

(Single State) Nullification: Right Problem, Wrong Answer?

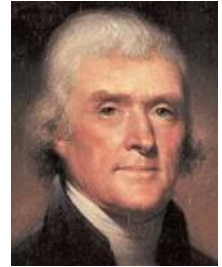
What is (single state) “Nullification?” The basic idea is that each state on its own has the (sovereign) authority within the Constitution to nullify any law of Congress that it considers not “in pursuance thereof.”

At the heart of nullification is a concern over the right problem: there exists a foundational issue within the original Constitution: **No one is a fair judge in their own case.**

Therefore, the federal government (nor any branch of it such as the Supreme Court), cannot be the rightful judge of whether it has itself exceeded its own limited powers under the Constitution.

“... the government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself; since that would have made its discretion, and not the Constitution, the measure of its powers.”

Kentucky Resolutions, November, 1798, 1st Resolution (Thomas Jefferson)



What's wrong with (single state) nullification?

If each state can nullify an act of Congress on its own, **it contradicts the purpose of the Constitution:** “in order to form a more perfect union” (that is, a better union than the Articles of Confederation)

“It is evident that a similar doctrine [Calhoun’s nullification] destroys the very basis of the Federal Constitution, and brings back all the evils of the old confederation, from which the Americans were supposed to have had a safe deliverance.”

Democracy in America, Alexis de Tocqueville

Single state nullification contradicts the supremacy clause

If the Constitution has a different meaning across the several states, then it cannot be “the supreme law of the land.” Single state nullification guarantees that the Constitution would be used to strike down the same law in one state, but not in the next, in clear (and absurd) violation of the supremacy clause.

James Madison denounced single state nullification?!



Madison called single state nullification “**a contradiction in terms**” and “**a fatal inlet to anarchy.**” He insisted interposition was “a concurring authority, not that of a single state” Madison denied the 1798 Virginia Resolutions had nullified the Sedition Act and pointed out that James Callender (of Virginia) was convicted and imprisoned, “without the slightest opposition on the part of the state.”

- We cannot allow the federal government to be the final judge of its own limited powers. In Jefferson’s words, this makes the Constitution “a mere thing of wax in the hands of the judiciary” and the national government eventually assumes all powers unto itself (as Jefferson predicted and we now witness.)
- We cannot allow a single state to nullify the Constitution on its own. This breaks the union apart.
- Elections are the ultimate check on unconstitutional laws, but elections are not immediate and they involve many trade-offs. We need a “bottom-up” check that is both directed and timely, like a Supreme Court judgment. As Madison wrote (in Federalist 51) “A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.”

So what’s the right answer? A check on the Congress by a “representative majority” of states

We need a direct means for “the several states” together to check the national government: We need a State Repeal Amendment (SRA) so a representative majority of states can repeal federal laws.

Lost in the Woods of 21st Century Nullification (A Critical Review)

According to the conjecture of historian George Santayana, we learn from the past to avoid repeating the same mistakes, but the whole theory falls apart when we tally our previous misses as hits! And speaking of cheating the scorecard a bit, a good example would be Nullification: an idea in American history whose time has come . . . and gone!

Thomas Woods is seeking to repeat our mistakes in his (2010) book “Nullification: How to Resist Federal Tyranny in the 21st Century.” There’s a fair amount to praise in this work. There’s also a good size corpse to bury, lest fellow travelers take a wrong turn down a proven dead-end.

Problems in Tom Woods’ book on “Nullification”

Major arguments against nullification are entirely omitted and ignored

- James Madison gets a cheap shot dismissal (page 288 footnote) not even quoting his objections
- Jefferson’s views are misrepresented. Jefferson believed elections were the “true corrective.”
- Did nullification actually work in 1798? Wasn’t it Jefferson’s election in 1800 that worked?
- Nothing quoted from the various state replies to the Kentucky and Virginia Resolutions?
- Nothing quoted from Andrew Jackson’s reply to Calhoun?
- Nothing about the uses of nullification by three southern Governors to defend racial segregation? (1957 Arkansas Gov. Orval Faubus, 1962 Mississippi Gov. Ross Barnett, 1963 Alabama Gov. George Wallace) Why ignore these most recent uses of nullification?
- Doesn’t the supremacy clause require the Constitution to mean the same thing in every state?
- Wasn’t the Constitution formed to create a supreme, but limited, national government? and to correct this very problem under the Articles of Confederation: that each state claimed a sovereign nature to ignore the laws of Congress as it pleased?
- Does nullification lead ultimately to secession? (“Nullifying” a marriage leads to divorce.)

Tom Woods does not answer these questions in his book. He does not even ask them.

Only a straw man argument is answered: was nullification used to defend slavery?

It’s fair to say that single state nullification was not used directly in defense of slavery. (Calhoun believed the tariff was an indirect attack on slavery.) Nullification (grounded mostly in juries) was used more against the fugitive slave laws. Woods seems quite proud of himself to “debunk” this misconception.

In the end, secession was used to defend slavery. Nullification was used in defense of segregation.

About the Book

Constitutional Awakening: How To Restore American Federalism with Madison’s “Lost” Amendment

*It’s easy to show the Constitution is “broken”--
It’s hard to fix it!*

Designed for a six-week home study course, here is the class for a 21st-century “Constitutional Awakening!”

About the Author

Lloyd Sloan hosted “The Sloan Ranger Show” on WGNU (2001 to 2007)
Lloyd graduated from Harvard College in 1978.
He’s worked as a math teacher, actuary and computer programmer.

