

Is “Nullification” the Answer?

Some conservative groups have argued that the Tenth Amendment allows an individual state to “nullify” any federal law that exceeds the enumerated powers delegated to the federal government under the Constitution. It is important to examine this claim carefully as we evaluate our options in addressing the current crisis of a runaway federal government.

Types of Nullification

First of all, we must determine what is meant by “nullification.” For instance, one type of nullification involves states refusing to accept federal funds, and thereby preserving their freedom from invasive federal regulations that are tied to those funds. States can--and should--participate in this kind of nullification.

But there are countless other abuses of federal power that cannot be nullified in this way. The states cannot nullify the national debt, federal agencies’ spying on U.S. citizens through our cell phones and email accounts, nor unilateral decisions of the President to take our nation to war.

The remainder of this article will examine the proposition that individual states can “nullify” any unconstitutional federal action by simply declaring it void.

Constitutional Structure and the Problem of Unconstitutional Laws

The Tenth Amendment is a clear expression of a defining, foundational principle of the government designed by our Founders: that powers not delegated to the federal government by the Constitution are reserved to the states or to the people. But this, in and of itself, does not imply that individual states have the authority to independently determine when the federal government has acted outside the scope of its authority; much less does it imply that an individual state, upon reaching this conclusion, may simply ignore a duly-enacted federal law. The Tenth Amendment establishes a *principle*, but it does not establish a *remedy* or *process*.

We know from Article VI that the Constitution and federal laws passed pursuant to it are the “supreme law of the land.” We also know from Article III that the United States Supreme Court is

the final interpreter of the Constitution.¹ So according to the Constitution, the Supreme Court determines whether a federal law must be considered the “supreme law of the land” when it decides whether or not that law is proper under the Constitution. The Supreme Court—not an individual state—has the final say in whether or not the federal government has acted outside the scope of its authority under the Constitution.

Groups claiming that states have the power to ignore or “nullify” federal laws often rely upon the Kentucky and Virginia Resolutions written by Thomas Jefferson and James Madison, respectively, in 1798. But it is important to read and understand these documents in context, and in light of subsequent documents.

Jefferson and Madison wrote the 1798 Resolutions to proclaim that Kentucky and Virginia considered the Alien and Sedition Acts to be unconstitutional. In the 1798 Kentucky Resolutions, Jefferson argued that every state had the authority to “nullify” unconstitutional federal acts. In the Virginia Resolution, Madison stopped short of claiming state authority for “nullification,” but rather discussed a general duty of states to “interpose” themselves between the federal government and the people to maintain liberty.

No other state concurred in the idea of “nullification.” In fact, states that responded to these Resolutions specifically declared that it was the judiciary—not individual states—which held the power to invalidate acts of Congress. Upon receipt of these responses, Jefferson wrote the 1799 Kentucky Resolution, expressing Kentucky’s commitment to continue to “bow to the laws of the Union,” while solemnly protesting the Alien and Sedition Acts “in a constitutional manner.”

Applying the *Entire* Tenth Amendment

It is also important to carry the nullification concept to its logical conclusion, applying it consistently to the entire Tenth Amendment. The Tenth Amendment does not solely protect the rights of the states. It 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.

The rights of the people are just as important as the rights of the states under the Tenth Amendment. There is no basis for distinguishing between the states and the people in this regard. The federal government cannot invade the rights of either.

So it stands to reason that if the states can nullify a federal law under the Tenth Amendment, then individuals should be able to nullify a federal law on this basis as well. Can you imagine a nation in which every single person has the right to nullify a federal law because he believes it to be

¹ The historical evidence supporting judicial review is overwhelming. Discussions during the Constitutional Convention indicate that James Madison, George Mason, Elbridge Gerry and numerous other delegates believed that the Supreme Court would be vested with the power of judicial review. In total, around 30 convention delegates are on the record as supporting judicial review and only 5 or so are on the record as opposing it. In Federalist No. 78, Alexander Hamilton discusses judicial review at length and firmly asserts that it is within the power of the federal judiciary.

unconstitutional? Our federal system cannot work this way. There must be an appropriate, workable *process* for checking federal abuses of power that are not corrected by the federal judiciary.

What is the Proper Remedy for Unchecked Abuses of Power?

The question, then, is what remedy do we have when the Supreme Court interprets the Constitution in a manner that is historically incorrect, thus legitimizing federal actions that transgress the principle of enumerated powers and intrude upon the powers reserved to the states and the people under the Tenth Amendment? The answer lies in Article V. We *amend* the Constitution to clarify the meaning of the clauses that have been perverted. We assert our authority to close up the loopholes that the Supreme Court has opened.

In Madison's Report of 1800, he clarified his stance on "nullification" by specifically declaring that individual states did *not* have the right to invalidate federal laws. He explained that state resolutions (like the Kentucky and Virginia Resolutions) could only be used to express the state's conviction that a federal law was unconstitutional, which might be useful for mobilizing public opinion to persuade federal officials to overturn the law.

Finally, in a letter to Edward Everett in 1830, Madison provided further guidance on this point by describing the Article V Convention of States to propose amendments as "the final resort within the purview of the Constitution" for correcting usurpations and abuses of power by the federal government. In other words, Article V is the *ultimate* nullification procedure.

In their wisdom, the drafters of the Constitution provided us with a remedy for abuses of federal power that are left unchecked by the federal judiciary. It is time for us to apply that remedy by invoking Article V's procedure to call for a Convention of the States to propose amendments that will restore the original meaning of the Constitution.