



Nullification as a Growing Form of Resistance to the Federal Government by the U.S. States

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Ideological polarization is the defining feature of the modern American political landscape. Politicians and voters are sorting into consistently opposed voting blocks that express growing disagreements between social groups. Although the effects of polarization have been widespread, it has especially affected American federalism — the division of political power between the federal government and state governments.

Students of federalism have always explored tensions between the states and the federal government. But scholars note that state resistance to actions by the federal government has increased in force and frequency of resistance as polarization has increased over the past few decades. State Attorneys General have turned to lawsuits against the federal government to voice their displeasure on policy topics like the Affordable Care Act, education mandates, and immigration directives. Similarly, governors and state legislators are more often using their offices to voice displeasure with the federal government and its policies. Perhaps most surprising — states have started to turn down grants providing free federal funds out of principled disagreement with federal initiatives.

Although all of these forms of state resistance are important, new [research](#) I have conducted with Andrew Karch and Adam Olson identifies a more forceful face of state resistance to federal policies that has largely gone unstudied: outright state nullification of federal laws.

The History of Nullification

Nullification is a legal doctrine, which argues that states have the ability — and duty — to invalidate national actions they deem unconstitutional. In its most overt manifestation, this form of resistance is used by state leaders to dispute perceived federal overreach and reject federal authority. Less overt forms of the practice involve actions by states to ignore or refuse to implement federal policy initiatives they deem outside the scope of federal authority. Nullification declarations appeared in U.S. political debates as early as the late 1700s, when Thomas Jefferson presented it as a way to preserve the principles of the constitution while states resisted unwanted direction. Nullification maneuvers laid the foundation for key 1800s disagreements that led to the Civil War of 1861-65.

Despite its importance to early American political history, nullification disappeared from political discourse in the 20th century, when this principle was not widely invoked by states opposing the federal government and was rarely mentioned by scholars of federalism. Our research using a common measure of public discourse shows that from 1981 to 2008, nullification was only mentioned 21 times in the New York Times — with ten of those mentions appearing in book reviews and others in obituaries, speeches, and even sports columns.

In the past decade, however, public discourse on nullification returned with a vengeance. During the presidency of Barack Obama alone, we identified 36 mentions of nullification in the New York Times, only two of which came from book reviews. These Obama era mentions add up to almost two times as many as were seen under Presidents Ronald Reagan, George H. W. Bush, Bill Clinton, and George W. Bush combined.

Nullification and Legislative Behavior

Critically, growing discussion of nullification over the past decade has been accompanied by a boom of state legislation invoking the doctrine. Our research identified over 1,500 proposals introduced from 2010 to 2016 that invoke nullification principles to question federal statutes. These state nullification proposals occurred about policies across the ideological spectrum. Although we expected and found Republican state resistance

to policies like the Affordable Care Act and the Common Core, we also identified instances where nullification was invoked to resist policies like police militarization that are more closely aligned to conservative preferences. And we also found it invoked in connection with other policies like license plate tracking that are more difficult to place on partisan spectrum. Nor is nullification just posturing. For the years in analysis, we found that almost 43% of proposals were given hearings and 11% were actually codified into state law.

We also identify considerable variation in the strength of the state nullification proposals put forward in the past decade. True nullification legislation declares federal policies null and void in the state; non-acquiescent nullification legislation does not explicitly question constitutionality but prevents state implementation; and procedural nullification legislation does not prevent implementation but modifies state statutes to render them out of step with federal expectations. Our analysis finds that all three types have been used by states during this period of heightened intergovernmental tensions. Although true nullification is rare, both non-acquiescent and procedural nullification have been frequently invoked by states in the past decade.

Although all 50 states have participated, we find that nullification activity is more common in states controlled by Republican legislatures, and also in more populous states. Larger states like Texas may be more likely to see themselves as independent entities that do not want or need federal intervention. Finally, poorer states are more likely to pursue nullification, probably because they are concerned about the financial impact of new national policies on state budgets.

The New Face of State Resistance

The fact that state leaders have recently invoked nullification over 1,500 times in seven years to question the constitutionality of federal policies highlights the truly tense state of current U.S. intergovernmental relations. Policymakers and scholars alike need to understand the impact of growing invocations of nullification. Most notably, careful attention should be paid to left-leaning nullification activity during the Donald Trump presidency. Initial evidence suggests that nullification is not just a conservative maneuver and remains a key weapon. Many states controlled by Democratic legislators have already pursued nullification challenges to the Trump administration, such as by supporting the Paris Climate Agreement after national withdrawal or blocking Trump administration immigration directives and travel bans.

Read more in Timothy Callaghan, Adam Olson, and Andrew Karch "Return of the "Rightful Remedy": Partisan Federalism, Resource Availability, and Nullification Legislation in the American States" *Publius: The Journal of Federalism* 48, no. 3 (2018): 495-522.