant, since he used the phrase in reference to Article VI, Clause 2 of the Constitution, which he quoted earlier in the same essay. Often referred to as the Supremacy Clause, it states: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Ironically, the Supremacy Clause is often cited to support the erroneous claim that all U.S. laws are “the law of the land” and supersede state laws, when in fact, in context, the clause actually states that only those laws that are made pursuant to the Constitution are the law of the land. (It’s worth noting that Supreme Court decisions are also sometimes erroneously referred to as “the law of the land,” despite the fact that the Supreme Court is not even mentioned in the Supremacy Clause.)

Moreover, it is not just U.S. officials who take an oath to uphold the Constitution, but also state officials, as stipulated in Article VI, Clause 3, the clause immediately following the Supremacy Clause: “The Senators and Representatives before mentioned, and the Members of the several State Legislatures,



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and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.” Thus, state officials are duty-bound not to join their federal counterparts in carrying out any unconstitutional federal acts. Yes, federal officials are also duty-bound, but when they unconstitutionally intrude on the rights of the states, this does not justify state officials violating their own oaths of office.

The Founding Fathers expected better. In the Kentucky Resolutions of 1798, Jefferson recommended nullification as the “rightful remedy” for countering unconstitutional federal acts: “Where powers are assumed which have not been delegated, a nullification of the act is the rightful remedy: that every State has a natural right in cases not within the compact ... to nullify of their own authority all assumptions of power by others within their limits: that without this right, they would be under the dominion, absolute and unlimited, of whosoever might exercise this right of judgment for them.”

In the Virginia Resolutions of 1798, Madison similarly wrote that states have the right to “interpose” themselves “within their respective limits” in order to protect “the authorities, rights and liberties appertaining to them” against federal acts not authorized by the Constitution. In fact, he said the states were “duty bound” to do so.

And Hamilton said in *The Federalist* No. 16, “If the interposition of the State legislatures be necessary to give effect to a measure of the Union, they have only *not to act*, or to *act evasively*, and the measure is defeated.” (Emphasis in original.)

Standoff in Texas

Fast-forward to today, and the state of Texas is refusing to comply with a U.S. Supreme Court order to allow the federal government to remove razor wire installed by the Texas National Guard to stem the illegal-alien invasion. In so doing it is engaging in an act of nullification, not secession or insurrection. It is also upholding the Constitution.

Article I, Section 10, Clause 3, of the Constitution states, “No State shall, without the Consent of Congress ... engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.” The sheer size of and direction behind the illegal immigration onslaught, which includes within its numbers terrorists and others who wish to do harm to the United States, should qualify as an invasion under this clause, even if the hostile elements are not wearing uniforms. Yet, even if that is dismissed as a stretch beyond what the Founders intended, it should be uncontested that Texas is responding to “imminent Danger.”

Moreover, Texas has the right to deploy its Guard to defend itself. As Madison observed at the Virginia Ratifying Convention in 1788, “As each state will expect to be attacked, and wish to guard against it, each will retain its own militia for its own defense.”

On the other hand, it is the U.S. government that is behaving unconstitutionally in its border showdown with Texas by trying to deny Texas’ right to self-defense and by ignoring its obligation in Article IV, Section 4, to “protect each of them [the states] against Invasion.”

Of course, nullification can be applied to declare null and void other federal transgressions — such as unconstitutional gun laws or an unconstitutional deployment of a state’s National Guard — not just by Texas but by the other states as well. In addition to the states, local sheriffs can apply the principle of nullification by interposing themselves between the people in their county whose rights are being



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violated and the offending government agencies.

Nullification is often equated with secession even though, as already indicated, the two are different. It is also sometimes vilified as racist. But this characterization is utter nonsense, since nullification was used by the state of Wisconsin in 1850 to void the federal Fugitive Slave Act within the borders of Wisconsin. This onerous federal law required slaves who had escaped to states where slavery was prohibited to be returned to their “masters” in states where slavery was legal, and Wisconsin rightfully refused to abide by this violation of human rights.

What About Secession?

The case for nullification notwithstanding, let’s now take a look at secession as a way to end federal overreach, beginning with this question: Do states have the right to secede from the United States? Although many today claim that the answer is no, there is no question that the Founding Fathers firmly believed that the 13 British Colonies in America had the right to secede from Great Britain — because that is exactly what they did. In their Declaration of Independence of July 4, 1776, they declared that “these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved.”

The Declaration listed the particular train of abuses committed by the British Crown that compelled the separation. It also included, prior to this list, a revolutionary statement declaring when the people have the right “to alter or to abolish” their government. Recall that we earlier quoted this “self-evident” truth from the Declaration: “That to secure these [unalienable] rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.” This truth was immediately followed by: “— That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles.”



Thomas Jefferson

While the American War for Independence was still raging, the 13 “Free and Independent” American



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states united under the Articles of Confederation. After the war, they formed a new government under the Constitution. Thus, the states created the U.S. government, not the other way around. If the states created the new government, it can be reasoned, they also should be able to secede from it.

It is hard to imagine that the Founders, having recently fought the War for Independence to secure their rights, would join a new political union believing that they could never resume their rights should that union overstep its delegated powers and become tyrannical. During the ratification of the Constitution, three states said otherwise in their ratification documents.

- New York: “That the Powers of Government may be resumed by the People, whensoever it shall become necessary to their Happiness; that every Power, Jurisdiction and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the Government thereof, remains to the People of the several States, or to their respective State Governments to whom they may have granted the same.”
- Rhode Island: “That the powers of government may be reassumed by the people, whensoever it shall become necessary to their happiness: — That the rights of the States respectively, to nominate and appoint all State Officers, and every other power, jurisdiction and right, which is not by the said constitution clearly delegated to the Congress of the United States or to the departments of government thereof, remain to the people of the several states, or their respective State Governments to whom they may have granted the same.”
- Virginia: “The People of Virginia declare and make known that the powers granted under the Constitution being derived from the People of the United States may be resumed by them whensoever the same shall be perverted to their injury or oppression.”

Some claim that the American Civil War settled once and for all whether a state may secede from the Union. But this claim is based on the fallacy that might makes right.

However, the fact that states *may* secede does not mean that they *should* secede, particularly considering that other means may be employed to restrain a federal government that has usurped unconstitutional powers, including the “proper remedy” of nullification.

Secession is fraught with danger. One such danger is the ability of divided states to defend themselves against a foreign invader. In *The Federalist* No. 4, John Jay warned of such a danger: “Leave America divided into thirteen or, if you please, into three or four independent governments — what armies could they raise and pay — what fleets could they ever hope to have? If one was attacked, would the others fly to its succor and spend their blood and money in its defense? Would there be no danger of their being flattered into neutrality by its specious promises, or seduced by a too great fondness for peace to decline hazarding their tranquillity and present safety for the sake of neighbors, of whom perhaps they have been jealous, and whose importance they are content to see diminished? Although such conduct would not be wise, it would, nevertheless, be natural. The history of the states of Greece, and of other countries, abounds with such instances, and it is not improbable that what has so often happened would, under similar circumstances, happen again.”

Another danger lies in the challenges of being able to form a new government that measures up to (if not exceeds) the greatest experiment in human liberty the world has ever seen — the American Republic, which was bestowed upon us by the Founding Fathers. This is particularly the case during a period when the understanding of the people and their political leaders is so lacking — e.g., most



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believe the United States is a democracy — and when global elites are working to destroy a free and independent America in order to bring about global control. Those forces would move to take secessionist movements off course, no matter how well-intended or liberty-minded those movements may be.

Even before the Constitution was ratified, Madison recognized that what America had already accomplished was unparalleled in history, writing in *The Federalist* No. 14, “Happily for America, happily, we trust, for the whole human race, they pursued a new and more noble course [than others]. They accomplished a revolution which has no parallel in the annals of human society. They reared the fabrics of governments which have no model on the face of the globe.”



Gouverneur Morris

Not long after the American Revolution and the adoption of the U.S. Constitution, another revolution took place in France that some Founding Fathers looked upon with favor, at least initially. But that revolution took a very different course, leading to the Reign of Terror and despotism. One Founding Father who was able to foresee this course early on was Gouverneur Morris, the author of the Preamble to the U.S. Constitution. Morris arrived in France in February 1789, before the attack on the Bastille on July 14 of that year, and was there until 1794. In 1792, prior to the Reign of Terror, he had already seen enough to conclude, “France is on the high road to despotism. They have made the common mistake that to enjoy liberty it is necessary only to abolish authority.”

In America today, the U.S. Constitution is still the law of the land, despite the fact that it is so routinely ignored and transgressed. The constitutional means are still available to restore good government and safeguard our endangered liberties — means that would no longer be available if the Constitution were abrogated or abandoned. Before seceding from the United States, we recommend that states first try nullifying unconstitutional federal overreach. Instead of advocating states going it alone (or perhaps with a handful of other states) without the Constitution and our federal system of government, let’s inform our fellow citizens about the Constitution and the principles undergirding it, and insist that the Constitution once again be obeyed. Regarding the states in particular, let’s insist that state officials who have taken an oath to the Constitution honor that oath by nullifying unconstitutional federal acts, declaring those acts null and void at their state borders. As Madison noted, they are “duty bound” to do



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