Written by **Joe Wolverton, II, J.D.** on December 7, 2013

New Cato Paper Proposes Fixes for Loss of Federalism

As the Obama administration accelerates the federal government's accumulation of all powers — those that constitutionally belong to it and those which should rightly remain with the states — conservative and libertarian organizations are searching for a way to apply the brakes.

The Cato Institute recently released a new policy analysis by John Dinan, "How States Talk Back to Washington and Strengthen American Federalism." In his paper, Dinan points to several ways states can limit federal overreach, beyond lawsuits, lobbying, and nullification.

According to a press release announcing the new publication, "Decentralized federalism is at the core of Cato's policy and Dinan, a professor of politics and international affairs at Wake Forest University, shows how political and legal processes offer states a way to limit the reach of the federal government."

The study declares that states can use the following tactics to simultaneously push back against the feds and make headway in the restoration of federalism:

> Decriminalization: Using regulatory authority states can enact measures decriminalizing certain practices, hoping federal executive officials will not enforce federal statutes in states with contrary policies.
>
> Nonparticipation: States can decline to participate in federal programs and accept the designated penalties, hoping Congress will revise statutes or executive officials will issue rules or waivers that moderate the programs.
>
> Judicial Reconsideration: When federal judicial doctrine is uncertain or in flux, states can enact measures inconsistent with Supreme Court precedents, hoping the Court will reconsider and relax judicially imposed constraints on state policy discretion.
>
> Judicial Veto: States can also enact measures inconsistent with federal statutes, hoping the Supreme Court will invalidate or limit the reach of federal statutes.

Dinan's study provides examples of states successfully employing these tactics in gaining relief from federal laws and regulations relating to marijuana, education, abortion, and health care.

"These examples show the kind of leverage states officials have in pushing back against federal officials and securing modification or repeal of policies that burden states or impose unnecessary uniformity," the press release declares.

Dinan's effort to point to alternative routes to a restoration of federalism is to be applauded. The four points listed above should be in the arsenal of every state lawmaker and governor determined to enter the fray against federal authoritarianism.

The problem is that Dinan's treatment of the disease purposefully neglects promotion of the "rightful

remedy" to the sickness of the unbalance of power.

Nullification is not only a more powerful antidote than those set out by Dinan, but it is more permanent, as well.

Some conservatives, though, misunderstand the principle and believe it to have been settled by the Civil War. Dinan certainly does not belong in this bloc, but he does take a decidedly non-nullification tack in taming Washington.

Even among those who espouse nullification as an answer to federal usurpations and encourage its practice by the states, though, there is an aspect of the states' power to reject unconstitutional federal acts that is rarely discussed.

This often overlooked element is that in the exercise of this exclusive authority, a state may unilaterally (that is, without the cooperation or agreement of any of her sister states or the permission of the federal government) nullify an act of Congress without assuming a revolutionary (secessionist) posture. If the other states decide not to nullify the measure found offensive by the nullifying state, neither the strength of the union nor the sovereignty of the non-nullifying states is diminished.

We need to relearn this lesson and to reassert the sovereignty of the states we live in. We need to better understand that each state is absolutely sovereign and they have never surrendered that sovereignty. Accordingly, any one state or group of states may exercise that sovereignty by negating any unconstitutional act, regulation, or order of the general government — whether positively through acts of nullification or negatively through refusing to obey or enforce those acts.

Neither of those approaches to nullification requires a coalition of states to be effective. In fact, such a requirement of multi-state collaboration in this check on the general government usurpations would diminish the sovereignty of the individual state. Such a requirement would reduce the single state to temporary sovereign status, sovereign only in those instances when it agrees to join some provisional confederacy of other states opposing this or that act of the general government.

Ironically, perhaps, if a plurality (or a majority) of states nullified the same act or edict of one of the branches of the central government, the union would be strengthened by such a concerted commitment to the Constitution and the foundational principle of enumerated powers. Think of it this way: how much safer, cleaner, and attractive would a neighborhood be if the homeowners consistently enforced the terms of the covenant that created the Homeowners' Association?

Federalism is a delicate flower that grows best when planted in the rich soil of constitutional consistency.

But that plot of land has lain fallow for so long and the weeds of centralism have grown so tall, that there are few legislators or laymen who remember the fertile, loamy soil that once nourished abundant acre upon abundant acre of the life-giving harvest of liberty.

Today, federalism is not only misunderstood, but misapplied by those who claim to appreciate its qualities.

For example, so often so-called "conservatives" will push back against the aggression of the federal government until the feds win (and they always do), and then the former foes retreat to safety behind the lines of the Supremacy Clause.

State legislators who consider themselves lawmakers per se, that is to say, not proxies for their colleagues on Capitol Hill, could foment real revolution without ever firing a shot and without ever filing

a bill.

Nullification, whether exercised by one state or many, is a fact of constitutional construction and does not require a bill to trigger its protections of state sovereignty and individual liberty.

States which refuse to enforce an unconstitutional federal edict nullify that act just as positively and permanently as a state that proposes and passes a law negating that same measure.

After establishing a record of reliable resistance to attempts by the federal government to exercise unconstitutional powers, citizens of a state or group of states that effectively ignore the offending counterfeit law would learn in a generation or two that there are just some things that the federal government can't do. That state (or states) would gradually gain a gravitational pull, attracting men and women who value liberty above devotion to a "union" that has long since ceased to abide by the terms of the contract that created it and had grown so gargantuan as to prevent the justice and liberty it was organized to preserve.

Sadly, state lawmakers and governors have thus far failed to appreciate the right and responsibility they have to build these bulwarks of freedom. Perhaps more pragmatically relevant, they have failed to understand the amount of money that would be pumped into state budgets by a constant stream of immigrants (from within the union) seeking to be free from the crushing weight of federal mandates and monetary manipulation. When the first state assembly or the first state chief executive catches the vision of the viability and economic worth of a state where the Constitution is rigidly adhered to, there will be an immediate response by other states seeking to emulate that state's success. And nullification is the arm that will ring the bell, calling civil libertarians and constitutionalists to gather inside the borders of the bastions of liberty.

Until the dawn of the new day, it is curious that so many centralists and consolidationists deny the simplicity of the proposition that the general welfare is helped rather than hindered when a state government boldly asserts its right to judge the validity of acts of the federal government, for although all other states may disagree with the nullifying state's stance, the assumption thereof reinforces the remedy and its availability to all who feel the force of the federal boot on their neck.

In their support of the constitutionality of the application of the nullification doctrine by one state regardless of the posture of her sister states, the Kentucky and Virginia Resolutions are a "reaffirmation of the Spirit of 1776" as asserted by William J. Watkins in his book *Reclaiming the American Revolution*:

> Whether made by one or many, these declarations of constitutional interpretations, like the Declaration of Independence, are statements renouncing the overreaching of government and reasserting the original right of other sovereignties to express that right and to require the central government to restrain itself within the sphere of power constitutionally assigned to it.

Watkins is right. It is important to recognize that the hand that wrote the Kentucky Resolutions also wrote the Declaration of Independence. Madison and Jefferson understood the wisdom of the proverb: "Start as you mean to go on." They likewise understood that even small and incremental deviations from the straight and narrow constitutional road would place this nation on a trajectory of tyranny — a path followed by so many of the formerly free governments of history.

Why do state legislators hesitate? Why do they deny the power that exists in them to put an end to the nearly constant contraction of liberty carried out by the federal government? Which state, if any, will become the site of the metaphorical Fort Sumpter?

Which governor, if any, will assert his state's constitutional prerogative to cut the cord from which dangles the federal carrot and break the stick over the knee of nullification?

One state. One state can lead the way. One state legislature can then take those sticks and rub them together until they spark a fire of freedom that will attract liberty-lovers to their borders like so many moths to the light of an irresistible flame.

While Americans wait for states' rights momentum to sweep likeminded lawmakers into state assemblies, other plans must be followed, and those ably explained by Dinan and the Cato Institute are worth the read.

Joe A. Wolverton, II, J.D. is a correspondent for The New American *and travels frequently nationwide speaking on topics of nullification, the NDAA, and the surveillance state. He is the host of The New American Review radio show that is simulcast on YouTube every Monday. Follow him on Twitter @TNAJoeWolverton and he can be reached at jwolverton@thenewamerican.com*