**Understanding the Theory of Nullification**

**What is it?**

Nullification is the idea that the states can and must refuse to enforce unconstitutional federal laws.

**Says Who?**

Says Thomas Jefferson, among other distinguished Americans. His draft of the Kentucky Resolutions of 1798 first introduced the word “nullification” into American political life, and follow-up resolutions in 1799 employed Jefferson’s definition that “nullification…is the rightful remedy” when the federal government reaches beyond its constitutional powers. In the Virginia Resolutions of 1798, James Madison said the states were “duty bound to resist” when the federal government violated the Constitution.

But Jefferson didn’t invent the idea. Federalist supporters of the Constitution at the Virginia **ratifying** convention of 1788 assured Virginians that they would be “**exonerated**” should the federal government attempt to impose “any supplementary condition” upon them – in other words, if it tried to exercise a power over and above the ones the states had delegated to it. Patrick Henry and later Jefferson himself elaborated on these safeguards that Virginians had been assured of at their ratifying convention.

**What’s the Argument for It?**

Here’s an extremely basic summary:

1) The states preceded the Union.  The Declaration of Independence speaks of “free and independent states” that “have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do.” The British acknowledged the independence not of a single blob, but of individual states, which they proceeded to list one by one. Article II of the Articles of Confederation says the states “retain their **sovereignty**, freedom, and independence”; they must have enjoyed that sovereignty in the past in order for them to “retain” it in 1781 when the Articles were officially adopted.  The **ratification** of the Constitution was accomplished not by a single, national vote, but by the individual ratifications of the various states, each assembled in convention.

2) In the American system no government is sovereign.  The peoples of the states are the sovereigns.  It is they who **apportion** powers between themselves, their state governments, and the federal government.  In doing so they are not impairing their sovereignty in any way. To the contrary, they are exercising it.

3) Since the peoples of the states are the sovereigns, then when the federal government exercises a power of dubious constitutionality on a matter of great importance, it is they themselves who are the proper disputants, as they review whether their agent was intended to hold such a power.  No other arrangement makes sense.  No one asks his agent whether the agent has or should have such-and-such power.  In other words, the very nature of sovereignty, and of the American system itself, is such that the sovereigns must retain the power to restrain the agent they themselves created.  James Madison [explains this clearly](http://www.tomwoods.com/blog/james-madison-states-need-recourse-against-courts/) in the famous Virginia Report of 1800.

**Why Do We Need It?**

As Jefferson warned, if the federal government is allowed to hold a monopoly on determining the extent of its own powers, we have no right to be surprised when it keeps discovering new ones. If the federal government has the exclusive right to judge the extent of its own powers, it will continue to grow – regardless of elections, the separation of powers, and other much-touted limits on government power. In his Report of 1800, Madison reminded Virginians and Americans at large that the judicial branch was not **infallible**, and that some remedy must be found for those cases in which all three branches of the federal government exceed their constitutional limits.

**Ratifying – to formally approve**

**Exonerated – to clear of a responsibility or accusation or blame**

**Sovereignty – the right/power of self-government**

**Ratification – to formally approve**

**Apportion – to divide and share out according to a plan**

**Infallible – incapable of error**