Struggling With Nullification

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Rob at James Madison's home in Virginia

Does a state have the right to nullify federal statutes the state considers unconstitutional? This depends largely on how you define “nullification.” It also depends on what you mean by “right” and what kind of document you understand the Constitution to be. In other words, it depends on your premises.

Unfortunately, people often discuss—and debate, and attack each other over—the merits or demerits of nullification without making their premises clear. The result is much quarreling among people who are fundamentally on the same side.

Historically, “nullification” was defined quite narrowly. It referred to a formal ordinance of a state legislature or state convention that declared a federal law void within the boundaries of the state. The state might or might not make the ordinance conditional, and it might or might not impose criminal or civil penalties on persons attempting to enforce the federal enactment. We can refer to this as the narrow, or historical, definition of nullification. It is traditionally credited to the Kentucky Resolutions of 1798, drafted by Thomas Jefferson.

Today the term often is used in a much broader sense by advocates, by opponents, and often by the press. So used, it refers as well to other mechanisms a state may deploy to assert its prerogatives against federal overreaching—that is, to other methods of what James Madison called “interposition.” The Tenth Amendment Center often uses “nullification” in this broad way.

Thus, “interposition” (by Madison’s definition) or “nullification” (by a broad definition) can refer to state actions such as:

* State legislative and executive expressions of opinion against a federal measure;

* State lobbying pressure to get the measure changed or repealed;

* State-sponsored lawsuits against federal actions deemed unconstitutional;

* Political coordination among states to promote change or repeal;

* Refusal of states to accept federal grants-in-aid attached to obnoxious conditions;

* Refusal of states to allow their officials to cooperate in the execution of federal programs;

* Refusal of states to render a particular activity that is a federal crime illegal under state law as well (e.g., the use of marijuana in Colorado and Washington); and

* The state application and convention process of Article V.

Constitutional wonks will recall that Madison anticipated most of these in Federalist No. 46, and included the others in later writings.

All of the interposition methods listed above are perfectly legal and constitutional. For example, there is certainly no requirement that a state duplicate federal crimes in its own statute books, and the Supreme

Court has said repeatedly (and held expressly in the NFIB v. Sebelius, the Obamacare case) that the federal government may not "commandeer" state officials in service of federal policy.

Clearly, calling these modes of interposition "nullification" does not render them unconstitutional or wrong.

On the other hand, there are methods of interposition that the Constitution does not authorize. In other words, they are *extra-constitutional*. Nevertheless, the Founders believed that natural law reserves them to the people in some circumstances.

The most dramatic illustration of an extra-constitutional remedy reserved by natural law is the right of armed revolution, which Madison also discussed in Federalist No. 46. He later stressed that the people should resort to extra-constitutional methods only when the constitutional compact has been irretrievably broken.

Both historically and today, the most serious nullification disputes center on whether states enjoy the constitutional prerogative of adopting formal nullification ordinances. In other words: Does a state have the constitutional power to void what it perceives to be an unconstitutional federal law?

Let's try to isolate some of the issues:

First: It is clear that in the extreme conditions justifying revolution, resistance need not be conducted solely by private individuals or groups. States may participate officially, as the colonies/states did during the years 1775-83. This is the scenario Madison presented in Federalist No. 46. Obviously, in these circumstances a state may declare federal law void within its boundaries. But this power flows from natural law, not from the Constitution (which in revolutionary circumstances, you recall, would have been irretrievably broken).

Second: What of our current situation—that is,when there is no revolution, the union continues, federal laws are still widely obeyed, and the Constitution is still largely in operation? In those circumstances, may a state declare void a judicially-sustained federal law that the state deems unconstitutional? The answer to this question turns largely on your conclusion as to the fundamental nature of the Constitution.

Third: What is that fundamental nature?

The Constitution has been characterized as:

* A compact (i.e., contract) to which only the states are parties, by which the states granted power to federal officials. This is the pure interstate compact theory, expressed in Jefferson's 1798 Kentucky Resolutions.

* A "compound" compact, created by the people but to which the states are parties. This was apparently Madison's post-ratification view (see, for example, the equivocal wording about the nature of the Constitution in his *Notes on Nullification*), and may have underlain his 1798 Virginia Resolution.

* A popular grant: that is, a grant of power from the people—mostly to federal legislators and officials, but in some cases to state legislative authorities (as in the Time, Places, and Manner Clause) or to state legislators (as in Article V). This view was expressed by some of the seven state legislatures that formally repudiated the Kentucky and Virginia Resolutions. It also was Chief Justice John Marshall's conclusion in the famous case of *McCulloch v. Maryland* (1819).

You can make the best case for narrow-definition nullification as a constitutional prerogative if you adopt the first of the three alternatives. The basic idea is that if other states have broken the compact by letting their agent (the federal government) run amok, then aggrieved states (compacting parties) have the right to protect themselves.

On the other hand, if you adopt the popular grant theory it is much more difficult to justify nullification. This is because the people, not the states, are the parties. By this analysis, the states may, as agents of the people, protest, sue, and protect their own governmental operations, but they may not void federal actions unilaterally, except by their legislators using their delegated power to amend under Article V.

And if you subscribe to Madison's mixed theory, then, as Madison pointed out in 1830 and again in 1834, there also are conceptual problems with considering nullification as a constitutional right rather than just a natural law remedy.

Fourth: So, again, we must ask, "Which of the three theories of the Constitution is correct?"—state compact, compound compact, or popular grant?

The answer to this question depends on the dominant understanding of (or meaning to) the people who ratified the Constitution between 1787 and 1790.

The answer does *not* depend on what Thomas Jefferson or James Madison wrote in the Resolutions of 1798, or on what other states proclaimed when they rejected those Resolutions. Even more clearly, the answer does not depend on what Chief Justice Marshall concluded in 1819, or what Madison, John C. Calhoun, or anyone else said in the 1830s.

Rather, determining the fundamental nature of the Constitution requires reconstructing the sense of the document *to those who ratified it.*

Anyone who has made an honest study of the ratification has to offer conclusions on this particular subject with humility. The ratification record can be confusing and the prevailing meaning at the time can be hard to reconstruct. For example, it is not sufficient to note that the Founders referred to the Constitution as a "compact." This is because they used that word to refer *both* to governments established by states (confederations) *and* to governments established among the people alone.

Nor is it sufficient, as do some writers popular among constitutionalists, to focus only the ratification debates within selected states. You have to view the wider picture. Similarly, it is insufficient to rely merely on a few key Founders, such as Madison, Hamilton, or Jefferson. There were 1648 ratifying delegates—not just two or three—and many had important things to say. So did the orators, newspaper writers, and pamphleteers who influenced them. Jefferson was a great man, but his opinions on the meaning of the Constitution have little value, since as our ambassador to France, he did not participate in the framing or ratification.

Nor can you rely only on the express language of the ratification debate. You have to get into the heads of the ratifiers by reading what they read, and understanding their jurisprudence and their customs.

This is not the place to get into the details (this posting is already too compendious). Suffice to say that long study of the ratification record convinced me that most of the ratifiers probably thought of the Constitution as a grant from the American people rather than as a compact among states, pure or compound (as I once thought). I set forth several of my reasons in *The Original Constitution: What It Actually Said and Meant.*

At this point, I'll explain just one reason. (But for for another see here.) It has to do with how 18th century English speakers drafted and read legal documents.

The Constitution famously begins with the phrase "We the People." States are not mentioned. Now, the script and the placement of that phrase was no accident. It followed the custom by which legal documents granting power listed the grantor first. Thus, in royal charters granting rights and privileges to citizens, the king—that is, the grantor—always appeared first in large and ornate script. (A wholly typical example is the

royal charter of Dartmouth College.) Although the Articles of Confederation had given that placement to the states, the Constitution afforded it to the people alone.

How do we know the delegates to the ratifying conventions caught the implications of this? Because some of them said so. For example, William Findley, an Anti-Federalist spokesman at the Pennsylvania ratifying convention, observed:

> *"In the Preamble, it is said, 'We the People," and not 'We the States,' which therefore is a compact between individuals entering into society, and not between separate states enjoying independent power and delegating a portion of that power for their common benefit."*

And Findley's leading adversary at the convention, James Wilson, agreed with him on this point.

Anti-Federalists not only understood, they objected vehemently. Patrick Henry, chief Anti-Federalist at the Virginia ratifying convention, demanded to know: "Who authorized [the Framers]to speak the language of, We, the people, instead of, We, the states?"

As events turned out, the delegates elected to represent the people of Pennsylvania and Virginia decided to accept that language. The Virginia delegates even recited in their ratification instrument that "the powers granted under the Constitution [are] derived from the People of the United States." The delegates in every other state also accepted the "We the People" formulation. Incidentally, among the delegates most responsible for Henry's defeat on his home ground were two young men named James Madison and John Marshall.

Finally: Once the pure state compact theory falls, it is very hard to justify nullification (narrowly defined) as a constitutional remedy. It remains instead a remedy reserved by natural law for when the Constitution has wholly failed—in other words, in situations justifying revolution.

Tags: Article 5, Article V, Chief Justice John Marshall, constitution, constitutional convention, constitutional law, convention for proposing amendments, federalism, interposition, James Madison, Jefferson Thomas, John Marshall, Justice John Marshall, Justice Marshall, Kentucky Resolution, Madison James, Marshall John, Natelson Rob, nullification, ObamaCare, ratification of constitution, Rob Natelson, Thomas Jefferson, Virginia Resolution