Written by **Steve Byas** on February 1, 2019

States Use Nullification to Rein in the Feds

Its use goes back to the earliest days of the republic. When the Federalist Party-dominated Congress passed the Sedition Act in 1798, Thomas Jefferson (the author of the Declaration of Independence) and James Madison (principal author of the Constitution) secretly wrote resolutions adopted by the state legislatures of Kentucky and Virginia, proposing to use "nullification" and "interposition" to uphold the First Amendment from its violation by Congress.

The First Amendment explicitly stated that Congress could make no law abridging the freedom of speech and the freedom of the press. Yet, just seven years later, Congress passed the Sedition Act, which proceeded to do both. Federalist judges fully implemented the unconstitutional act, despite this clear wording forbidding abridgement of speech and press.

In an effort to avoid violent resistance and still uphold the First Amendment, Jefferson and Madison supported nullification — as a last resort. The states would refuse to cooperate with the law's implementation in order to protect its citizens from the heavy hand of the federal government.

Nullification is regularly denounced in history books and by modern commentators largely ignorant of its purpose, with some even arguing that the Civil War was fought over the doctrine. This is historically inaccurate. The southern states that seceded were not attempting to nullify federal law — they were declaring their independence from the federal government.

Others insinuate that nullification was used by South Carolina in the 1830s to defend slavery. But South Carolina declared it was nullifying the tariff laws by refusing to collect the hated Tariff of Abominations, as they called it. The slavery question had no role whatsoever in the whole episode.

On the contrary, Northern states such as Michigan and Wisconsin used the doctrine of nullification to inhibit federal enforcement of the Fugitive Slave Act of 1850.

The use of nullification in the case of the Fugitive Slave Act is an example of how a state can best utilize the doctrine: by simply refusing to cooperate with federal authorities.

A good modern example of this use of nullification is a bill introduced in the Hawaii Senate to ban the use of "stingrays." Stingrays are devices that spoof cell phone towers, tricking devices within range into connecting with the stingray instead of an actual cell tower. This allows law enforcement to essentially violate the Fourth Amendment's ban on unreasonable search and seizure. Under the proposed law, Hawaii law enforcement officials would be forced to obtain a warrant before listening to any conversations captured by the devices.

The federal government has financed most of the stingray programs in the states. Sold originally as a way to combat "terrorism," the program is mostly used for routine criminal investigations — all without

a warrant and probable cause.

But by placing these restrictions on stingrays or by banning their use, state and local governments can severely limit the data available to federal law enforcement. The bill (SB 465) is presently in committee, awaiting hearings and a vote.

In the Arizona House of Representatives, a bill by Rep. John Fillmore would require a criminal conviction before prosecutors could seize a person's property under what is known as civil asset forfeiture (CAF). Under CAF, law enforcement officers often take someone's property, without a criminal conviction, or sometimes without even charging the person with any crime. They circumvent the Fifth Amendment with the argument that it is the property, not the person, being punished.

Because of this, state legislatures have begun to restrict or even abolish CAF; however, under a federal program known as "equitable sharing," state and local prosecutors can avoid state laws by passing the cases off to the federal government. The feds then seize the property and "share" it with the local authorities. In 2017, Arizona curtailed this practice by forbidding any law enforcement in that state from entering into such agreements with any federal agency. The latest legislation in that state (HB 2072), which requires a prior criminal conviction before assets can be seized, is awaiting action in a committee.

In West Virginia, HB 2684 would repeal all taxes on gold and silver specie, thus treating it as money, and not just a commodity. The U.S. Constitution actually states, "No state shall … make any thing but gold and silver coin a tender in payment of debts." The purpose of this legislation is to break the monopoly of Federal Reserve notes in West Virginia.

The bill has been referred to the House Finance Committee, where it is awaiting further action.

The Constitution delegated no power whatsoever to the federal government over laws regulating marriage and divorce, but federal courts decided in recent years to force the states to issue marriage licenses to same-sex couples.

A bill filed in the Oklahoma House of Representatives would end the government licensing of marriages, which would, in effect, nullify these odious court decisions. HB 2235 by Rep. Todd Russ (R-Cordell) would terminate the issuance of marriage licenses by the state, and instead provide the recording of marriages, with the issuance of certificates, simply recognizing that a couple has agreed to enter into a marriage contract.

A license is government permission, whereas a certificate is simply a recognition that a contractual relationship has been entered into. Christopher Wesley of the Mises Institute has said that marriage is endangered by resting it "in the coercive hands of the State."

The bill will be formally introduced when the Oklahoma Legislature convenes next week, at which time it will be referred to an appropriate committee.

A review of these actions in four different states on four different issues — marriage, money, civil asset forfeiture, and warrantless searches — reveals that while states have been stripped of much of their power over the last several decades, they still can make a huge difference in restraining the power of the federal behemoth, if only they will.

While they may not call it nullification, we can guess that Jefferson and Madison would approve.

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