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Living, Dead, and Undead: Nullification Past and Present

JAMES H. READ and NEAL ALLEN

ABSTRACT

Nullification is considered an antebellum relic. But recently several state legislatures have passed or introduced bills asserting a state's right to judge federal laws unconstitutional and block implementation within the state. Policies today targeted for nullification include health care regulation, firearms law, and birthright citizenship. This essay examines the constitutional theory of nullification in its antebellum, 1950s, and contemporary variants. Madison's "double security" federalism is contrasted with Calhoun's nullification doctrine. Nullification today advances different purposes than in the past, but its axioms echo Calhoun's and are incompatible with the Fourteenth Amendment. A federal union grounded on popular sovereignty responds to constitutional understandings of nonjudicial actors; thus, nullification bills have practical effects even if rejected in federal court. Nullification today inhabits a politically polarized climate, like the 1850s, where two states might nullify federal law in opposite directions. Nullification legislation "sends a message" better communicated in other ways.

The proceedings of state legislatures usually make dry reading. But not always. Sometimes they reveal a present we thought was past and a constitutional debate we thought was settled.

On February 16, 2011, the Idaho House of Representatives, by a 49-to-20 vote, passed House Bill 117, An Act Relating to State Sovereignty and Health and Safety, which declared the Patient Protection and Affordable Health Care Act of 2010 (the federal health care reform) to be "void and of no effect" within the state of Idaho—here deliberately echoing Thomas Jefferson's

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Kentucky Resolutions of 1798.¹ The bill invoked the “Sovereign Power” of Idaho to “interpose between said citizens and the federal government, when it has exceeded its constitutional authority.” The proposed nullification was not limited to the much disputed individual mandate but extended to the entire law, on grounds that the state possessed “sovereign power to provide regulatory oversight of insurance content, coverage, benefits and beneficiaries within the state of Idaho.” The legislation stipulated that no provision of the federal law may be enforced or administered by any “departments, political subdivisions, courts, public officers or employees” of the state and that citizens of Idaho would be entitled to injunctive relief in court against anyone implementing the law. House Bill 117 closed by asserting that because “an emergency is declared to exist,” nullification would go into effect immediately upon passage. The bill text closely resembles language recommended by the Tenth Amendment Center, an activist organization committed to the principle of state nullification as a remedy against “unconstitutional federal laws and regulations.”²

House Bill 117 failed in the Idaho Senate, which like the House has a Republican majority. One Republican Senate leader said he “agreed the health care overhaul passed by Congress last year was unconstitutional” but “couldn’t support a bill he thought also violated the U.S. Constitution” (Associated Press 2011). On April 20, Idaho’s governor, Butch Otter, issued an executive order barring state agencies from complying with the federal Patient Protection Act (Idaho Office of the Governor 2011).

A 2011 North Dakota bill, Senate Bill 2309, introduced under the title Nullification of Federal Health Care Reform Law, declared the Patient Protection Act to be “null in this state” and imposed criminal and civil penalties on any federal official, state official, or employee of a private corporation who attempts to enforce the Patient Protection Act. Unlike Idaho’s House Bill 117, North Dakota’s Senate Bill 2309 passed both houses of the legislature and was signed into law—but only after it was amended to delete the criminal and civil penalties and all explicit references to nullification.³

1. Sixty-First Idaho Legislature, 1st Regular Sess. (2011), H.B. 117 (<http://legislature.idaho.gov/legislation/2011/H0117.pdf>).

2. The organization’s mission statement reads, “The 10th Amendment Movement is an effort to push back against unconstitutional federal laws and regulations on a state level. The principle is known as ‘nullification’ and was advised by many prominent founders” (www.tenthamentendmentcenter.com/the-10th-amendment-movement/).

3. Legislative Assembly of North Dakota, 62d Sess. (2011), S.B. 2309. For text as originally introduced, see <http://www.legis.nd.gov/assembly/62-2011/documents/11-0742-02000.pdf>; for text as ultimately enacted, see <http://www.legis.nd.gov/assembly/62-2011/documents/11-0742-07000.pdf>.

Recent nullification efforts are not limited to health care policy but instead cover a wide range of political and constitutional disagreements between the federal government and states, including firearms law, land use, commercial and environmental regulations, and Fourteenth Amendment birthright citizenship. In its 2010 legislative session, Utah enacted at least three pieces of nullification-oriented legislation: House Bill 67, directed against the federal Patient Protection Act; Senate Bill 11, which nullifies federal firearms law as applied to firearms “manufactured in the state for use within the state” (similar legislation has passed in Idaho, Montana, Wyoming, Arizona, Tennessee, and Alaska); and House Bill 143, an act proclaiming the state’s right to use its power of eminent domain to seize federal lands located within the state.⁴

The 2010 Utah health care bill (H.B. 67) speaks of “opting out” of the federal health care law, thus rhetorically stopping short of the Idaho bill mentioned above, which explicitly calls the federal law “void and of no effect.”⁵ House Bill 67 blocks not only the individual mandate but “*any* part of federal health care reform” (emphasis added) deemed to infringe on the state’s asserted right to regulate all commercial activity occurring within its boundaries. Utah’s constitutional justification for “opting out” of federal health care regulation is similar to that underlying Senate Bill 11, the Utah State-Made Firearms Protection Act, which opens by proclaiming the state’s “sovereign” powers under the Ninth and Tenth Amendments and then asserts that Congress has authority to regulate interstate commerce only with respect to “basic materials,” not items manufactured within the boundaries of a state—a claim clearly not limited to firearms and that would overturn all US Supreme Court post-1937 precedents upholding expanded congressional power under the commerce clause. Most revealingly, the legislation asserts that Congress’s constitutional powers to regulate commerce shall be limited to how they were understood in 1896 “at the time that Utah was admitted to statehood,” which suggests that the state of Utah is the rightful judge of where the line between federal and state authority shall be drawn in matters affecting the state. Senate Bill 11 was signed into law despite Utah’s Office of Legislative Research report that the law was “highly likely to be held unconstitutional under the United States Constitution’s Supremacy Clause.”⁶ The “Firearms Freedoms” bills enacted in six other states likewise assert, in nearly identical language, a

4. Utah Legislature, 2010 General Sess., Health System Amendments, H.B. 67 (<http://le.utah.gov/2010/bills/hbillint/hb0067.htm>); Utah State-Made Firearms Protection Act, S.B. 11 (<http://le.utah.gov/2010/bills/sbillint/sb0011.htm>); Eminent Domain Authority, H.B. 143 (<http://le.utah.gov/2010/bills/hbillenr/hb0143.pdf>).

5. Utah Legislature, H.B. 67. For the argument that H.B. 67 qualifies as nullification although it does not use the term, see Card (2010).

6. Utah Legislature, S.B. 11. The Office of Legislative Research report on constitutionality is appended to the text of the bill.

state's right to restrict congressional commerce power to how it was understood when that state entered the Union: thus, for Montana the commerce power means what it was understood to mean in 1896; for Idaho and Wyoming, in 1890; for Arizona, in 1912; for Alaska, in 1959; and for Tennessee, in 1796.⁷

The number of recent nullification bills signed into law so far is small.⁸ If we also include nullification legislation passing at least one chamber or key committee or endorsed by statewide candidates for office, the picture expands beyond what can be summarized here. Among the more extreme bills is a proposed Minnesota constitutional amendment, House File 3738 (2010), coauthored by 2010 Minnesota Republican gubernatorial candidate Tom Emmer, that would nullify any federal law or regulation unless it was approved by a two-thirds vote of both chambers of the state legislature.⁹ House File 3738 would also strip Minnesota citizens of the right to seek redress in federal court for alleged Bill of Rights violations by the state, thus nullifying federal law, enacted pursuant to the Fourteenth Amendment, that authorizes individuals to sue on these grounds.¹⁰

7. Montana Legislature, 2009 Sess., Montana Firearms Freedom Act, H.B. 246; Idaho Legislature, 2d Regular Sess. (2010), Idaho Firearms Freedom Act, H.B. 589; Wyoming Legislature, 2010 Sess., Wyoming Firearms Freedom Act, H.B. 28; Alaska Legislature, 26th Legislature, 2009–10 Sess., Alaska Firearms Freedom Act, H.B. 186; Arizona Legislature, 49th Legislature, 2d Regular Sess. (2010), Arizona Manufactured Firearms, H.B. 2307; Tennessee General Assembly, 2009 Sess., Tennessee Firearms Freedom Act, S.B. 1610. South Dakota enacted a similar law restricting congressional commerce power but did not include the statehood date language. South Dakota Legislature, 2010 Sess., An Act to Exempt from Federal Regulation Any Firearm, Firearm Accessory, or Ammunition Manufactured and Retained in South Dakota, S.B. 89.

8. As of June 2012, we count at least nine pieces of legislation (all noted above) signed into law since 2009 that are nullificationist in substance, without fully meeting the strict definition of nullification proposed below: Utah's H.B. 67 (health care) and H.B. 43 (public lands) and the Firearms Freedoms laws enacted in Montana, Idaho, Wyoming, Alaska, Arizona, Tennessee, and Utah. But the Firearms Freedoms laws are vague on how states would enforce their claims. Companion bills imposing criminal penalties on federal officials for regulating state-manufactured firearms have been introduced but did not pass; see discussion of Montana's H.B. 381 below. The Tenth Amendment Center's website keeps a running count of nullification bills, noting where they have been introduced, passed at least one legislative chamber, enacted into law, or failed. But the center's count of enacted legislation is inflated by including medical marijuana laws and state noncooperation with the federal REAL ID Act, which for reasons noted below we do not classify as nullification.

9. Minnesota House of Representatives, 86th Legislative Sess. (2009–10), An Act Affirming the Sovereignty of Minnesota Citizens, H.F. 3738 (<http://wdoc.house.leg.state.mn.us/leg/LS86/HF3738.0.pdf>).

10. The bill stipulates that Minnesota citizens who allege that the state has violated their federal Bill of Rights protections may seek redress "exclusively through a jury trial in a Minnesota court and through enactment of a change in Minnesota law." The federal law targeted for nullification in this passage appears to be 42 U.S.C. § 1983, An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, enacted in 1871 under Sec. 5 of the Fourteenth Amendment. Many landmark civil rights cases have been brought to federal court under this statute, including *Brown v. Board of Education* (1954).

Montana Governor Brian Schweitzer led opposition to the REAL ID Act (involving uniform federal standards for state-issued driver's licenses) and is known for his propensity to tell the federal government "to go to hell." Yet Schweitzer denounced with even greater vehemence—characterizing them as "un-American"—the various nullification bills introduced in the state legislature in 2011, which he claimed "aren't just sprouting up naturally state by state" but are "handed down as talking points and bill language that are passed to legislatures around the country" (Ames 2011). Among these are House Bill 382, An Act Prohibiting Infringement of the State of Montana's Constitutional Right to Nullification of Any Federal Statute, Mandate, or Executive Order Considered Unconstitutional by the State, which would enable the Montana legislature by simple majority vote to "nullify in its entirety" any "federal law or regulation" judged to exceed the federal government's constitutionally delegated powers, and House Bill 381, An Act Creating the Offenses of Wrongful Enforcement of Certain Federal Firearms Laws, Regulations, or Orders, designed to add enforcement powers to the Montana Firearms Freedom Act enacted in 2009. House Bill 381 would impose criminal penalties on any "official, agent, or employee of the United States who purposely or knowingly enforces a law, regulation or order of the United States relating to a personal firearm, firearm accessory, or ammunition manufactured in this state."¹¹

Nullification is often described as a dead issue, a "repudiated doctrine," a relic of the antebellum Constitution (Jeffries 2001, 147; Dinan 2011). The US Supreme Court is said to have put the final nail in the coffin with its unanimous holding in *Cooper v. Aaron* (38 U.S. 1 [1958]) that a state may not nullify a decision of the US Supreme Court. This was in response to several Southern states' declaration that the court's desegregation decision in *Brown v. Board of Education* (1954) was "null, void, and of no effect" within the boundaries of their state (Bartley 1997, 131–33).

Nullification may still be dead as far as the US Supreme Court is concerned. But whether nullification theory is upheld in federal court is not the only question. States in the past have sometimes successfully obstructed federal laws and rulings for years despite consistently losing in court. And if the court—still rejecting nullification—should overturn on other grounds some federal laws currently targeted by state nullification legislation, advocates of nullification would likely claim political vindication for their efforts. Contemporary nullification may or may not ultimately catch on as

11. Montana Legislature, 2011 Sess., H.B. 382 (<http://data.opi.mt.gov/bills/2011/billhtml/HB0382.htm>) and H.B. 381 (<http://data.opi.mt.gov/bills/2011/billhtml/HB0381.htm>). Both bills passed committee but failed in a vote of the full chamber.

a living doctrine, powerful enough to bring a state and its citizens to a direct test of force with the federal government—as occurred in South Carolina in the 1830s and in several Southern states in the 1950s. But in the last few years nullification has at least rejoined the ranks of the “undead.”

This essay examines the theory and practice of nullification in its antebellum, 1950s, and contemporary variants, highlighting both continuities and changes over time. It treats a number of historical episodes—some well known, others relatively obscure. But the principal aim of the essay is to shed light on nullification as a political and constitutional theory and to explore what happens when that theory is put into practice. The historical sketches serve that purpose.

Whether nullification is good political and constitutional theory is not the only question; even a flawed theory merits attention when it has oriented political practice for some influential group of actors, past or present. Nullification finds little support in either constitutional text or the framers’ intentions, but the same might be said about many other constitutional doctrines (including some embraced by the court at one time or another). Nullification is a constitutional theory principally addressed to nonjudicial actors (although not the only such theory). In a polity grounded on the principle of popular sovereignty, the constitutional understandings of nonjudicial actors will always shape that system’s constitutional character to an important degree, whether or not those understandings accord with judicial precedent.

By “nullification” we mean the theory that each individual state is fully “sovereign” and as such the final judge of its own constitutional rights and obligations; that consequently it may legitimately rule that any federal act—law, regulation, judicial decision, executive action, or treaty—is unconstitutional; and, most important, that it may act on this judgment by blocking the implementation of that federal act within the state’s boundaries. The clearest instance of nullification thus defined is South Carolina’s nullification of the federal tariff in 1832. But states can also challenge federal law in ways that incorporate some but not all elements of the above definition. For instance, a state that declares a federal law unconstitutional but does not actively block federal implementation is not engaging in nullification in the strict sense. The term “quasi nullification” will be employed here to denote cases in which some but not all elements of nullification theory are present or in which the state leaves the extent of its nullificationist aims unclear. Nullification is thus in one sense a specific, clearly defined type of act and in another sense a continuum. There exists another term, “interposition,” sometimes employed to cover this wider spectrum of state resistance, but the meaning of interposition (as noted below) is disputed, so we avoid this term except when noting that dispute.

We first establish the context (sec. 1): a federal system grounded on popular sovereignty where the constitutional language dividing national from state jurisdiction is ambiguous. Next, in section 2, we show how nullification theory attempts to eradicate the Constitution's ambiguity by making each state fully sovereign and the final judge of its own constitutional rights and obligations. Section 3 explores several antebellum episodes in which nullification, or something akin to it, was translated into practice—including cases in which different states nullified federal acts for ideologically opposite purposes. Section 4 describes how nullification doctrine can persist despite its incompatibility with the Fourteenth Amendment. Sections 5 and 6 examine the revival of nullification in the 1950s by opponents of the US Supreme Court's school desegregation decisions and the civil rights movement's constitutional counterarguments, respectively. The concluding sections (secs. 7 and 8) return to contemporary nullification, which appears amid an increasingly polarized national political climate.

Contemporary nullification is motivated by different purposes than in the past. But its theoretical presuppositions are the same as in the antebellum era, and its incompatibility with the Fourteenth Amendment remains unresolved. Nullification would eliminate what Madison called the "double security" whereby each level of government guards against violations of rights and liberties by the other. And nullification is not the only means by which states communicate opposition to federal laws; to presume that states must either nullify or abjectly surrender to federal power is to pose a false choice.

The essay's ultimate view of nullification, whether as constitutional theory or political practice, is negative. But, more positively, the reappearance of nullification can lead us (whatever our positions on the policy questions in dispute) to reexamine the state of our federal system, the tone of our national politics, and the character of the United States as a political community.

1. FEDERALISM AND POPULAR SOVEREIGNTY

The framers of America's constitutions, state and federal, made two major innovations to republican theory and practice. One was to institutionalize the idea of the *sovereignty of the people*, through written constitutions ratified by the people themselves and superior to ordinary law (Wood 1969; Morgan 1988; Rakove 1997). The written constitution embodies the considered will of the people: the people alone breathe life into its operation; only they can legitimately ratify, amend, or replace it. The framers' other major innovation was to create a new *federal form of government* that constitutionally divided power between national government and states and was designed

to navigate between the extremes of debilitating weakness and domination by a single powerful state that had plagued federations in the past.

These two innovations were interdependent. The new federal theory presupposed the sovereignty of the people because both levels of government, federal and state, independently derived their authority from the American people themselves. This contrasted with the Articles of Confederation, which took the form of an intergovernmental pact, and with all other federations and leagues of which we have historical record. The idea of an American people that incorporated all the “peoples” of the states was rhetorically essential to the Constitution’s supporters in the ratification contest. “The federal and State governments are in fact but different agents and trustees of the people,” their “common superior,” James Madison argued in *Federalist* no. 46 (Shapiro 2009, 239).¹²

One of the advantages of a federal system, both levels of which draw their authority from the people, is that it promises what James Madison, in *Federalist* no. 51, called double security against threats to rights and liberties: the people will keep watch over both levels of government, and each level of government will keep watch over the other. During the 1780s, Madison argued (in *Federalist* no. 10 and elsewhere) that a properly designed federal government would better safeguard liberty by restraining the instability and injustices of the states and (in *Federalist* no. 46) that serious federal abuses of power (which he considered unlikely) would be readily reversed by common action of the states (Shapiro 2009, 240–44). By 1798, with the passage of the Alien and Sedition Acts, Madison realized the federal government could sometimes become the greater threat, and in the Virginia Resolutions he called on the states to “interpose” to rein in a Federalist-dominated government overleaping its constitutional bounds (Madison 1962–91, 17:188–90). But both of these stances, however different in diagnosis, timing, and strategy, were consistent with Madison’s double security thesis, which presupposes that either level of government may threaten rights and liberties, and either level of government may serve as an instrument of remedy. For Madison, this double security of rights and liberties added to the other advantages of a properly constructed federal system—among them remedying the paralysis resulting from the Articles of Confederation, under which, even on matters of great urgency (as Madison points out in *Federalist* no. 38), one state

12. Whether an American people exists in the political sense is still disputed. See, e.g., *U.S. Term Limits, Inc., v. Thornton*, 51 U.S. 779 (1995), where Justice Stevens’s majority opinion argues that “the Constitution thus creates a uniform national body representing the interests of a single people,” while Justice Thomas’s dissent holds that “the ultimate source of the Constitution’s authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole.”

could block policies and amendments supported by all the others (Shapiro 2009, 187).

But the language in the US Constitution establishing the federal structure is extremely general, ambiguous or silent on important matters, and open to wide varieties of interpretation and application. This is true even in the original, unamended Constitution; the interpretive difficulties multiply with the addition of subsequent amendments affecting the federal system, enacted at different times under different circumstances. The Constitution distinguishes between powers vested in the federal government, concurrent powers, and powers reserved to the states but does not precisely define each category or draw sharp lines between them. Article VI declares that “this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” But, as states’ rights advocates point out, the phrase “in pursuance thereof” implies that only *constitutional* laws are the supreme law of the land. The document does not specifically say who decides whether a law is constitutional.

The Tenth Amendment provides that “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.” This amendment is central to theorists of state sovereignty. Yet the amendment makes no mention of sovereignty; to assume that something sacred and inviolable called “sovereignty” is among the powers reserved to states is to beg the question. All the text specifically affirms is that the federal government does not possess all political powers, only those powers vested in it by the Constitution. The amendment does not itself draw the line or specify who draws it. Despite mountains of constitutional commentary addressing competing theories of sovereignty—state sovereignty, national sovereignty, divided sovereignty, dual sovereignty, popular sovereignty, the “sovereign immunity” of the Eleventh Amendment—the words “sovereign” or “sovereignty” appear nowhere in the Constitution, original or as amended. This does not mean that those who framed or ratified the Constitution gave no thought to the idea of sovereignty. On the contrary, the word appears with great frequency among both supporters and opponents of ratification. The conspicuous absence in the text itself of a word so frequently used in discourse about the text suggests that those who framed, ratified, and amended the document did not agree among themselves about what sovereignty was and where in the Constitution it was found.

The document cannot interpret itself, and in practice we have come to rely—not without resistance—on the judiciary authoritatively to determine whether a law, regulation, or act violates the Constitution; this includes the authority to draw the line between federal and state power. The document itself is famously silent on who holds this power and how it is to be exercised. It was the court itself in *Marbury v. Madison* (5 U.S. 137 [1803]) that held it was “the province and duty of the judicial department” to say what the Constitution means: the power of judicial review. The principal argument here was as much functional as textual: no other body was in a position to render consistent constitutional judgments binding on the nation as a whole. The justification for judicial review rested in turn on the theory of popular sovereignty. As Alexander Hamilton argued in *Federalist* no. 78, in holding a law to be inconsistent with the Constitution the judiciary does not make itself superior to the legislative but assumes instead that “the power of the people is superior to both” (Shapiro 2009, 395); the judiciary declares the people’s will as expressed in that Constitution.

But even if we accept the judiciary as the final institutional arbiter of constitutional questions (nullifiers do not), we are under no obligation to reason and speak about the Constitution in the same way that the court does.¹³ Some of the most important constitutional debates in American history have taken place in state legislatures, presidential cabinets, and Congress (Currie 1997, 2006). If in theory the people are sovereign and the Constitution embodies their will, then ordinary citizens as well as elected officials, state and federal, have a right and responsibility to make considered constitutional judgments on important matters. (On constitutional interpretations by nonjudicial actors, see Tushnet [2000] and Kramer [2005].)

The effective operation of our federal system presupposes some constitutional understanding (explicit or implicit) on the part of the tens of thousands of men and women who hold office under state governments. The federal courts cannot possibly rule in a timely fashion on every potentially contested question of federal-state authority; many federal questions are provisionally settled through the push and pull of practice long before (if ever) they are decided in court. John D. Nugent observes that “nonjudicial constitutional construction is a necessary feature of American political development” and that state and federal officials “do their jobs in ways that raise questions about the boundaries separating state and federal authority and prompt searches for resolutions” (2009, 7–9). The constitutional understandings of elected officials, state and federal, to some degree reflect the constitutional understandings of the voters who elect them.

13. *Marbury v. Madison* did not quite assert that the court was this final arbiter, a position the court did not take in unqualified form until *Cooper v. Aaron* (1958).

In short, how extrajudicial actors understand the federal structure established by the Constitution importantly shapes the actual workings of that system. Thus, no matter what happens in court, the character of a shared federal system is at stake when legislators in several states resurrect the claim that states can constitutionally nullify federal law.

2. NULLIFICATION THEORY

The theory of nullification holds that a state may legally and constitutionally judge that any federal act—law, regulation, judicial decision, executive action, or treaty—is unconstitutional and, moreover, act on that judgment by forcibly blocking the implementation of that federal measure within the state’s boundaries. For a state to declare that it considers an act unconstitutional is not by itself nullification; nullification begins when the federal act is blocked in practice. States may employ nullification (according to its advocates) not only against federal invasion of powers constitutionally reserved to the states, but they may also nullify the federal exercise of clearly federal powers if the state believes those powers have been improperly used.

All of these elements are evident in the classic instance of nullification in American history, South Carolina’s nullification of the federal protective tariff in 1832, and in the writings of the principal American theorist of nullification, John C. Calhoun (1782–1850), who played a key role in South Carolina’s decision to nullify. The US Constitution specifically assigns to Congress the power to levy tariff duties (Art. I, Sec. 8) and specifically denies that power to states (Art. I, Sec. 10). One cannot claim that the federal government usurped a state power in passing the protective tariffs of 1828 and 1832. South Carolina’s (and Calhoun’s) claim instead was that the ordinarily legitimate federal power to levy tariffs was exercised unconstitutionally if the main purpose of a tariff was to protect domestic manufacturers.¹⁴

Thus, in its 1832 Ordinance of Nullification, South Carolina declared the tariff “null, void, and no law, nor binding upon this State, its officers or citizens”; “all judicial proceedings” attempting to enforce the law were

14. For example, in defending South Carolina’s nullification of the tariff in his 1833 speech on the Force Bill, Calhoun said, “The Federal Government has, by an express provision of the constitution, the right to lay duties on imports. The State has never denied or resisted this right, nor even thought of so doing. The Government has, however, not been contented with exercising this power as she had a right to do, but has gone a step beyond it, by laying imposts, not for revenue, but for protection. This the State considers as an unconstitutional exercise of power—highly injurious and oppressive to her and the other staple States, and has, accordingly, met it with the most determined resistance” (1959–2003, 12:46).

“utterly null and void”; any attempt to take the matter to federal court was a prosecutable offense. State officeholders were required to take an oath “truly to obey, execute, and enforce, this Ordinance” and to resist all federal attempts to enforce the tariff. If the federal government attempted nevertheless “to enforce the acts hereby declared to be null and void,” the state would secede from the Union (Freehling 1967, 150–52). President Andrew Jackson replied with a proclamation denouncing nullification, and Congress passed legislation (which South Carolina also nullified) authorizing the president to use force if necessary to implement federal tariff law. A potentially violent confrontation was avoided when Congress passed a compromise tariff in 1833. Calhoun believed the compromise demonstrated the workability of nullification; others saw it as civil war narrowly averted (Freehling 1965; Ellis 1987).

The principal text to which nearly all nullification-oriented legislation refers is Thomas Jefferson’s 1798 Kentucky Resolutions draft, which denounced the Alien and Sedition Acts as unconstitutional and asserted the right of a state to declare a federal act to be “unauthoritative, void, and of no force” (Peterson 1984, 449–56). Jefferson’s language was echoed in South Carolina’s 1832 Ordinance of Nullification, in Southern state resolutions claiming to nullify *Brown v. Board of Education* in the 1950s, and in the 2011 Idaho nullification bill described above.

Yet Jefferson’s Kentucky Resolutions offer something less than a fully developed theory of nullification. The document’s constitutional authority is shaky: Jefferson was not a framer of the Constitution, his draft was toned down by Kentucky, and most states specifically rejected its claims. Moreover, neither Jefferson’s Kentucky Resolutions nor Madison’s Virginia Resolutions of the same year propose any specific actions to block the enforcement of the Alien and Sedition Acts within a state’s boundaries. Jefferson thus introduced the general idea of nullification but provided only fragmentary justification and did not translate theory into practice—except to win election as president by campaigning against the acts and then, once in office, letting them expire.

John C. Calhoun was the true father of nullification because he laid out its assumptions, reinterpreted constitutional text and history to support the theory, answered objections, and translated theory into practice. (See esp. *The Fort Hill Address* and *A Discourse on the Constitution and Government of the United States* [Calhoun 1959–2003, 11:413–39, 28:71–239]; for critical examination of Calhoun’s thought, see Read [2009].) All subsequent advocates of nullification, however fond of quoting Jefferson, depend on Calhoun whether they recognize it or not. Calhoun did not invent the idea of states resisting federal law; the possibility and motives for doing this are inherent in a federal system of dispersed powers. What Calhoun provided was

a carefully worked out argument that (1) a state possessed the constitutional right to nullify federal law, (2) the federal government and other states were constitutionally obliged to respect a state's nullification, and (3) nullification would not produce anarchy, or let one state ride roughshod over the interests of others, but instead was workable and beneficial to the whole. Calhoun recognized the need for common policy on matters of common concern—including policies on international trade and the status of slavery in federal territories. But he believed that the crisis generated by a single state's act of nullification would force all states to come to consensus on the true common good. To advocates of nullification, Calhoun provides the foundations they take for granted; for critics, Calhoun usefully highlights where the theory can be challenged.

The purposes for which nullification has been attempted have varied. But the theory itself has remained fairly consistent since Calhoun. A set of common claims are made by Calhoun; by James J. Kilpatrick (1920–2010), editor of the *Richmond News Leader* during Southern states' campaign of "massive resistance" to the Supreme Court's school desegregation decisions and author of *The Sovereign States* (1957); and by Thomas E. Woods, author of *Nullification* (2010) and a contemporary advocate of nullification affiliated with the Tenth Amendment Center. Neither Kilpatrick nor Woods would qualify as significant political theorists, but they demonstrate how Calhounian theory can be applied much later under different circumstances.

The three axioms of nullification are as follows: (1) *There does not exist, and never can exist, any "people of the United States."* In his *Discourse on the Constitution* Calhoun writes, "There is, indeed, no such community, politically speaking, as the people of the United States, regarded in the light of, and as constituting one people or nation" (1959–2003, 28:100). Kilpatrick speaks of "the delusion that sovereignty is vested in the whole people of the United States" and that "'we the people' in the preamble to the Constitution ... means everybody! It does not; it never did" (1957, 15). Woods writes, "The United States consists not of a single, aggregated people, but of particular peoples, organized into distinct states" (2010, 89). If there exists no "people of the United States," then the "sovereignty of the people" can only mean the separate sovereignties of the peoples of each state.

One obvious objection to the claim that there exists no "people of the United States" is that the opening words of the Constitution's preamble, "We the People of the United States," mark a significant change from the opening words of the Articles of Confederation, which, in the equivalent location, list the 13 separate states by name. To this objection Kilpatrick, Calhoun, and Woods give the identical answer: that the phrase "We the people of the United States" was inserted late in the federal convention,

was generally understood to mark no substantive shift from the separate listing of each state in the Articles, and was employed simply because at that moment it was uncertain which states would actually ratify the document (Kilpatrick 1957, 17–18; Calhoun 1959–2003, 28:83–84; Woods 2010, 100–101).

Whether it made sense in 1787 to speak of an American people may certainly be debated. But the claim that “We the People” was by common agreement a phrase of little significance is difficult to reconcile with the fact that opponents of ratification criticized the Constitution precisely for including so radical and momentous a phrase—“Who authorized them to speak the language of ‘We the people,’ instead of ‘We the States?’” Patrick Henry complained at the Virginia Ratifying Convention (Storing 1985, 297)—while advocates of the Constitution embraced the notion of an American people.

(2) *Sovereignty is inherently indivisible and inalienable.* States cannot be “partly sovereign,” and sovereignty cannot be divided between the federal government and the states. Therefore, unless the American states at some point expressly and fully renounced all their sovereignty—which they never did—they must be understood to have retained full sovereignty from the moment of independence from Britain through the present day. Calhoun, responding to Madison’s argument for divided sovereignty in *Federalist* no. 39, remarks that “we might just as well speak of half a square, or half of a triangle, as of half a sovereignty” (1959–2003, 12:71). Kilpatrick quotes this exact phrase from Calhoun and adds that the states “*surrendered* nothing to the Federal government they created. *Some of their powers they delegated; all of their sovereignty they retained*” (1957, 14). Woods agrees: “Sovereignty is neither partible nor alienable” (2010, 99). This is not an argument based on the Constitution’s text—where the word “sovereignty” nowhere appears—but on extratextual assumptions about the nature of sovereignty.

(3) *Because each state is sovereign, each state is final judge of the Constitution.* This is the key step linking the assumption of sovereignty to the presumed right of nullification. One of the key attributes of sovereignty as characterized by Thomas Hobbes (among others) is the right of final judgment. If each individual state is fully sovereign in this sense, then it follows that each state is final judge, for itself, of the Constitution’s meaning and entitled to act on that judgment. The “supreme law of the land” clause of Article VI is no obstacle because each state decides for itself what this supreme law of the land means in practice. This argument is facilitated by the fact that the Constitution does not specifically vest the Supreme Court with the power of judicial review. But under nullification theory, states would have the right of final judgment even if the Constitution specifically vested the federal judiciary with the power of judicial review. For (as Calhoun put it), the federal judiciary is the final authority only with respect to the acts of the federal

government itself; nothing in the Constitution “can possibly give the judicial power authority to enforce the decision of the government of the United States, against that of a separate State, when their respective decisions come into conflict” (1959–2003, 28:156). Kilpatrick echoes this judgment: nowhere, he claims, does the Constitution give the federal judiciary “jurisdiction over controversies *between a State and the United States*” (1957, 23); Woods takes the same position (2010, 5–7). The nullifiers’ argument here is difficult to reconcile with Article VI’s specification that “judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding” or with Article III, Section 2’s provision that “the judicial Power of the United States ... shall extend to all Cases, in Law and Equity, arising under this Constitution.”

Nullification as outlined above represents a clear and (if one grants its premises) internally consistent constitutional theory. The same cannot be said for “interposition,” a vaguer term often used in connection with nullification. “Interposition” has been used in American constitutional discourse in at least two different ways: as nullification by another name—Calhoun, Kilpatrick, and Woods use the terms interchangeably—and to refer to methods other than nullification by which states resist federal laws they consider oppressive or unconstitutional. (For the latter employment, see Hays [2007].)

The terminological confusion has been there from the beginning. Madison in the 1798 Virginia Resolutions called on the states to “interpose for arresting the progress of the evil” (1962–91, 17:189), which led Calhoun and others to cite Madison’s authority in support of nullification. In his public rejection of nullification in 1830, Madison denied that the Virginia Resolutions contained “any reference whatever to a constitutional right in an individual State to arrest by force the operation of a law of the U.S.” and argued instead that they called on other states “*concurrently* and co-operatively” to remedy obnoxious laws through “measures known to the Constitution, particularly the ordinary controul of the people and Legislatures of the States over the Govt. of the U.S.” (1910, 9:402). Madison’s *Report of 1800*, which explains and defends the Virginia Resolutions, supports Madison’s later denial that he had advocated nullification. The *Report* affirms a state’s right “of declaring the alien and sedition acts to be unconstitutional,” of “communicating the declaration to other states,” and of inviting other states to “concu[r] in making a like declaration, supported too by the numerous applications flowing directly from the people.” The object of such a declaration would be to lead states to make “a direct representation to Congress, with a view to rescinding the two offensive acts” or, by a two-thirds majority of states, to “propose an explanatory amendment to the constitution” (1962–91, 17:349).

Nullifiers responded by claiming Madison was dishonestly covering up his earlier position, or of failing mental powers, or both (McCoy 1991, 119–70). The real quarrel, however, was about words: for Madison “interpose” and “nullify” meant different things; to nullifiers these were synonyms.¹⁵

3. ANTEBELLUM EPISODES

Nullification as a constitutional countertradition has its own body of precedent, just as the Supreme Court does, and a historical narrative designed to show that nullification advances liberty and upholds the true Constitution. What follows is a counternarrative to that countertradition, touching on some of the same events but calling into question some conclusions nullifiers draw from those events. The single most important precedent is South Carolina’s nullification of the tariff, described above.

The first significant episode of nullification, or at least quasi nullification, under the Constitution was Georgia’s refusal to recognize the US Supreme Court’s jurisdiction in *Chisholm v. Georgia* (2 Dall. 419 [1793]). Two citizens of South Carolina sued in federal court to recover debts owed by the state of Georgia. Article III, Section 2, of the Constitution stipulates that the judicial power of the United States shall extend to controversies “between a State and Citizens of another state” or “foreign States, Citizens or Subjects,” and Article I, Section 10, stipulates that no state may pass a law “impairing the obligation of contracts.” But during the ratification debate, a number of leading Federalists, including Alexander Hamilton in *Federalist* no. 81, had argued that the Constitution would not eliminate states’ immunity from private suits without consent. Hamilton added, however, that states would not be immune wherever there is “a surrender of this immunity in the plan of the convention”—implying that states would be subject to federal court decision on legitimately federal questions (Shapiro 2009, 411).

Georgia’s own claims of sovereign immunity were more sweeping: not only could it not be sued without consent by private citizens for collection of debt, but as a “free, sovereign, and independent State” it could not be “drawn or compelled” to answer in court “before any Justices of any Court of Law or Equity whatsoever” (Mathis 1967, 22). On grounds of sovereignty, Georgia refused to appear before the US Supreme Court, and judgment went against it by default. Georgia not only refused to accept the decision but passed a bill

15. Both McCoy (1991) and Read (2009) argue that Madison’s denunciation of nullification was consistent with his record in 1798–1800; for an opposing view, see Gutzman (1995). Whatever Madison meant in 1798, by 1830 he definitely distinguished between nullification and interposition, while nullifiers did not, which sufficiently demonstrates the contested meaning of “interposition.”

providing that anyone attempting to enforce the court's decision should "suffer death, without benefit of clergy, by being hanged" (Currie 1997, 195–96).

Negative reaction to the court's decision led to the passage of the Eleventh Amendment (1795), which holds that "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Advocates of nullification interpret the episode as vindicating Georgia's claim that a sovereign state is not subject without its consent to decisions of the US Supreme Court (Kilpatrick 1957, 58). But the actual text of the Eleventh Amendment is narrower in scope: it overturns the substance of the *Chisholm* ruling but does not endorse Georgia's claim of immunity from "any Court of Law or Equity whatsoever," and the amendment does not mention sovereignty.¹⁶ Georgia's response to *Chisholm* clearly qualifies as an act of state resistance to federal authority. Whether it qualifies strictly as nullification is less clear because the state never fully explained its constitutional reasoning, and the Eleventh Amendment ended debate before it began.

Article II, Section 2, of the Constitution stipulates that "the President shall be Commander in Chief ... of the Militia of the several States, when called into the actual Service of the United States." Because the militias remain state-constituted bodies, the clause presupposes cooperation between federal and state authorities. In 1809 Thomas Jefferson, as president, called up state militia to enforce the Embargo Act, which was deeply unpopular and widely evaded in New England. Connecticut Governor Jonathan Trumbull refused to permit the use of the state's militia, claiming that "the late law of Congress for the more rigorous enforcement of the embargo is *unconstitutional* in many of its provisions, interfering with the state sovereignties, and subversive of the guaranteed rights, privileges, and immunities of the citizens of the United States." He claimed the right as governor to refuse "to contribute his *volunteer* aid in support of laws bearing such an aspect." The Connecticut Assembly passed resolutions approving the governor's action (Johnson 1912, 263–67).

Connecticut's resistance to enforcement of the embargo features prominently in the nullification narratives of Kilpatrick and Woods (Kilpatrick 1957, 125–36; Woods 2010, 189–96). Whether the act rose to the level of strict nullification may be debated.¹⁷ Neither governor nor assembly asserted

16. For broad versus narrow constructions of the amendment in historical context, see Barnett (2007). The scope of the Eleventh Amendment's implicit "sovereign immunity" guarantee remains in dispute; see the majority opinion and dissents in *Seminole Tribe of Florida v. Florida*, 57 U.S. 44 (1996), and *Alden v. Maine*, 527 U.S. 706 (1999).

17. Hays (2007) argues that Connecticut's resistance to the embargo was "interposition" but not nullification.

state power to block the enforcement of the embargo by federal authorities but limited their intervention to noncooperation by the state. There was no declaration that the embargo was “void, and of no force” within the state’s boundaries. Nevertheless, the refusal of Connecticut and other New England states to cooperate in enforcing the embargo significantly weakened the policy; in that sense, this act of quasi nullification was politically successful. Jefferson, despite having authored the Kentucky Resolutions, regarded New England states’ obstruction of the policy as illegitimate.

In 1822, South Carolina, believing that free blacks from outside the state destabilized slavery, enacted a law “requiring all colored seamen to be seized and jailed while their ships remained in Charleston harbor.” The law was a clear violation of the US treaty with Great Britain, which publicly objected to the arbitrary incarceration of its subjects under the law. Because the law required incarceration of all free black seamen, it applied equally to free black citizens of Northern states. US Attorney General William Wirt argued that “the law violated both the treaty with England and Congress’s exclusive power to regulate commerce,” and US Supreme Court Justice William Johnson reiterated that federal laws and treaties were “the supreme law of the land.” Nevertheless, South Carolina successfully resisted all federal attempts to stop the practice. Later, both John C. Calhoun and South Carolina senator Robert Hayne characterized this episode as a successful state nullification of federal law (Freehling 1965, 111–16). Calhoun admitted that the law “came into conflict with our commercial treaty with Great Britain” but nevertheless insisted that the federal government not only had no right to challenge the state’s law but was duty bound to assist the state in enforcing it (1959–2003, 14:55). This episode (about which Kilpatrick and Woods are conspicuously silent) served as an important precedent for South Carolina in explicitly nullifying the tariff a few years later.

Georgia resisted the Supreme Court again in the case of *Worcester v. Georgia* (31 U.S. 515 [1832]), a case pitting the state’s aggressive policy of Indian removal against the federal government’s authority to enact treaties with Indian tribes (and its generally feeble attempts to protect Indians under those treaties). Georgia claimed sovereign jurisdiction over Indian territories within the state and convicted several New England missionaries (who opposed Indian removal) for entering Cherokee territory without state license. The state declared its right “to coerce obedience ... from all description of people, be they white, red, or black, who reside within her limits” (Johnson 1912, 309). Georgia once again, on grounds of sovereignty, refused to appear before the US Supreme Court. Chief Justice John Marshall ruled that Georgia’s law was unconstitutional and directed that the prisoners be released. President Andrew Jackson, who supported Indian removal, made no attempt to enforce the court’s decision.

This precedent encouraged South Carolina to go forward with its nullification of the tariff later that year, and much later it served as precedent for the resurrection of nullification in the 1950s (Freehling 1965, 232–34; Watson 1990, 105–13; Bartley 1997, 128–29; Howe 2007, 412–16).

Wisconsin's nullification of the Fugitive Slave Act of 1850 is of enormous rhetorical importance to twentieth-century and contemporary advocates of nullification as a counterargument to those who associate nullification with the defense of slavery. Kilpatrick (1957, 199–216) devotes an entire chapter to the personal liberty laws of Northern states and featured them in one of his interposition editorials for the *Richmond News Leader* during its campaign of massive resistance against *Brown v. Board of Education*. Woods devotes more space to Wisconsin's nullification of the Fugitive Slave Act than to South Carolina's nullification of the tariff (2010, 75–85, 261–63).

The antebellum Constitution (Art. IV, Sec. 2) included a provision stipulating that persons “held to service or labour,” escaping to another state, “shall be delivered up” but did not specify whether this was to be done under federal authority, state authority, or both. The Supreme Court's decision in *Prigg v. Pennsylvania* (41 U.S. 539 [1842]) upheld federal authority to make and enforce fugitive slave laws but did not compel state authorities or individual citizens to cooperate in that enforcement. The personal liberty laws passed by a number of Northern states before 1850 forbade state authorities from assisting in the capture of fugitive slaves, but did not directly block federal enforcement (which was weak in any case), and in that sense arguably qualify as quasi nullification rather than strict nullification. Calhoun, however, classified these personal liberty laws as nullification—and denounced them as illegitimate. He saw no contradiction because in his view the protective tariff nullified by South Carolina was clearly unconstitutional, while the duty to render fugitive slaves was clearly affirmed in the Constitution. In his final Senate speech (March 4, 1850), Calhoun laid down an ultimatum, failing which slave states would secede from the Union; among the conditions were that Northern states must cease to “set aside and annul the clause of the Constitution providing for the delivery up of fugitive slaves” (1959–2003, 27:201). The Fugitive Slave Act of 1850, a key element of the 1850 Compromise, was enacted because Northerners took the secession threat seriously.

Yet despite the Constitution's fugitive slave clause, the 1850 act was itself open to serious constitutional objections. It obliged not only state authorities but even individual citizens of free states to cooperate in rendition of fugitive slaves. It provided no trial for alleged fugitives and thus no legal means by which a person of African descent could argue that he or she had been legally emancipated or wrongly identified. Free black residents, even citizens, of Northern states could thus be forced into slavery by federal action in violation of all due

process protections. Antislavery activists considered recapture of fugitive slaves a violation of natural rights, even when the identity and status of the fugitive was not in doubt. Many prominent abolitionists, among them William Lloyd Garrison and Wendell Phillips, considered the Constitution fatally compromised on slavery and advocated free-state secession from the Union. Other abolitionists sought to preserve the Union and employ the Constitution as an antislavery instrument wherever possible.

It was in this volatile context that in 1854, in the *Booth* and *Rycraft* cases, the Wisconsin Supreme Court declared the Fugitive Slave Act of 1850 unconstitutional. The case involved a fugitive slave, Joshua Glover, whose rendition was successfully blocked by abolitionists, two of whom, Sherman Booth and John Rycraft, were charged with obstructing the Fugitive Slave Act. The Wisconsin Supreme Court freed the defendants on grounds that the Fugitive Slave Act was unconstitutional, unanimously holding that it violated constitutional protections of due process and (with some dissent) that the Constitution did not authorize Congress to legislate about fugitive slaves at all. Wisconsin's judicial and legislative action was not limited to state noncooperation with federal authority (as in pre-1850 personal liberty cases) but directly sought to block it. The US Supreme Court intervened and in *Ableman v. Booth* (1859) overturned the Wisconsin court's ruling and authorized federal authorities to arrest Booth (Baker 2006, 112–34, 154–61). The Wisconsin legislature replied with its March 19, 1859, resolutions declaring the Taney Court's decision in *Ableman v. Booth* to be “without authority, void, and of no force” in the state of Wisconsin (State Historical Society of Wisconsin 1892, 143).

Thus matters stood on the eve of Southern states' secession from the Union. The first grievance listed in South Carolina's December 20, 1860, Declaration of Causes of Secession is not any federal act or law but the fact that “fourteen of the States have deliberately refused, for years past, to fulfill their constitutional obligations” to return fugitive slaves and, furthermore, “have enacted laws which either nullify the Acts of Congress or render useless any attempt to execute them” (Heidler and Heidler 2002, 2240–43). South Carolina, the slave state that pioneered the constitutional doctrine of nullification, dissolved the Union when free states began nullifying laws South Carolina considered essential.

Thus, the antebellum historical evidence does not support the conclusion that nullification is a consistently liberty-enhancing practice grounded in states' mutual respect for one another's differing constitutional judgments. The purposes for which South Carolina nullified federal treaty provisions and disregarded the Constitution's “privileges and immunities” clause with respect to free black seamen and the purposes for which Wisconsin nullified

the Fugitive Slave Act were not only different but diametrically opposed: for Wisconsin, it violated the Constitution not to treat persons of African descent as entitled to due process rights; for South Carolina, it violated the Constitution to accord persons of African descent any such rights. Neither Thomas Jefferson nor John C. Calhoun could admit the legitimacy of a state's obstructing a federal law that they regarded as essential. This is not mere hypocrisy but connected with the very nature of nullification. Those who nullify federal law believing they possess the "correct" understanding of the Constitution are unlikely to accord equal legitimacy to those who nullify for constitutionally "incorrect" reasons.

Nor, of course, does the antebellum record suggest that the federal government is always the friend of liberty and states always its enemy. Madison argued that the best system was one that provided double security against threats to liberty proceeding from either direction. But under the antebellum Constitution, this double security was weakened by the lack of any common definition of rights and liberties constitutionally binding on both the federal government and states. Madison's original proposal for the Bill of Rights would have bound both the federal government and states to respect freedom of speech, press, religion, and jury trial (Madison 1962–91, 12:208), but the Bill of Rights as enacted only restricted the federal government. And any definition of key rights and liberties binding both the federal government and states would have been difficult in a nation half slave, half free.

On moral grounds one can respect abolitionists who were willing to risk disunion rather than permit the return of fugitive slaves. But nullification as practiced in the 1850s—whereby Wisconsin's Supreme Court, imitating South Carolina, nullified the Fugitive Slave Law, the US Supreme Court overturned the Wisconsin Supreme Court's ruling, Wisconsin's legislature nullified the US Supreme Court's ruling, and South Carolina threatened to secede unless it got its way with everyone—was not a sustainable constitutional practice. These were symptoms of a nation headed for civil war.

4. THE FOURTEENTH AMENDMENT

The Thirteenth, Fourteenth, and Fifteenth Amendments (ratified respectively in 1865, 1868, and 1870) fundamentally altered the Constitution in ways irreconcilable with the antebellum doctrine of nullification. They did so in two specific respects. First, all three amendments specify that "Congress shall have power to enforce this article by appropriate legislation." The fundamental premise of nullification was that federal acts could never be enforced within a state's territory without that state's consent, for a state's power to grant or withhold consent was fundamental to its sovereignty. The "power to enforce"

clauses of the postwar amendments are arrows directed at the heart of nullification. They are more forceful than Article VI's "supreme law of the land" clause and more explicit than any comparable power vested in the judiciary. They do not authorize Congress to legislate upon states in any matter whatsoever. But to authorize federal enforcement against a nonconsenting state on *any* matter overrides the doctrine of nullification, which holds that states are final judges of their constitutional obligations on *all* matters.

Second, these three amendments specifically authorized the federal government to protect persons living within a state from being deprived of liberty or equal protection of the laws by the action of their own state—and, in the case of the Thirteenth, to ban slavery in any form, public or private. The antebellum Constitution did not define national citizenship but merely obliged each state to extend "privileges and immunities" to citizens of other states—and in practice permitted slave states to deny "privileges and immunities" to free blacks on grounds that they were not legitimately citizens anywhere. Section 1 of the Fourteenth Amendment creates "citizens of the United States" who are simultaneously citizens "of the state wherein they reside," thus challenging the premise that there exists no "people of the United States." How broadly or narrowly to interpret the Fourteenth Amendment's ringing phrases "life, liberty, or property," "due process of law," and "equal protection of the laws" was debated when that amendment was framed and continues to be debated today (Curtis 1986; Berger 1989; Zuckert 1992). But whether interpreted broadly or narrowly, the amendment's language would be meaningless unless it empowered the federal government, in at least some class of cases, to intervene to safeguard the life, liberty, and property of citizens against the laws and acts of a state—whether that state consents to the intervention or not. In that sense, even on a narrow reading, the Fourteenth Amendment is incompatible with nullification.

Twentieth-century and contemporary advocates of nullification, unlike Calhoun, must somehow get around the Fourteenth Amendment; that is the fundamental discontinuity between antebellum nullification and later variants. There are two strategies available. One is to deny the legitimacy of the Fourteenth Amendment. The other is to claim it did not alter the relation between the federal government and states in any significant way. These moves are complementary rather than contradictory: the perceived illegitimacy of the Fourteenth Amendment also grounds the claim it subtracted nothing from the full sovereignty of states.

The Fourteenth Amendment was not ratified in strict accordance with the amendment procedures set forth in Article V of the Constitution, a fact admitted even by some of its most committed champions (see Ackerman [1998, 99–119], who grounds its legitimacy on an unconventional but democratic

process). Among other irregularities, the states of the defeated Confederacy were variously included or excluded from the roster of states, depending on which counting rule best achieved the constitutionally prescribed amendment ratios (two-thirds for congressional proposal, three-fourths for ratification). The US Supreme Court's fateful rulings in the *Slaughterhouse Cases* (1873) and *Civil Rights Cases* (1883), which reduced the Fourteenth Amendment's rights-protection provenance nearly to the vanishing point (at least for a long time) may have been influenced in part by the questionable legitimacy of its birth (Zuckert 1992, 88–91).

Thus, twentieth-century and contemporary advocates of nullification perceive no obstacle in the Fourteenth Amendment. Kilpatrick, justifying “massive resistance” to *Brown v. Board of Education*, writes: “The Fourteenth Amendment to the Constitution, never having been validly ratified, cannot provide a valid basis for the mandate the Supreme Court proposes to inflict upon the Southern States.” Kilpatrick does not quite call for disregarding the Fourteenth altogether—over time, he says, Southern states have “tacitly acquiesced in the amendment’s existence”—but he insists on Tenth Amendment grounds that Southern states may block judicial reinterpretations of the Fourteenth Amendment that unsettle long-established interpretations acceptable to those states (1957, 258–62).¹⁸ Woods likewise denies that the Fourteenth Amendment was legitimately enacted and (like Kilpatrick) argues that in any event the Fourteenth altered nothing in the essential character and structure of the federal union because “the nature of sovereignty will not permit such a thing” (2005; 2010, 84–85).

Both Kilpatrick and Woods treat the Thirteenth Amendment (which abolished slavery) as legitimately enacted because after the Civil War the Southern states voted to ratify it (Kilpatrick 1957, 259; Woods 2005). But judged by the standard of regular amendment procedures, the Thirteenth would count as the most illegitimate of all—for only the outcome of war made it possible. The Fourteenth and Fifteenth Amendments were continuations of the moral and political crisis that produced the war itself. Under the antebellum Constitution there was no regular constitutional procedure for freeing chattel slaves, making them citizens, and giving them the right to vote. To participants in the civil rights movement, the Fourteenth Amendment’s legitimacy was self-evident—written so to speak in nature’s hand, no matter what counting rule was used to secure its adoption.

18. With respect to the Fifteenth Amendment, Kilpatrick asserts (despite the amendment’s enforcement clause) that the right to vote “is a right that comes from the State; it is not a right subject to regulation as a right of ‘citizens of the United States’” (1957, 233). Thus, federal efforts to enforce Fifteenth Amendment voting rights for those on whom the (illegitimate) Fourteenth conferred citizenship would also be illegitimate.

5. NULLIFICATION, INTERPOSITION, AND “MASSIVE RESISTANCE”

It was Herman Talmadge, governor of Georgia, who in 1951 first resurrected “the long-abandoned doctrine of interposition.” What suggested the idea was “Georgia’s successful nullification of *Worcester v. Georgia*,” the 1832 Indian lands case discussed above (Bartley 1997, 128–29). But interposition really caught on after *Brown v. Board of Education* (1954), when it was taken up by political leaders of other Southern states and especially the *Richmond News Leader* under James Kilpatrick’s editorship. On November 21, 1955, the *News Leader* commenced its interposition campaign, “thus beginning one of southern journalism’s more successful editorial crusades ... *The News Leader* editorials on interposition were printed in pamphlet form and circulated widely.” By 1957 the states of Alabama, Mississippi, Georgia, and Florida had passed resolutions pronouncing “the Court’s ruling null and void.” Several other Southern states approved interposition resolutions that stopped short of the “null and void” language (Bartley 1997, 129–31). Southern leaders did not all agree on whether “interposition” meant nullification and whether to push resistance to the point of declaring *Brown* null and void.¹⁹ But certainly for Kilpatrick and the *Richmond News Leader* (and Senators Harry F. Byrd of Virginia and James O. Eastland of Mississippi) interposition meant nullification.

Nullification means more than a state declaring some federal act unconstitutional; it entails attempts actively to block the federal policy’s implementation within that state’s boundaries. The call for “massive resistance” to *Brown* produced a diverse array of state legislation of this kind. Mississippi passed a law that ordered all persons in the executive branch of government at any level “to prohibit ... the implementation or the compliance with the Integration Doctrine.” Louisiana passed a state constitutional amendment “withdrawing consent of the State to suits” involving racial segregation of schools, thus “making the state responsible for resisting federal court orders.” Several states attempted to close public schools and redirect public funds to racially segregated “private” schools. Virginia’s (and the *News Leader*’s) leadership was key, both in spreading the call for massive resistance from the Deep South to “the peripheral South” and for providing “a theoretical basis for opposition to desegregation” (Bartley 1997, 134–35).

Kilpatrick’s editorials were published under the title “Interposition” and widely distributed throughout the South. The editorials argue that in the

19. “An enormous amount of Deep South energy went into debate over whether to nullify the *Brown* decision or just to pledge opposition to the ruling. Although the two doctrines of interposition and nullification were politically similar in that they both denied the validity of the Supreme Court decision, politicians considered nullification a more profound political commitment” (Bartley 1997, 136).

Brown decision the Supreme Court, by reversing a “precedent, long acquiesced in,” had in effect amended the US Constitution, “disregarding the orderly processes for its amendment set out in Article V thereof” (Kilpatrick and Bryant 1956). Thus, unless and until three-fourths of the states passed a constitutional amendment upholding the court’s decision in *Brown*, any state that considered that decision wrong could legally and constitutionally refuse to comply with it. (The argument that nullification stands unless explicitly overturned by constitutional amendment originated with Calhoun; see Calhoun 1959–2003, 11:421).

Throughout the *News Leader*’s interposition editorials, the words “we” and “us” suggest a state and region unanimous in its opposition to *Brown* and to racial integration in general. This also characterizes the Southern Manifesto of 1956 (“We regard the decisions of the Supreme Court in the school cases as a clear abuse of judicial power. . . . We decry the Supreme Court’s encroachment on the rights reserved to the States”) as well as the various state nullification and interposition resolutions.²⁰ There is no suggestion that anyone residing in Southern states might have a different perspective on the court’s desegregation rulings. A few years later, Kilpatrick dropped the fiction of unanimity and admitted what was implicit all along. “When I speak in this essay of ‘The South,’ what I mean is the white South. . . . There is, of course, a Negro South, but it is mysterious and incomprehensible to most white men” (1962, 8–9).

Thus, nullification (or interposition) as practiced in the 1950s was unquestionably grounded in defense of racial hierarchy, although Kilpatrick and some other advocates of the doctrine argued for its extension to other spheres of policy as well. Later in life Kilpatrick apologized for the racial arguments he had made during the anti-*Brown* campaign but did not (so far as we know) retract the claim that states are fully sovereign and their constitutional judgments—right or wrong—final. For the idea of state sovereignty “depends for its success on the right of the States to be wrong . . . simply because they are states” (Kilpatrick 1962, 106). The doctrine of nullification, while it obviously does not require, certainly permits states to deny rights and liberties to some of their citizens—even if they do so wrongly—and rejects as illegitimate any federal remedy to which the state does not consent.

6. THE CIVIL RIGHTS MOVEMENT’S CONSTITUTION

Interposition did not in the end prevent racial desegregation of Southern schools. Nor was the interposition argument ever taken seriously by the Supreme Court. But interposition contributed politically to a campaign of massive resistance that

20. The Southern Manifesto, 102 Cong. Rec., pt. 4, 4459–60 (daily ed. March 12, 1956), 84th Congress, 2d Sess.

delayed real progress on integration for at least a decade (Rosenberg 1991/2008, 42–71). Interposition was politically effective because it tapped a deep vein of popular sovereignty by rejecting the premise that the US Supreme Court was the final arbiter of the Constitution or that its decisions commanded automatic deference. A decision claiming to be “the law of the land” will be difficult to enforce if it is seen merely as the act of one small unelected body. Real progress on racial integration required the active support of three presidents, a Civil Rights Act passed by Congress, and thousands of civil rights activists even more committed to equality than their opponents were to segregation. If the *Brown* ruling triggered a popular backlash among white Southerners in defense of segregation, that backlash in turn helped inspire a national political movement in favor of the racial equality promised by the Constitution that was in the end more effective than the *Brown* decision itself.²¹

The civil rights movement also made powerful use of constitutional arguments, and not just in the courtroom. One of the movement’s strengths was its own profound belief in the Declaration of Independence and the Constitution—a constitutional vision in which the unfulfilled promise of the Fourteenth Amendment was central. Civil rights activists over nearly a century were never reconciled to the precedent established in the *Civil Rights Cases* (1883): that race discrimination by nonstate actors—including discrimination encouraged by state officials—could not be remedied by federal action under the Fourteenth Amendment. Civil rights leaders responded by resorting to the commerce clause to challenge racial discrimination in common carriers and public accommodations (Tushnet 1994, 72–76). When Congress passed the landmark Civil Rights Act of 1964 it grounded the legislation not on the Fourteenth Amendment (because court precedents still blocked that path) but on the interstate commerce provisions of Article I, Section 8. Yet the civil rights movement always saw civil rights legislation as fulfillment of a Fourteenth Amendment promise—never merely as a commerce clause matter. That the Supreme Court had for nearly a century refused to countenance this use of the Fourteenth did not prevent civil rights activists from making a Fourteenth Amendment argument, in writings, public speeches, and meetings with elected leaders. Martin Luther King, among others, called for a “Second Emancipation Proclamation” declaring “all segregation illegal in light of the Fourteenth Amendment”

21. Scholars disagree about the degree to which *Brown* and its successor decisions provided essential inspiration to the civil rights movement. Rosenberg (1991/2008) downplays the importance of *Brown* as motivation for the movement. Garrow (1994) rejects Rosenberg’s minimization of *Brown* but agrees that the court’s decisions alone did not achieve substantial racial integration without the support of a powerful civil rights movement and congressional action.

(Garrow 1986, 169).²² For the civil rights movement, too, the Constitution belonged to the people, not just to the courts.

7. NULLIFICATION IN POLARIZED TIMES

Having explored nullification's past, we now return to the present and look to the future. As constitutional doctrine, nullification has risen from the dead, but the legislators and activists who embrace it are very much alive and moved by present-day passions, interests, and hopes. Despite complications introduced by the Fourteenth Amendment, the constitutional theory of nullification has remained essentially constant since the time of Calhoun. But the specific issues that today lead legislators and activists to advocate nullification are different from in the past. Nullification activists who aim to block what they consider overbearing federal health care laws, environmental policies, and firearms regulations and to restrict federal authority over commerce to what they consider its "correct, pre-1937 interpretation," typically reply with scorn to anyone who mentions nullification's past employment to bolster slavery and racial hierarchy (Woods 2010, 59, 126). Nullification can in principle be advocated for any policy goal—"right wing" or "left wing"—except the goal of ensuring an effectively functioning federal government. If nullification's past is worth recalling, it is not because contemporary nullifiers somehow embrace the same purposes as antebellum slaveholders and 1950s segregationists. Nevertheless, nullification doctrine today remains irreconcilable with the federal remedies historically employed against race discrimination.

Nullification was employed in the antebellum period for mutually contradictory purposes by states making opposite constitutional judgments; the same could happen if nullification became general practice today. We live at a time of intense and increasing political polarization in the United States, a phenomenon affecting both national and state politics. Analysts differ on whether the entire population or only the most politically committed subset of the population has become highly polarized (Bishop and Cushing 2008; Fiorina and Abrams 2009), but its consequences are ominous in either case. The polarization is national, but its effects are geographically magnified: elected officials and public opinion leaders from states and regions on opposite sides of the ideological divides increasingly appear foreign and incomprehensible to one another. Such geographically marked ideological polarization

22. It is also worth noting that in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), where the US Supreme Court upheld the constitutionality of the 1964 Civil Rights Act on interstate commerce grounds, Justices Douglas and Goldberg argued in concurring opinions that the court should have based its ruling primarily on the Fourteenth Amendment.

is not without precedent in American history: it was the case to a greater degree in 1850, but the historical parallel is not an encouraging one.

It is amid this volatile brew that nullification has recently reemerged as popular constitutional theory in some states and ideological circles. Nullification did not produce the increased polarization (which predated the doctrine's recent revival and whose causes are too complex to explore here). But as polarization increases, so does the psychic appeal of nullification and the temptation actually to resort to it. Nullification's seductive appeal is that it promises faster results than the long, patient work of winning national elections and convincing national majorities. Rather than persuading those who live and vote in other states, one can ignore them and simply act—but in ways that nevertheless affect those whom one has ignored.

The intersection of nullification doctrine with deepening political and cultural divides also increases the likelihood of mutually contradictory nullification efforts on matters affecting the interests of all states. Many such scenarios are imaginable; a single example will have to suffice. If nullification became accepted policy, with each state the final judge of its own constitutional rights and obligations, then Arizona and California, bordering on Mexico and each other, might nullify federal law in opposite directions: one to criminalize those who cross borders and to deny citizenship to their US-born children; the other to welcome border crossers and their children. The full scenario is hypothetical, but the rudiments exist. A pair of 2011 Arizona bills (S.B. 1308 and S.B. 1309, which cleared committee but did not pass the full chamber) would restrict Fourteenth Amendment birthright citizenship to children for whom at least one parent is a citizen or legal resident, “notwithstanding any state or federal law to the contrary,” and would have enforced the provision by directing the state to issue separate, noncitizen birth certificates for children of undocumented immigrants.²³ On the other side of the ideological divide is the Sanctuary Ordinance enacted by San Francisco that prohibits any city or county official from “assisting or cooperating, in one’s official capacity,” with any “investigation, detention, or arrest procedures, public or clandestine, relating to alleged violations of the civil provisions of the federal immigration law.”²⁴ The ordinance limits itself to noncooperation (not active obstruction) and is largely symbolic because federal

23. Both bills are from the Arizona Legislature, 1st Regular Sess. (2011): Arizona Citizenship, S.B. 1309 (http://www.azleg.gov//FormatDocument.asp?inDoc=/legtext/50leg/1r/bills/sb1309p.htm&Session_ID=102), and Interstate Birth Certificate Compact, S.B. 1308 (http://www.azleg.gov//FormatDocument.asp?inDoc=/legtext/50leg/1r/bills/sb1308p.htm&Session_ID=102).

24. City and County of San Francisco, Sanctuary Ordinance, Administrative Code Chap. 12H (<http://sfgsa.org/index.aspx?page=1069>).

immigration authorities have enforcement powers of their own. Moreover, it is the act of a municipality, which cannot plausibly claim sovereignty, not the act of a state. But the combination of Arizona's Senate Bill 1308 and San Francisco's Sanctuary Ordinance extrapolates a possible future in which two or more states, acting on contradictory constitutional judgments, might nullify federal immigration law in opposite directions, neither state recognizing the other state's nullification as legitimate.

That states and regions often differ significantly in their values and perceived interests is among the chief reasons for instituting a federal system in the first place: differences that produce sharp conflict at one level might be defused at another. And advocates of nullification claim exactly those virtues for their state-sovereign version of federalism. But any federal system founded on a shared constitution presupposes some interdependent interests (like immigration policy) and thus some procedure for making decisions binding on the whole. Nullification theory either denies the need for binding federal policies or trusts they can always be formulated by interstate consensus.²⁵ The danger in mutually contradictory nullifications is not just the messy policy implications (although this is problem enough) but also that the denial of reciprocity—each state claiming a right it is unwilling to extend to the other—may escalate the states' conflict.

Contemporary nullification talk is the effect, not the cause, of the ideological polarization we observe in American politics today. There have been other eras of polarization, some much more extreme (e.g., the 1850s). The periods leading up to the 1800, 1828, 1860, 1896, and 1932 elections were all characterized by high ideological polarization—sometimes between parties, sometimes within them (Burnham 1970). But not all periods of polarization in American political history have generated calls for nullification. The polarized climate surrounding the 1896 and 1932 elections did not trigger noticeable nullification efforts. The nullification action of Southern states in the 1950s occurred in the context of moderate ideological distance between the national Democratic and Republican parties but intense ideological division over civil rights within the Democratic Party itself. The high ideological polarization of the 1790s occasioned Jefferson's nullification language in the 1798 Kentucky Resolutions, but this same polarization helped build an effective national party that ultimately enabled Jefferson to reverse the offending policies without nullification. South Carolina's 1832 nullification of the tariff occurred in the wake of deep fractures

25. Woods sees no need for uniformity in any respect and dismisses the problem of dueling nullifications. "Vermont may object to one unconstitutional law and Kansas another"—which presumes that Vermont's and Kansas's nullifications are complementary, not contradictory (Woods 2010, 15). Calhoun, in contrast, assumed a high degree of interdependent interest and the need for common policy but believed that states and regions would come to consensus on important matters (Read 2009, 160–95).

within the hitherto dominant Jeffersonian Democratic-Republicans. Wisconsin's 1854 nullification of the Fugitive Slave Act occurred as both national parties, Democrats and Whigs, were split over slavery—the Whigs fatally so. Thus, deep internal divisions within national political parties appear often to be a factor in states' resort to nullification. Race-related conflict (slavery, Indian rights, segregation) has also been a frequent, although not universal, element of nullification politics. The interconnection among nullification, polarization, national party dynamics, and race is complex and deserves further study.

8. FEDERALISM, “TALKING BACK,” AND PUBLIC CONSTITUTIONAL ARGUMENT

The discussion so far has taken nullification at face value, as a theory to be put into practice against federal resistance, if necessary by force, and its most committed advocates intend it as such. But at present it is unclear whether most legislators voting for nullification bills are willing to push it to a test of force. Many appear instead to consider nullification bills to be statements expressing opposition to federal policy—a kind of high-octane version of free speech—without seriously intending nullification.²⁶ This ambiguous picture—is nullification intended as law, statement, or both?—is one of the reasons why nullification today cannot yet be clearly pronounced either dead or alive. Much depends on how our constitutional politics develop over the next several years.

This raises a wider question: In what ways other than nullification are states able to safeguard their interests and “talk back” to the federal government when they believe it has overreached? And equally important, how does a healthy federal system encourage states, and their citizens, to communicate with one another? If political polarization generates divides, we should ask how our federal system might bridge rather than deepen those divides.

John Dinan argues that much recent state resistance to federal policy, including legalizing medical marijuana and opposing implementation of the REAL ID Act of 2005 (establishing uniform federal standards for state-issued driver's licenses) cannot accurately be described as “invoking the clearly repudiated doctrine of nullification” but instead demonstrates how states “are capable of safeguarding federalism principles without engaging in nullification” (2011, 101, 104). The medical marijuana laws enacted so far by 16 states do not claim to nullify federal drug laws but instead skillfully exploit federal officials' willingness (until recently) not to press the issue. With respect to drivers' licenses, several

26. For example, Montana's Republican House Majority Leader Tom McGillvray said that he voted yes on nullification bills that he knew the governor would veto because they enabled the legislature to convey the “statement” that “sometimes the federal government gets too heavy-handed” (Ames 2011).

states have passed laws barring state officials from complying with the federal REAL ID Act—some opposing the act on principle, others because federal funds did not cover the state’s compliance costs. But the act itself does not mandate state compliance; states choosing not to participate accept the consequence that their citizens may not be able to use state-issued identification to board airplanes. Dinan also points out that states will often enact legislation that conflicts with current federal law in order to have the federal law tested and possibly overturned in federal court. A state that accepts the federal judiciary’s authority to police the boundaries of federalism is not engaging in nullification—in contrast to nullifiers for whom any federal court ruling unfavorable to nullification “should itself be nullified, if not simply ignored” (Woods 2010, 139). Dinan criticizes Woods and the Tenth Amendment Center for incorrectly claiming that medical marijuana laws and anti-REAL ID measures count as nullification.²⁷ But at least some recent state efforts (including Idaho’s H.B. 117 and Montana’s H.B. 383 and H.B. 382, described in the introduction) clearly take their bearings from the doctrine of nullification.

Dinan’s summary of recent (nonnullification) state resistance reinforces Martha Derthick’s observation that states “may bargain with Congress” and “talk back to it” because “they are not Congress’s creatures.” She worries about federal overreach, and as a remedy she urges reinvigoration of the Madisonian idea of a *compound republic* as a middle ground between national supremacy and state sovereignty but treats nullification as a dead doctrine: “the federal government has won the crucial conflicts. Surely its ascendancy is not currently in dispute” (2001, 37, 39). Vincent Ostrom rejects all talk of sovereignty, federal or state, in favor of a “theory of constitutional choice” in which federal processes enable a self-governing citizenry to “elucidate information, clarify alternatives, stimulate innovation, and extend the frontiers of inquiry” (1991, 94–95, 272). John Nugent describes multiple ways in which states defend their interests in federal policy making and in the process—as nonjudicial actors—continually reshape the constitutional order itself. Nugent likewise treats nullification as a superseded doctrine and does not seem worried about states’ capacity to hold their ground in contemporary policy making (2009, 3–18, 46, 64, 193–94). Derthick, Ostrom, and Nugent do not seem to have anticipated the recent resurgence of nullification theory.

Nullification bills, like these other forms of “talking back,” send the message that one believes the federal government has gone too far. But nullification does this by substituting the state as the absolute authority, whose judgments

27. The Tenth Amendment Center does include medical marijuana laws and anti-REAL ID measures in its checklist of successful nullification initiatives; the site describes the Real ID Act as “virtually null and void ... in response to this massive state resistance” (<http://www.tenthamendmentcenter.com/the-10th-amendment-movement/#realid>).

and opinions are final and may not be questioned by federal officials or by one's fellow citizens in other states. This disregards any notion of a compound republic, dismisses the arguments of those outside one's borders, and does little to "extend the frontiers of inquiry" on matters of common concern. Nullification pronouncements are an impoverished form of political communication compared to other well-documented ways in which states "talk" to the federal government and to one another.

If one believes, along with the nullifiers, that the federal government has been an outright tyranny for decades, no further explanation is needed for the rebirth of nullification talk. To those who (despite policy disagreements) do not regard the contemporary federal government as inherently a tyranny, some other explanation is called for. One obvious hypothesis is that the federal government has become—at least in some respects—too big, too interventionist, and too restrictive of personal liberties and that critics believe they must yell as loudly as possible to be heard at all. Conservatives who do not subscribe to nullification as constitutional theory may be inclined to interpret its wider political significance this way; liberals and progressives have their own, somewhat different, list of overbearing federal laws and policies. Certainly national debate about which federal powers are genuinely necessary and which are not is always appropriate, now as much as ever. But threatening federal officials with criminal penalties for carrying out federal law (as in Montana's H.B. 31 and several other recent nullification bills) does not contribute anything constructive to this debate.

Another hypothesis (not incompatible with the one above) is that the federal legislative, judicial, and regulatory authority targeted by nullifiers has been so taken for granted by its supporters that they have ceased to make sustained constitutional arguments outside the courtroom. The draw of nullification comes not from its being good constitutional theory but from the mere fact that it *is* a constitutional theory, addressed to nonjudicial actors in language they understand, within a political community founded on the premise that the Constitution ultimately expresses the will of the people. Those who employ constitutional arguments, even weak ones, have an advantage over those who neglect constitutional arguments altogether. Contemporary nullification thrives in this vacuum.

One of the great strengths of the civil rights movement was precisely that it embraced the Constitution—a vision of the Constitution in which the Thirteenth, Fourteenth, and Fifteenth Amendments were central—and publicly demanded that the federal government use its legitimate power to guarantee equal protection of the law. The movement's legal team won important cases in federal court, but in public its leaders called for an end to segregation because that was what the Constitution—and justice itself—demanded. Passage of the 1964 Civil Rights Act and 1965 Voting Rights Act was possible because

ultimately a majority of the people of the United States found the civil rights movement's view of the Constitution more compelling than the segregationists' constitutional vision.

Those who today believe that the federal government has legitimate (although not exclusive) power to regulate the health care market, limit fossil fuel emissions, and continue to make policy in many other areas recently targeted by nullification bills stand to learn something from the civil rights movement's willingness to make sustained public constitutional arguments. But arguing for legitimate federal power in the constitutionally contested terrain of the twenty-first century will not be as morally straightforward as demanding federal action against race discrimination was in 1964. The pluses and minuses of expanded federal authority today are more ambiguous. The contemporary case for federal authority, where it is made, will be more effective if it addresses in clear language a public presumed to take the Constitution seriously, and conscientiously delineates the boundaries to any newly assumed power.

Theorists of nullification past and present deny that there has ever existed, or ever can exist, any sovereign "People of the United States"; there are only the separate peoples of each sovereign state. The Constitution's preamble suggests the opposite, and its internal provisions are difficult to reconcile with the separate sovereignty of 50 distinct peoples. But whether an American people exists as a living, deliberating political community cannot be answered by phrases on parchment or a Supreme Court ruling. That question must be continually answered in practice through the political decisions, constitutional judgments, and public arguments made every day, by officeholders and ordinary citizens, at all levels of our federal union.

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