

The Return of a Forbidden Idea

WHEN HOUSE SPEAKER NANCY PELOSI was asked by a reporter in 2009 where in the Constitution she found the authority to impose a health insurance mandate on Americans, she laughed and replied, “Are you serious? Are you serious?” The reporter answered that indeed he was. The Speaker just shook her head, and then took another question.

Pelosi’s press spokesman clarified the Speaker’s non-answer by explaining that this was “not a serious question.”¹

Senator Pat Leahy was asked the same thing—where in the Constitution is the federal government granted the authority to do this? His answer: “There’s no question there’s authority. Nobody questions that.”² He had no idea, in other words.

Senator Mark Warner, in turn, came out with this gem of constitutional insight: “There is no place in the Constitution that talks about you ought to have the right to get a telephone, but we have made those choices as a country over the years.”³ Got that? So *what* if the Constitution says nothing about granting

the federal government the power to force Americans to buy approved health insurance packages? The Constitution also says nothing about allowing American citizens to buy a telephone, eat at Taco Bell, or have children, and we do those things, don't we?

The difference that managed to escape Senator Warner is that in a free society *people* do not require constitutional authority to act. Government does.

The controversy over health care reflects a much broader and deeper constitutional void in American life. Some fifteen years ago, a Supreme Court Justice asked the United States Solicitor General (the government's lawyer for Supreme Court cases) if he could name an activity or program that, in his view, would fall outside the bounds of what the Constitution authorized the federal government to do. He could not.⁴

This contempt for constitutional limitations on the federal government is bipartisan and long-standing. Unsurprisingly, when the Constitution is thought of not as the strict limitation on government that its original supporters sold it as, but as something so compendiously broad as almost to defy limitation, government will continue to grow. Some federal activities have begun to alarm even those who have historically cheered government growth as a progressive force. Yet nothing has been able to stop it. Even Ronald Reagan, for all his charisma and rhetorical prowess, was able only to *slow the growth* of certain categories of federal spending.⁵ In 1994, the Republican Party won control of both houses of Congress in a historic off-year election victory. Government would at last be shrunk, politicians assured us.

Sure it would.

More and more Americans concerned about ongoing and apparently unstoppable government growth are beginning to wonder if some other strategy should be pursued, the exclusively electoral one having been such a failure. In the face of decades of broken promises and precious few victories against the seemingly inexorable federal advance, the pretty speeches of the plastic men are starting to ring a little hollow.

This is the spirit in which the Jeffersonian remedy of state interposition or nullification is once again being pursued. As we shall see in chapter 2, it was Thomas Jefferson, in his draft of the Kentucky Resolutions of 1798, who introduced the term “nullification” into American political discourse. And as we’ll see in chapter 4, Jefferson was merely building upon an existing line of political thought dating back to Virginia’s ratifying convention and even into the colonial period. Consequently, an idea that may strike us as radical today was well within the mainstream of Virginian political thought when Jefferson introduced it.

Nullification begins with the axiomatic point that a federal law that violates the Constitution is no law at all. It is void and of no effect. Nullification simply pushes this uncontroversial point a step further: if a law is unconstitutional and therefore void and of no effect, it is up to the states, the parties to the federal compact, to declare it so and thus refuse to enforce it. It would be foolish and vain to wait for the federal government or a branch thereof to condemn its own law. Nullification provides a shield between the people of a state and an unconstitutional law from the federal government.

The central point behind nullification is that the federal government cannot be permitted to hold a monopoly on constitutional interpretation. If the federal government has the exclusive

right to judge the extent of its own powers, warned James Madison and Thomas Jefferson in 1798, it will continue to grow—regardless of elections, the separation of powers, and other much-touted limits on government power. A constitution is, after all, only a piece of paper. It cannot enforce itself. Checks and balances among the executive, legislative, and judicial branches, a prominent feature of the Constitution, provide little guarantee of limited government, since these three federal branches can simply unite against the independence of the states and the reserved rights of the people. That is precisely what Jefferson warned William Branch Giles was already happening in 1825: “It is but too evident, that the three ruling branches of [the Federal government] are in combination to strip their colleagues, the State authorities, of the powers reserved by them, and to exercise themselves all functions foreign and domestic.”⁶ Much more important than the feeble restraint of “checks and balances” is the ability of the states to interpose to prevent the enforcement of unconstitutional laws. That is a *real* check on federal power.

It is not clear what the alternative to Jefferson’s remedy of nullification might be. Unconstitutional laws have indeed been passed, in very great abundance, so the question he poses about what to do in such a situation is not merely academic. Should people gather petitions, asking those who drafted the objectionable law to change their minds? Good luck with that. They could instead appeal to the courts. Although it would be nice if the courts were to grant us relief, what if they do not? The federal courts have, for all intents and purposes, ceased to police the federal government. We cannot be expected to believe that the matter is settled, and an odious law to be complied with,

merely because a handful of politically well-connected lawyers whom we are urged to treat with superstitious awe have solemnly informed us that all is well.

It is not difficult to find support in history for the general principle that an unconstitutional law is void. Alexander Hamilton contended in *Federalist #78* that “there is no position which depends on clearer principles, than that every act of a delegated authority contrary to the tenor of the commission under which it is exercised, is *void*. No legislative act, therefore, contrary to the constitution, can be *valid*. To deny this, would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men, acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.”

This principle should be beyond debate. The controversy arises when we consider how and by whom an unconstitutional law should be *declared* void (and thus not enforced). It was Hamilton’s view that the courts would put things right. But what if they didn’t? And since the federal courts are themselves a branch of the federal government, how can the people be expected to consider them impartial arbiters? The Supreme Court itself, after all, although usually pointed to as the monopolistic and infallible judge of the constitutionality of the federal government’s actions, *is itself a branch of the federal government*. So in a dispute between the states and the federal government, the resolution is to come from . . . the federal government? Jefferson refused to accept that answer. Under that arrangement, the states would inexorably be eclipsed by the federal government. It was impossible for Jefferson to believe that the states

would have agreed to a system that assured their unjust subordination.

Spencer Roane, a Virginia judge who would have been appointed Chief Justice of the United States by Thomas Jefferson had John Adams not chosen John Marshall in the waning hours of his presidency, noted that if the federal judiciary were to arbitrate such a dispute between itself and the states, it would be presiding over its own case, a clear absurdity:

It has, however, been supposed by some that . . . the right of the State governments to protest against, or to resist encroachments on their authority is taken away, and transferred to the Federal judiciary, whose power extends to all cases arising under the Constitution; that the Supreme Court is the umpire to decide between the States on the one side, and the United States on the other, in all questions touching the constitutionality of laws, or acts of the Executive. There are many cases which can never be brought before that tribunal, and I do humbly conceive that *the States never could have committed an act of such egregious folly as to agree that their umpire should be altogether appointed and paid by the other party*. The Supreme Court may be a perfectly impartial tribunal to decide between two States, but cannot be considered in that point of view when the contest lies between the United States and one of its members. . . . The Supreme Court is but a department of the general government. A department is not competent to do that to which the whole government is inadequate. . . . They cannot do it unless we tread underfoot the principle which forbids a party to decide his own cause.⁷

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Joseph Desha, governor of Kentucky, identified the very same problem in 1825:

When the general government encroaches upon the rights of the State, is it a safe principle to admit that a portion of the encroaching power shall have the right to determine finally whether an encroachment has been made or not? In fact, most of the encroachments made by the general government flow through the Supreme Court itself, the very tribunal which claims to be the final arbiter of all such disputes. What chance for justice have the States when the usurpers of their rights are made their judges? Just as much as individuals when judged by their oppressors.

Desha concluded that it is “believed to be the right, as it may hereafter become the duty of the State governments, to protect themselves from encroachments, and their citizens from oppression, by refusing obedience” to “unconstitutional mandates.”⁸

Once we accept the underlying premise that an unconstitutional law is *ipso facto* void, it is not a long way to Jefferson’s commonsense conclusion that someone ought to protect the people from the enforcement of such a law, and that the state governments, each one speaking only for itself, are the logical choice to do so.⁹

All over the country today, state legislators are introducing measures by which their states would refuse to enforce federal laws that violate the Constitution. Two dozen states nullified the REAL ID Act of 2005, legislation which aroused the opposition of both fiscal conservatives, who resented another unfunded federal mandate imposed on the states, and civil libertarians, who

raised privacy concerns against the legislation's proposed standardization and centralization of identification procedures. Resistance was so widespread that although the law is still on the books, the federal government has, in effect, given up trying to enforce it. This makes for an excellent example of how nullification can work—the states' resistance to some federal action is perceived as being so fierce and determined that Washington backs off, deciding that a particular struggle isn't worth pursuing. A new piece of legislation, the so-called PASS ID Act, is now under consideration at the federal level, but the states are likely to grant it a similar reception.

Another example of a state challenge to federal power is the Sheriffs First initiative, whereby, with a few exceptions, it would be a state crime for a federal law enforcement official to make an arrest or engage in a search or seizure without first receiving permission from the local sheriff.¹⁰ Locally elected sheriffs, who have some semblance of accountability to the people, might thereby be able to prevent some of the inevitable abuses that have accompanied the increasing centralization of law enforcement in the United States. Anyone concerned for the protection of civil liberties must find great appeal in this movement.

One of the most successful examples of modern-day nullification involves the medicinal use of marijuana, which is illegal under federal law. As of this printing, fourteen states are openly resisting the federal government's policy.

California's Angel Raich suffers from an astonishing range of afflictions, including fibromyalgia, seizures, nausea, and an inoperable brain tumor. Scoliosis, endometriosis, and temporomandibular joint dysfunction put her in constant pain. She loses a pound a day as a result of a mysterious wasting syndrome.

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Cannabis alone has granted her any relief worth speaking of, without burdening her with intolerable side effects, and has arrested her weight loss. Her physician testified in court that she would die without it.

California's Compassionate Use Act of 1996, passed into law in the wake of a popular referendum in defiance of the federal prohibition, allowed her to have recourse to the one treatment that could help her. When a series of raids by federal agents in 2002 led to a wave of arrests, Angel Raich and fellow sufferer Diane Monson sought an injunction against further raids by the federal government. Although they lost in district court, a panel of the U.S. Circuit Court of Appeals for the Ninth Circuit came down in their favor and forbade federal agents from seizing the women's marijuana. The Justice Department, in turn, appealed the case, which would go before the Supreme Court as *Gonzales v. Raich* (2005).

The Justice Department pointed to the Constitution's commerce clause to justify the federal prohibition on the use of marijuana even for medical purposes.¹¹ The presence of medical marijuana in one state, it was argued, could have spillover effects on other states. Even though the marijuana was grown in one state, was never transported out of that state, was never sold at all, and was immediately consumed in that state, the Justice Department wanted it to be treated as interstate commerce and therefore subject to federal regulation. It was the typical absurdity for which commerce-clause jurisprudence has become notorious. As usual, the Court's liberals, Stephen Breyer and Ruth Bader Ginsburg, took the nationalist position against the states. It was the much-maligned conservative, Clarence Thomas, who composed the most withering critique of the Court's decision

and the inane jurisprudence that informed it. “One searches the Court’s opinion in vain for any hint of what aspect of American life is reserved to the States,” Thomas wrote.¹² The Court ruled against Angel Raich, and declared that medical marijuana suppliers and users could be prosecuted even when the states had legislated to the contrary.

Had the Supreme Court been correct about the alleged spillover effects of medical marijuana from one state into another, we should expect some of those state governments to have filed amicus briefs in support of the federal government’s position. To the contrary, Alabama, Louisiana, and Mississippi, three southern states known for their conservatism, filed amicus briefs *in support of Angel Raich*. They opposed California’s policy on medical marijuana, they said, but they were much more strongly opposed to a federal government so oblivious to restraints on its power that it would actually disallow California’s policy.¹³

In 2007, Angel Raich renewed her litigation before the Ninth Circuit, with an even more grotesque result. The circuit court conceded the seriousness of her condition, and noted that if she did not have recourse to the liberties the California Compassionate Use Act made available to her she would be forced to endure “intolerable pain, including severe chronic pain in her face and jaw muscles due to temporomandibular joint dysfunction and bruxism, severe chronic pain and chronic burning from fibromyalgia that forces her to be flat on her back for days, excruciating pain from non-epileptic seizures, heavy bleeding and severely painful menstrual periods due to a uterine fibroid tumor, and acute weight loss resulting possibly in death due to a life-threatening wasting disorder.” The Ninth Circuit admitted

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Raich did “not appear to have any legal alternative to marijuana use.”¹⁴ But that was just too bad. “Federal law does not recognize a fundamental right to use medical marijuana prescribed by a licensed physician to alleviate excruciating pain and human suffering.”¹⁵

Now consider: the federal government defied the states’ resistance efforts, launching a series of raids on medical marijuana patients and dispensaries. The Supreme Court ruled against the states. And yet the use of medical marijuana goes on as if none of this ever occurred. There are as many as one thousand functioning dispensaries in Los Angeles County alone, each of which operates in direct defiance of the federal will.¹⁶

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