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# Several States Invoking Nullification to Rein In Federal Government


From the Dakotas to Rhode Island to Kentucky, states are increasingly moving to use nullification as a method to curtail what they contend are unconstitutional actions by the U.S. government.

Nullification is a political theory that has its origins in the very early years of the republic, championed by two of the most important of the Founding Fathers — Thomas Jefferson, principal author of the Declaration of Independence; and James Madison, principal author of the Constitution — in 1798, when they secretly authored the Kentucky and Virginia Resolutions and set forth the fundamental concept. The resolutions, adopted by the legislatures of those two states, were seen as necessary because of the congressional enactment of the Sedition Act. The Sedition Act infringed upon the constitutionally protected rights of freedom of speech and freedom of the press, and the federal courts had done nothing to block the law.

The First Amendment, ratified in 1791, specifically forbade Congress from passing any law "abridging the freedom of speech, or of the press." Yet, only seven years later with the Sedition Act, Congress did exactly that. The Kentucky Resolutions, written by Jefferson, asserted that whenever any state determines a law to be unconstitutional, nullification by the states is the proper remedy. Madison's Virginia Resolutions said states could exercise "interposition" — using the power of the state to protect citizens from unconstitutional actions by the federal government.

While nullification has been — wrongly — blamed for the Civil War, and dismissed as just a doctrine promoted by southern secessionists and slaveowners, the truth is that northern states, such as Wisconsin and Michigan, also made use of the principles of interposition and nullification to help escaped slaves being hunted down by the federal Fugitive Slave Act of 1850.

The Tenth Amendment Center (TAC) is a leader in promoting the concept, and in a recent news report has cited several efforts of states using nullification to curb federal actions that they argue are unconstitutional. Legislation (HB 1309) introduced in North Dakota would make it a "Gun Rights Sanctuary State." Specifically, according to TAC, "The legislation would bar any state agency, political subdivision, law enforcement officer or state employee from contracting with or providing assistance to a federal agency or official in the enforcement of a federal statute, order, rule, or regulation purporting

to regulate a firearm, firearm accessory, or firearm ammunition in most situations."

This illustrates well the circumstances in which nullification, or interposition, works most effectively to prevent unconstitutional federal actions — refusal of the state to cooperate in the unconstitutional activity. It is somewhat more difficult to enact laws in defiance of, say, a court decision, and then enforce those laws. But in cases in which states and their local subdivisions just refuse to help the federal government, nullification has been highly effective.

In New Mexico, the "Electronic Communications Privacy Act" (SB 199) proposes to block the use of cell-site simulators, known as "stingrays." These are devices that spoof cellphone towers, tricking any device within range into connecting to it — the stingray — rather than a legitimate tower. This is a method used by law enforcement to "sweep up communications content," and locate and track a person in possession of a specific phone or other electronic device. This is, of course, considered a violation of protections found in the Fourth Amendment.

Another bill in North Dakota would effectively terminate the federal loophole by which local law-enforcement authorities circumvent state laws against civil asset forfeiture, i.e., seizing a person's assets even when he has not been convicted of a crime. Local law enforcement often works with federal law enforcement to continue using civil asset forfeiture, regardless of state laws passed to stop the odious practice.

Kentucky would ban the use of any state resources for the enforcement of some federal marijuana laws, and legalize marijuana use by adults.

Rhode Island has a bill, that if passed, would prohibit "roadway surveillance," including the use of automatic license plate readers (ALPRs), without a warrant in most situations. This is designed to help block a national license plate tracking program.

Not surprisingly, the nullification and interposition movement has been falsely pictured as a movement with ties to segregation, slavery, and secession. Often, it is referred to as "the Tenther movement" by detractors. Randy Balko, in a weblog post for *Reason* magazine, notes that the term "Tenther" originated as a pejorative, intended to reference and draw comparisons to the Birthers and the Truthers.

But can a movement that originated with the authors of America's founding documents really be extremist? Those who see little to restrict what the federal government can do like to cite the "Supremacy Clause," found in Article VI of the Constitution. According to this thesis, the federal government can do just about anything it wishes, and can overrule state actions pretty much at will, all in the name of "national supremacy."

A closer look at the actual wording of the Constitution does not support this "national supremacy" viewpoint. "This Constitution, and the laws of the United States which shall be made in pursuance thereof … shall be the supreme law of the land," reads Article VI. In other words, the Constitution is the supreme law of the land, not just anything the federal government decides to do. Laws only become the supreme law of the land when they conform to the Constitution.

The 10th Amendment is a significant part of the Constitution, and the supremacy clause must be interpreted in light of it. After all, it was adopted *after* Article VI. If there were a conflict between the two (which there is not), then Article VI would have to give way to the 10th Amendment, which reads, "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."

Writing in *The Federalist*, no. 45, James Madison — who essentially authored both the supremacy clause and the 10th Amendment — 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.... The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the People, and the internal order, improvement, and prosperity of the State."

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