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Two Constitutional Wrongs Don't Make a Right: Why Conservatives Should Just Say "No" to Nullification

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A number of states, including Missouri, Kansas, and Alaska either have passed or are considering state laws intended to invalidate federal statutes, most notably, federal gun laws. Many have modeled their bills on Montana's "Firearms Freedom Act," which was recently struck down by a federal appeals court. In so doing, they have drawn upon the political doctrine of nullification, according to which individual states have the right to pass legislation voiding any federal law that they believe to be unconstitutional.

Their inclination to do so is understandable since states are facing an increasingly overbearing federal government seemingly intent on infringing on state prerogatives and on the individual liberties of their citizens; however, this effort is nonetheless misguided.

The History of Nullification. Historically, nullification has an ignominious lineage. Its chief architect was John C. Calhoun, former Vice President, Secretary of War and State, and U.S. Senator from South Carolina, who used the concept of nullification to defend states' rights against federal tariffs and, ultimately, challenges to the institution of slavery.

This paper, in its entirety, can be found at t**http://report.heritage.org/ib4042**

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The core premise behind Calhoun's concept of nullification is that the states were, prior to the framing of the Constitution, independent sovereigns that consented to be bound by federal law only on certain conditions and that they retained enough of that sovereignty to "veto" unconstitutional federal laws. Yet the Constitution contemplates not a league of independent sovereigns but a federated republic. After 1787, the several states were not independent sovereigns in the same sense that Spain or France were independent sovereigns—for instance, they could not wage war, maintain diplomatic relations with foreign nations, or coin their own money. And, in the federated republic that was forged by the Constitution, duly enacted federal laws cannot be vetoed by individual states, even where they appear to encroach upon state prerogatives.

That is why James Madison, in opposing what he considered to be unconstitutional federal laws, did not press for legislation voiding those laws. The Virginia Resolution, which Madison drafted in 1798 in response to the Alien and Sedition Acts, were intended as "a *legislative* declaration of opinion on a constitutional point."[1]

Thomas Jefferson's view of the matter may have been somewhat different. In his initial draft of the Kentucky Resolution, Jefferson asserted that "where powers are assumed [by the federal government] which have not been delegated, a nullification of the act is the rightful remedy.... [E]very State has a natural right...to nullify of their own authority all assumptions of power by others within their limits."[2] But Jefferson's final draft of the 1798 resolution, which was adopted by the Kentucky General Assembly, did not refer to nullification and called on other states to

join their opposition to the Alien and Sedition Acts by "requesting their repeal at the next session of Congress."[3] The 1799 Kentucky Resolution mentioned "nullification"[4] but not in the Calhounian sense. The General Assembly declared that it would "bow to the laws of the Union," although it would not "cease to oppose in a constitutional manner" the offensive acts.[5]

States' Recourse. That is not to say, of course, that the states are helpless in the face of federal encroachment. Perhaps the most unique contribution that the Framers made to political theory was that of "dual sovereignty." Within their spheres of authority, the states are supreme. The Tenth Amendment declares that that any powers that are not expressly delegated to the federal government are "reserved to the States respectively, or to the people."

What, then, are the states to do in the face of gun laws that legislators consider unconstitutional because they infringe upon the states' police powers (which the Constitution does not delegate to the federal government) and "the right of the people to keep and bear Arms" as provided in the Second Amendment?

In his essay "Interposition and the Heresy of Nullification: James Madison and the Exercise of Sovereign Constitutional Powers," Christian Fritz describes how Madison "distinguished carefully between interposition—groups of citizens or state legislatures identifying unconstitutional laws—and any effort by individual states to nullify such laws." While Madison believed that a "single state lacked constitutional authority to nullify national laws or secede from the Union," Fritz explains, he did affirm that the people of the several states could act in concert with one another to resist federal legislation. This affirmation was grounded in his view that the people in their collective capacity constituted the sovereign of the national government.[6]

On Madison's understanding, "Only when the people of a given state acted in combination with the sovereign people of other states could there be a legitimate claim of the ultimate sovereign authority of "the people."[7] The Constitution enables the people to make their opposition effective by publicly denouncing federal laws, defunding or slowing their implementation, challenging them in the courts, or, if necessary, amending the Constitution.

Nullify Nullification. In response to Calhoun's call for nullification, President Andrew Jackson, himself a strong advocate of states' rights, proclaimed that nullification was "incompatible with the existence of the Union, contradicted expressly by the letter of the Constitution, unauthorized by its spirit, inconsistent with every principle on which It was founded, and destructive of the great object for which it was formed."[8] To call for nullification is to reinvigorate an idea that threatens to rend the very constitutional fabric that the nullifiers are seeking to preserve.

As Cato Institute chairman Robert Levy argued in a recent op-ed, to defend Second Amendment rights "we can't begin by flouting the very document that inspires that fight in the first place: the Constitution."[9] It is time finally pronounce Calhoun's unconstitutional (indeed, *anti*-Constitutional) doctrine null and void.

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1. James Madison, *Letters and Other Writings of James Madison*, vol. IV (Philadelphia: J. P. Lippincott and Company, 1865), p. 335 (emphasis added).
2. "Kentucky Resolutions Adopted by the Kentucky General Assembly," November 10, 1798, in *The Papers of Thomas Jefferson*, ed. Julian P. Boyd et al., Vol. XXX (Princeton, NJ: Princeton University Press, 1950), p. 552.
3. Ibid.
4. Constitution.org, "Kentucky Resolutions of 1799," http://www.constitution.org/cons/kent1799.htm (accessed September 11, 2013).
5. Ibid.
6. Christian G. Fritz, "Interposition and the Heresy of Nullification: James Madison and the Exercise of Sovereign Constitutional Powers," Heritage Foundation *First Principles Series Report* No. 41, February 21, 2012, http://www.heritage.org/research/reports/2012/02/interposition-and-heresy-of-nullification-james-madison-exercise-of-sovereign-constitutional-powers.
7. Ibid.
8. Andrew Jackson, "[Nullification] Proclamation," December 10, 1832, in James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents*, vol. II (Washington, DC: U.S. Government Printing Office, 1896–1899), p. 643.
9. Robert A. Levy, "The Limits of Nullification," *The New York Times*, September 4, 2013, http://www.nytimes.com/2013/09/04/opinion/the-limits-of-nullification.html?_r=0 (accessed September 11, 2013).