STATE OF THE NULLIFICATION MOVEMENT

2022:
2022 State of the Nullification Movement Report

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2022 state of the nullification movement

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THE RIGHTFUL REMEDY

“Vote the bums out!” is the dominant political strategy in the United States. It’s absolutely the wrong one, too.

If you don’t like what’s going on, wait two years, or maybe four, and kick the offensive politicians out of office. Right?

Well, the problem with this strategy is you almost always end up with nothing more than new bums.

And even in the few individual cases where you don’t, unconstitutional federal overreach continues unabated.

The largest government in the history of the planet keeps
growing. The drug war rages on. The federal spies keep spying. Bombs keep falling on faraway lands. The government keeps borrowing, spending and devaluing your money. The gun-grabbers keep gun-grabbing.

At the end of the day, everything continues on as it was while everybody gears up for the next election.

Wash. Rinse. Repeat.

Clearly, voting the bums out isn’t a good strategy when it comes to stopping unconstitutional federal power grabs and reducing the power of the monster state.

Thomas Jefferson told us this was the case in his draft of the Kentucky Resolutions of 1798.

Of course, there is a time and place for everything.
Jefferson said “vote the bums out” was the right approach for dealing with bad policy or a bad administration of the constitutionally delegated powers.

“In cases of an abuse of the delegated powers, the members of the general government, being chosen by the people, a change by the people would be the constitutional remedy.”

But when the federal government goes beyond the limits of the Constitution, Jefferson called for more aggressive measures, writing “nullification is the rightful remedy.”

“But where powers are assumed which have not been delegated, a nullification of the act is the rightful remedy.” [emphasis added]

Jefferson didn’t give us step-by-step instructions on how to nullify. The Kentucky Resolutions, along with the Virginia Resolutions of 1798 penned by James Madison, provide the philosophical and constitutional justification, but they don’t give us a blueprint on what to do, and when. We’ll get to that in more detail later in this report.

Jefferson was far from alone in warning that the people would have to be willing to take action to stop federal usurpation of power.
James Iredell, who later became one of the first Supreme Court justices, put it this way in the North Carolina Ratifying Convention:

“Abuse may happen in any government. The only resource against usurpation is the inherent right of the people to prevent its exercise. This is the case in all free governments in the world. The people will resist if the government usurp powers not delegated to it.” [Emphasis added]

Notice that Iredell called resistance the “only resource” against an exercise of undelegated powers. He didn't consider it a mere good idea, or something to be tried after everything else fails.

Instead, he expected that the people would resist if the general government tried to exercise unwarranted powers.

That was the same message Jefferson gave us when he wrote that nullification is “the” rightful remedy, and not just one option among many.

In fact, the idea that the people of the several states should ignore, resist or block unwarranted federal actions predates the Constitution.
During the ratification debates, opponents of the Constitution warned that the new general government would easily abuse its delegated powers and usurp those not delegated.

But numerous supporters of the Constitution argued that there was nothing to worry about because the states would be under no obligation to submit to unconstitutional acts.

Another North Carolinian, Archibald Maclaine, argued that states should not only disregard unconstitutional acts; they should “punish” Congress if it overstepped its bounds.

“If Congress should make a law beyond the powers and the spirit of the Constitution, should we not say to Congress, ‘You have no authority to make this law. There are limits beyond which you cannot go. You cannot exceed the power prescribed by the Constitution. You are amenable to us for your conduct. This act is unconstitutional. We will disregard it, and punish you for the attempt.’” [Emphasis added]

In Federalist No. 33, Alexander Hamilton wrote that if Congress passed laws that were not “PURSUANT to its constitutional powers,” that such acts “will be merely acts of
usurpation, and will deserve to be treated as such.”

[emphasis added]

During the Massachusetts ratifying convention, Theophilus Parsons argued that there is a check on federal power “founded in the nature of the Union, superior to all the parchment checks that can be invented, -- the 13 state legislatures.”

He said they have the means, as well as the inclination to successfully oppose federal usurpation. “Under these circumstances, none but madmen would attempt a usurpation.”

Writing as PUBLIUS in Federalist No. 46, James Madison made the same case, noting that “legislative devices” and a “refusal to cooperate with officers of the Union” when used by multiple states “would present obstructions which the federal government would hardly be willing to encounter.”

In other words, if multiple states refused to participate in the enforcement or implementation of a federal act, it would be virtually impossible for the general government to carry it out.

And this was in a time where the proposed federal
government would be so small in comparison to the monster state of today that it would be totally unrecognizable.

We'll cover more of Madison’s strategy to stop federal overreach outlined in Federalist No. 46 in a bit.

When you consider what these and other supporters of the Constitution said, it becomes clear the document was ratified on the promise that the people and the states could hold the federal government in check through the power of resistance and nullification.
THE PRINCIPLES
OF '98

Thomas Jefferson and James Madison reiterated the principles behind nullification, sometimes referred to as the “Principles of ‘98.”

The Kentucky and Virginia Resolutions of 1798 were written in response to the Alien and Sedition Acts, four laws that clearly violated the Constitution. For instance, the Sedition Act criminalized criticism of the president and Congress.
Madison and Jefferson approached the issue in slightly different ways, but both affirmed the power of the states to resist these unconstitutional federal acts.

Madison wrote that the powers of the federal government are “limited by the plain sense and intention of the instrument constituting the compact” and “no further valid than they are authorized by the grants enumerated in that compact.”

And he said the states were obligated to step in when the federal government oversteps its bounds.

“In case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the states who are parties thereto, have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them.” [Emphasis added]

In the Kentucky Resolutions, Jefferson argued “whenever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force.”
Notice that Jefferson emphatically asserted that when the government acts outside of its delegated powers the action is “void.”
This concept predates the drafting and ratification of the Constitution for the United States. The American colonists developed this idea in the early days of their resistance to British power and its currents ultimately ran all the way through the ratification of the Constitution.

When used as a verb, Merriam Webster defines “void” as “to nullify or annul.” It means to make something without force, or “to make of no value or consequence.”

One of the major complaints American colonists raised against the British was it passing acts outside of its constitutional authority.

In his 1761 speech against the writs of assistance, James Otis said, “An act against the constitution is void.”

The colonists carried this idea over into their own conception of government under the Constitution.

During the Virginia ratifying convention, George Nicholas said if the new general government committed an act beyond its specifically delegated powers, “the people will have a right to declare it void.”

In the Connecticut ratifying convention, future Chief Justice
Oliver Ellsworth declared, “If they make a law which the constitution does not authorize, it is void.”

Alexander Hamilton joined the chorus in Federalist No. 78:

“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.” [Emphasis added]

Roger Sherman was the only person to sign the Continental Association, the Declaration of Independence, the Articles of Confederation and the Constitution.

In December 1787, Sherman argued that "all acts of the Congress not warranted by the constitution would be void" and such acts would be unenforceable “contrary to the sense of a majority of the States.”

He continued, noting that “when [the federal government] overleaps those bounds and interferes with the rights of the State governments, they will be powerful enough to check it.”
VOID IN PRACTICE: RESISTING THE STAMP ACT

Declaring something “void” is one thing. Making it void in practice is something else altogether.
You can’t just scream, “That is void!” and hope the government will stop. And you can’t wave the Constitution around like a red blanket at a bull and expect the government to suddenly cease and desist.

Words on paper don’t enforce themselves. And as we’ll see, they were never expected to, either.

That means there has to be some mechanism to shut down a government action when the people and government disagree about whether an act is void under the constitution. And this is going to happen in virtually every case. The government always thinks its actions are justified. After all, the government passed the questionable act into law to begin with.

We have an example of this type of action that predates the Constitution.

American colonists declared the British Stamp Act void. Then they mounted fierce resistance, refused to comply with the act, and effectively nullified it in practice and effect. This spirit of noncompliance was carried through to the American founding.

In March of 1764, Parliament expressed its intention to
impose a direct tax on the colonies by requiring that important documents be printed on “stamped” paper. The act quickly flamed widespread opposition in the colonies.

By 1765, the standard American position held that the Stamp Act violated the bounds of the British constitutional system. Objecting to the notion that Parliament was supreme, and could impose whatever binding legislation it wished, the colonies instead adopted the rigid stance that colonists could only be taxed by their local assemblies. This idea, they said, stretched all the way back to 1215 and the Magna Carta.

News of the proposed taxes reached Virginia in the summer of 1765. Led by Patrick Henry, the House of Burgesses adopted a series of resolutions a few weeks later. These were known as the Virginia Resolves.

Henry drafted seven resolutions. Five were adopted, although the House of Burgesses repealed one after Henry left. Nevertheless, drafts of all seven resolutions circulated widely throughout all 13 colonies and flamed resistance to the Stamp Act.

Some of the language in the resolutions foreshadowed the Kentucky and Virginia Resolutions of 1798. And with a
young Thomas Jefferson in the audience, it’s likely he was influenced by them as well.

For instance, in the fifth resolution, the assembly asserted their rights under the unwritten British constitution, insisting,

“the General Assembly of this Colony have the only and exclusive Right and Power to lay Taxes and Impositions upon the inhabitants of this Colony and that every Attempt to vest such Power in any person or persons whatsoever other than the General Assembly aforesaid has a manifest Tendency to destroy British as well as American Freedom.”

The sixth resolution asserted that the colonists were not required to follow any illegitimate “law.”

Henry wrote the inhabitants of the colony were “not bound to yield obedience to any law or ordinance whatsoever designed to impose any taxation whatsoever upon them, other than the laws and ordinances of the general assembly aforesaid.” [Emphasis added]

In other words, the Stamp Act was “void.”

In the final resolution, Henry wrote that any person
asserting otherwise “shall be deemed an enemy to this his majesty's colony.”

Like the Kentucky and Virginia Resolutions, the Virginia Resolves didn't outline any specific actions colonists should take, but they provided a needed spark that ignited an aggressive and effective patriot campaign against the Stamp Act throughout the colonies.

Other colonies also adopted resolutions. Pennsylvania’s assembly asserted that it was “the inherent Birthright and indubitable Privilege of every British Subject to be taxed only by his own Consent or that of his legal Representatives.” A similar resolution in Massachusetts claimed that restricting taxation to local assemblies only was “one of the main pillars of the British constitution.”

Many prominent founding-era figures also wrote forcefully against the Stamp Act. John Dickinson, known as the “Penman of the Revolution,” urged colonists to refuse to cooperate with the act, warning, “If you comply with the Act by using Stamped Papers, you fix, you rivet perpetual Chains upon your unhappy Country. You unnecessarily, voluntarily establish the detestable Precedent, which those who have forged your Fetters ardently wish for, to varnish the future Exercise of this new claimed Authority.”
And in his argument against the hated British Stamp Act, John Adams declared that it was “utterly void, and of no Binding force upon Us.”

“For it is against our Rights as Men, and our Privileges as Englishmen. An Act made in Defiance of the first Principles of Justice: an Act which rips up the foundation of the British Constitution, and makes void Maxims of 1800 years standing.”

Just two weeks before the Stamp Act went into effect, John Hancock wrote a defiant letter to his London agent Johnathan Bernard, insisting, “The people of this country will never suffer themselves to be made slaves of by a submission to the damned act.”

Opposition to the Stamp Act didn’t end with fiery rhetoric. They didn’t depend on mere talk to make it void. Colonists took direct action to resist it as well.

For instance, in Massachusetts, Samuel Adams and the “Loyal Nine,” led a large group of patriot agitators and merchants aligned against Andrew Oliver, the British agent responsible for enforcing the stamp tax in the colony.
A massive gathering of people hung Oliver in effigy from a liberty tree. “Liberty, property, and no stamps!” became their rallying cry.

The protesters even conducted a mock funeral procession, where they took the corpse to the top of a hill, stamped it, and burned it in a bonfire. The next day, a group of patriots “convinced” Oliver to resign from his post and vowed to do the same for any replacement officer sent to enforce the Stamp Act.

Similar tactics were utilized by most of the other colonies. Hostile groups seized stamp paper, pressured officers to delay the law’s enforcement, and forced the stamp distributors out of commission.

The campaign proved effective. Parliament ultimately repealed the unenforceable Stamp Act in March 1766. But the repeal didn’t end the conflict between the colonists and the mother country. At the same time, the king gave royal assent to the Declaratory Act, maintaining that British colonies were absolutely subordinate to the Parliament by claiming the power to bind them “in all cases whatsoever.”

The seeds of noncompliance and resistance planted during
the Stamp Act fight continued to grow as tensions
between the colonists and the British government
intensified. As this constitutional struggle continued, the
colonists maintained a spirit of resistance and their
refusal to submit to what they viewed as an illegitimate,
unconstitutional authority.

We find the First Continental Congress using language
similar to the Stamp Act resolutions in its 1774 Declaration
and Resolves. After listing various actions they deemed
unconstitutional and unjust, the Continental Congress
declared, “To these grievous acts and measures Americans
cannot submit.”

Colonial resistance to the Stamp Act and subsequent
British actions demonstrates an important truth –
constitutional barriers alone aren’t enough to protect
liberty. They must be backed up and enforced by concrete
action. As Thomas Jefferson wrote in A Summary View of
the Rights of British America in 1774:

“A free people [claim] their rights, as derived from the laws
of nature, and not as the gift of their chief magistrate.”
Even as the Constitution was being debated and ratified, there was a general understanding that the document wasn’t going to enforce itself.
Without some enforcement mechanism, the Constitution is of little use when it comes to limiting the power of the federal government.

In Federalist No. 48, James Madison described limits on power in constitutions as mere “parchment barriers.”

“Will it be sufficient to mark, with precision, the boundaries of these departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American constitutions.”

Madison continued:

“But experience assures us, that the efficacy of the provision has been greatly overrated; and that some more adequate defence is indispensably necessary for the more feeble, against the more powerful members of the government.”

In other words, governments won’t adhere to the limits on their own power just because we write them out.

Madison went on to warn about the consequences of relying on parchment barriers.
“The conclusion which I am warranted in drawing from these observations is, that a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.”

And in a letter to Thomas Jefferson regarding the proposal for a Bill of Rights, Madison pointed out that state governments were notorious for ignoring their constitutional constraints.

“Repeated violations of these parchment barriers have been committed by overbearing majorities in every State. In Virginia I have seen the bill of rights violated in every instance where it has been opposed to a popular current.”

Madison suggested that we need something to back up our words – “some more adequate defense.” In short – the people must enforce their constitutions.

As John Dickinson wrote under the pen name Fabius IV, keeping the government within the bounds of the constitution is ultimately up to “the supreme sovereignty of the people.”
IT IS THEIR DUTY TO WATCH, AND THEIR RIGHT TO TAKE CARE, THAT THE CONSTITUTION BE PRESERVED; or in the Roman phrase on perilous occasions—To PROVIDE, THAT THE REPUBLIC RECEIVE NO DAMAGE. [all caps original]
A BLUEPRINT FOR LIBERTY

As we’ve already seen, in the American system, the states were intended to serve as the defense against federal usurpations.
Alexander Hamilton made this point in *Federalist No. 28*.

“It may safely be received as an axiom in our political system, that the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority.”

Roger Sherman made a similar point in a 1787 letter, saying the general government wouldn’t even be able to act without the support of the states.

“All acts of the Congress not warranted by the constitution would be void. **Nor could they be enforced contrary to the sense of a majority of the States.** One excellency of the constitution is that when the government of the United States acts within its proper bounds it will be the interest of the legislatures of the particular States to support it, but when it overleaps those bounds and interferes with the rights of the State governments, they will be powerful enough to check it.” [Emphasis added]

Hamilton yearned for a strong central government, but he stumbled on the truth in *Federalist No. 16*.

He argued that the states should not have any say in executing the powers of the federal government. In so
doing, he unwittingly laid the foundation of state nullification.

“If the interposition of the State legislatures be necessary to give effect to a measure of the Union, they have only NOT TO ACT, or to ACT EVASIVELY, and the measure is defeated.”

Hamilton got what he wanted in one sense. State legislatures have no say in approving or disapproving federal measures. The federal government acts directly on the American people.

But states still play a significant role in enforcing the federal government’s will. While state legislatures do not approve federal measures directly, the federal government almost always depends on state resources and personnel to carry them into effect.

By refusing to act, states have the power to defeat federal measures in practice and effect.

This is the power behind the blueprint James Madison gave us to resist federal actions in Federalist No. 46. He said state and individual action – specifically “a refusal to cooperate with officers of the union” – would impede federal power even in a single state.
When multiple states do the same, Madison said it would “create obstructions which the federal government would hardly be willing to encounter.”

Here, Madison offered a simple but incredibly effective strategy to nullify federal acts in practice - refuse to cooperate.

“Should an unwarrantable measure of the federal government be unpopular in particular States, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are powerful and at hand. The disquietude of the people; their repugnance and, perhaps refusal to cooperate with officers of the Union, the frowns of the executive magistracy of the State; the embarrassment created by legislative devices, which would often be added on such occasions, would oppose, in any State, very serious impediments; and were the sentiments of several adjoining States happen to be in Union, would present obstructions which the federal government would hardly be willing to encounter.” [Emphasis added]

In other words, whether a federal act or program is considered “unwarrantable” (unconstitutional), or “warrantable” (constitutional but merely “unpopular”),
refusal to participate in its enforcement or implementation can stop that federal act or program in its tracks.

Madison developed this strategy when the federal government was absolutely tiny in size and scope. As we take on the largest government in the history of the world, his blueprint can prove even more effective today.

As the National Governors Association pointed out in a letter during the 2013 federal government shutdown, “states are partners with the federal government in implementing most federal programs.” [emphasis added]

A 2021 Pew Research Foundation report on surface transportation funding reiterated this important point. The paper is the first in a series on "Fiscal Federalism in Action." In the "about this report" section, the authors make the same admission as the National Governors Association made eight years before.

"The federal government and the states are partners in almost every major domestic policy area. Together, their dollars pay for health care, education, transportation, public safety, and many other programs important to the American public." [Emphasis added]
But here’s a little secret that supporters of the monster state don’t want you to know: Partnerships don’t work too well when half the team quits.

These facts give Madison’s strategy even more power.

The feds depend heavily on state and local resources, including personnel, to do virtually everything. When states refuse to participate, it makes it difficult, if not impossible, for the federal government to run its programs or enforce its laws in that state.

Whether initiated by individuals or state legislative action, or a combination of the two, non-cooperation - “a refusal to cooperate with officers of the Union,” as James Madison put it - creates serious impediments and obstructions, and can ultimately nullify such federal programs in practice and effect.
ANTI-COMMANDEERING

This strategy of non-cooperation has not only been proven effective, it’s also been repeatedly validated by the Supreme Court, with multiple opinions holding that the federal government cannot require states to expend resources or provide personnel to help it carry out its acts or programs.
Known as “anti-commandeering,” this doctrine rests primarily on five major SCOTUS cases. The Court first established the doctrine in the 1842 fugitive slave case, Prigg v. Pennsylvania. Justice Joseph Story held that the federal government could not force states to implement or carry out the Fugitive Slave Act of 1793. He said that it was a federal law, and the federal government ultimately had to enforce it.

“The fundamental principle applicable to all cases of this sort, would seem to be, that where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is entrusted. The clause is found in the national Constitution, and not in that of any state. It does not point out any state functionaries, or any state action to carry its provisions into effect. The states cannot, therefore, be compelled to enforce them; and it might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted to them by the Constitution.”

Murphy v. NCAA (2018). The Printz case serves as the cornerstone. Justice Scalia wrote the opinion for the majority.

"We held in New York that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States' officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty."

This captures the heart of Madison's advice in Federalist No. 46 - a “refusal to cooperate with officers of the Union.”

In 2018, the Supreme Court reaffirmed and even expanded the anti-commandeering doctrine, holding that Congress can’t take any action that “dictates what a state legislature may and may not do” even when the state action conflicts with federal law. Samuel Alito wrote, “a more direct affront
to state sovereignty is not easy to imagine.” He continued:

“The anticommendeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, i.e., the decision to withhold from Congress the power to issue orders directly to the States ... Conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anticommendeering doctrine simply represents the recognition of this limit on congressional authority.”

It's important to understand that no determination of constitutionality is necessary to invoke the anti-commendeering doctrine. State and local governments can refuse to enforce federal laws or implement federal programs whether they are first deemed unconstitutional or not.

The crux of the anti-commendeering doctrine is that a state has the right to direct its personnel and resources as it sees fit. It can prohibit the enforcement of federal laws or the implementation of federal programs for any reason at all.

A state could withdraw state resources from the
enforcement of a federal act just because it’s Tuesday and there’s snow on the ground.

But won’t the feds just pull funding if a state refuses to cooperate?

The anti-commandeering doctrine even limits this option for federal “coercion.”

In simple terms, the federal government cannot use funding to coerce states to take some desired action. *Independent Business v. Sebelius* directly addressed this issue. In this case, the Court held that the federal government cannot compel states to expand Medicaid by threatening to withhold funding for Medicaid programs already in place. Justice John Roberts argued that allowing Congress to essentially punish states that refused to go along violates the constitutional separation of powers.

This built on the standard set years earlier, in *South Dakota v. Dole*.

In 1984, Congress passed the National Minimum Drinking Age Act, withholding 5 percent of highway funds from states that didn’t raise their drinking age to 21 in the first year, and 10 percent per year thereafter. South Dakota
refused and challenged the law in court.

Although the Supreme Court upheld the federal law, it came with some specific limitations. One was a requirement that the amount of funding could be seen only as an “inducement,” and not be “so coercive as to pass the point at which pressure turns into compulsion.” In this case, a withholding of 5 percent was below this threshold as the Court noted this “constituted less than half of one percent of South Dakota’s budget at the time.”

Additionally, the Court has held that funding conditions on States must be reasonably related. For example, if the state refuses to enforce federal marijuana laws, the federal government can possibly cut some funding relating to drug war enforcement that the state agreed to participate in initially, but it can’t take away education funding to punish a state for not cooperating with marijuana prohibition.

In practice, the federal government can withhold previously-agreed upon funding directly related to any action that a state refuses to take, but with some significant limitations and caveats. And it can’t take away unrelated funding.
"REAL" NULLIFICATION?

By refusing “to cooperate with officers of the union,” states and even localities can effectively nullify federal actions. But some will argue this isn’t “real nullification.”
In order to understand the modern nullification movement, it’s important to first understand what the word actually means.

We can define nullification in two primary ways; a legal definition and a practical definition.

A modern Merriam-Webster dictionary defines "nullify" in this way:

1. to make null; especially: to make legally null and void
2. to make of no value or consequence

The first definition is the legal meaning – ending the force of something in law. For example, a court might nullify, or invalidate, a contract between two people. By a ruling of the court, the contract becomes void and has no legal force.

The second definition is the practical meaning – ending the actual effect of something. Merriam-Webster gives an example of a penalty nullifying a goal in a game of soccer. As another example we’re all familiar with, when the flow of traffic moves at 80 mph in a 70 mph zone, the speed limit is nullified in practice and effect. The law remains on the books, but it can’t be practically enforced.
People of the founding era also understood nullification in much the same way. Evidence from contemporary dictionaries of the day indicates that there were two primary definitions of the word; one legal and one practical.

The New Law Dictionary by Giles Jacob was one of the leading legal dictionaries of the 18th century and defined a nullity as that which renders something of no legal force. On the other hand, a number of 18th-century popular dictionaries defined words like nullify, nullity and null as something rendered ineffectual.
WHAT ABOUT JOHN C. CALHOUN?

When pundits, members of the media, and legal experts talk about “nullification,” they almost always focus exclusively on the legal definition.
They specifically fixate on a peculiar nullification process created and proposed by South Carolina Sen. John C. Calhoun during the so-called “tariff crisis” of the late 1820s and early 1830s.

Given the way the media and academics talk about nullification, you would almost think Calhoun came up with the concept himself. Because Calhoun was a vocal proponent of slavery, nullification opponents play this game to the hilt, inferring, and sometimes outright asserting, that the whole idea is rooted in racism.

Calhoun started with Thomas Jefferson’s reasoning in the Kentucky Resolutions of 1798, asserting that a part of the federal government (the Supreme Court, that is) could not serve as the final arbiter in determining the extent of federal power. Jefferson wrote:

“The government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself; since that would have made its discretion, and not the Constitution, the measure of its powers; but that, as in all other cases of compact among powers having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress.”
But Calhoun took this general principle and invented his own elaborate process out of thin air to carry out nullification.

In fact, Thomas Jefferson never mentioned a specific path to nullify in the Kentucky Resolutions, or anywhere in his writings. He never outlined a process, much less an exclusive method of nullification, as Calhoun claimed.

The Calhoun-inspired South Carolina plan for nullification held that if a single state declared a federal act unconstitutional, it legally overturned the law - not just in that state, but throughout the entire country.

From that point forward, the state's position must be immediately recognized by the federal government as legally binding unless ¾ of the other states, in convention, overruled the single state and overturned its nullifying act.

As Mike Maharrey noted in his handbook Smashing Myths: Understanding Madison's Notes on Nullification, James Madison was asked to offer his opinion on the proposal and came down strongly against it.

And rightly so, based primarily on the “peculiar” (his word) process that Calhoun and South Carolina proposed.
The *Smashing Myths* handbook covers Madison’s views in more detail.

Calhoun’s process rested solely on a legal definition of nullification. By focusing on this exclusively, mainstream historians and media pundits completely ignore nullification that has happened and is happening now in a more practical sense.
SUCCESS STORY: FUGITIVE SLAVE ACT

The Tenth Amendment Center nullification strategy follows Madison’s blueprint of non-cooperation to nullify federal acts in practice and effect. This has proven extremely successful when applied.
One of the first widespread movements to put this strategy into effect was done by Northern abolitionists in the years leading up to the Civil War.

The Fugitive Slave Act of 1850 made it a federal crime to help an escaped slave, and denied any semblance of due process to those accused of running away from their “owners.” Northern states implemented policies to effectively end cooperation with enforcement of this federal law, including passage of “personal liberty laws” to thwart fugitive slave rendition.

For instance, the Michigan Personal Freedom Act guaranteed any man or woman claimed as a fugitive slave, “all the benefits of the writ of habeas corpus and of trial by jury.” It also prohibited the feds from using state or local jails for the purposes of holding an accused fugitive slave and made any attempt to send a freedman South into slavery a crime.

Before the beginning of the Civil War, every northern state had passed some type of law intended to thwart the enforcement of the Fugitive Slave Act.

This nullification effort didn’t rely solely on legislative action.
Individuals simply ignored the federal law and helped escaped slaves travel along the Underground Railroad on the path to freedom. Additionally, Northern juries often refused to convict people charged under the Fugitive Slave Act.

These efforts by individuals, in conjunction with the Personal Liberty Laws of the states, nullified the federal law in practice and effect. It remained on the books, but it became virtually unenforceable in most areas in the North.

Leading abolitionists supported this nullification of the Fugitive Slave Act. For instance, John Greenleaf Whittier, an ardent abolitionist from Massachusetts, said:

“Since the passage of the Fugitive Slave Law by Congress, I find myself in a position with respect to it, which I fear my fellow citizens generally are not prepared to justify. So far as that law is concerned, I am a nullifier.”

And abolitionist strategist William Lloyd Garrison agreed:

“The nullification advocated by Mr Whittier...is loyalty to goodness.”

Southerners considered these northern actions to be
nullification as well. In fact, the first grievance listed in the Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union was Northern nullification of the Fugitive Slave Act. It even used the word “nullify.”

“For many years these laws were executed. But an increasing hostility on the part of the non-slaveholding States to the institution of slavery, has led to a disregard of their obligations, and the laws of the General Government have ceased to effect the objects of the Constitution. The States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, Pennsylvania, Illinois, Indiana, Michigan, Wisconsin and Iowa, have enacted laws which either nullify the Acts of Congress or render useless any attempt to execute them.” [Emphasis added]

Other seceding states, including Mississippi, Texas and Georgia included similar statements in their own secession documents.

So, while northern actions didn’t legally overturn the Fugitive Slave Act, they did make it nearly impossible to enforce, thereby nullifying it in practice and effect.
SUCCESS STORY: ALCOHOL PROHIBITION

In the 20th century, state, local and individual action effectively nullified federal alcohol prohibition long before it was repealed by a Constitutional amendment.
After ratification of the 18th Amendment, nearly every state passed laws to enforce prohibition under the Volstead Act. State leaders widely accepted that they had an obligation to do so.

But Maryland never passed any laws to enable state-level enforcement. It was eventually joined by other states as they repealed enforcement provisions, starting with New York in 1923.

A University of Houston study noted that states eventually grew tired of the hassle that came with enforcing the federal alcohol ban. By 1925, six states had developed laws that kept police from investigating alcohol infractions.

Cities in the Midwest and Northeast were particularly uninterested in assisting the feds with maintaining federal Prohibition. By 1928, 28 states had stopped funding for alcohol prohibition enforcement.

Add to all this the millions of individuals who flat out defied federal law.

Instead of decreasing drinking, Prohibition resulted in an alcohol boom.

Prior to Prohibition, there were fewer than 15,000 legal bars in the United States. By 1927, more than 30,000 speakeasies were in business, and approximately 100,000 people brewed alcohol illegally from home.
During that time, Maryland’s Senator William Cabell Bruce recognized what was happening. He noted that even though national prohibition went into legal effect, “except to a highly qualified extent, it has never gone into practical effect at all.” [Emphasis added]

New York Mayor Fiorello LaGuardia agreed when he said “It is impossible to tell whether Prohibition is a good thing or a bad thing. It has never been enforced in this country”

It wasn’t for a lack of trying on the federal level. But individuals, cities and states resisted Prohibition on a massive scale. In some cases, they even prohibited Prohibition enforcement.

In the end, the federal government was unable to overcome this effective, practical nullification, and it was eventually forced to repeal Prohibition altogether with the passage of the 21st Amendment.
SUCCESS STORY: CANNABIS PROHIBITION

The nullification of federal marijuana prohibition is the most successful nullification effort in American history. There has never been another time when so many states have actively defied the feds.
Efforts in California started in the 1970s and 80s, but practically speaking, the modern nullification movement got rolling in 1996 when voters there approved Proposition 215. The Compassionate Use Act authorized the possession, cultivation and use of cannabis (marijuana) for limited medical purposes.

Under the federal Controlled Substances Act (CSA) passed in 1970, the federal government maintains complete prohibition of marijuana to this day. It makes no exception for medical use.

As the November vote loomed in 1996, three different presidents came to California to campaign against it. Of course, opponents trotted out the typical “reefer madness” philosophical opposition to the proposition. But they also made a constitutional claim – that the supremacy clause didn’t allow the people of California to defy federal marijuana policy.

They defied it anyway.

With marijuana being legal in some form in 37 states today, it’s easy to forget the precarious nature of limited medical marijuana legalization in California in those early days. The federal government put heavy pressure on anyone violating
its prohibition. The DEA jailed people. The feds took people's property. Federal officials threatened to go after doctors who recommended medical marijuana. The government regularly carried out more and more aggressive raids. And by the time Bill Clinton left office, seven more states had legalized medical cannabis.

From those small beginnings, Prop 215 grew into a nationwide movement that has overwhelmed federal marijuana prohibition in practice. At this point, the feds have mostly given up prosecuting marijuana users in states where it's legal.

In 2016, Californians voted to make cannabis legal for recreational use. And even before full legalization went into effect, the plant already ranked as the #1 cash crop in the state, ahead of almonds, dairy and grapes.

The growth of the marijuana industry happened *despite* increasingly aggressive federal measures in subsequent years. Enforcement escalated significantly, first under Presidents Clinton and G.W. Bush. Enforcement under President Obama proved even more aggressive in his first term, more than doubling the number of enforcement actions and the amount of resources spent by his two predecessors - over three terms - *combined*.
It also happened in the face of a 2005 Supreme Court opinion in *Gonzales v Raich*. The Court took the position that the “interstate commerce clause” of the Constitution authorized the federal government to prohibit the possession, consumption, and production of a plant, even if it was never bought or sold, and never left your backyard.

At the time of that case, there were 10 states with medical marijuana laws on the books. Not one single state repealed its law after the court issued its opinion. Today, that number has more than tripled, to 37. Meanwhile, 19 states - and counting - have legalized marijuana for adult recreational use.

Even in the face of increasing federal enforcement measures, the states and the people found the winning path. It’s only a matter of time before they overwhelm federal enforcement capabilities completely. At that point, the feds will have to act like they’ve decided to drop the issue just to save face.

We’ll cover more details on continuing efforts later. More importantly, however, this represents an effective strategy that can be implemented on other issues too.
Political action at the state and local level is key to taking on overreaching federal power, but depending on government action alone to nullify isn’t enough. Ultimately it takes individuals willing to engage in the prohibited activity.
In short, it takes human action.

Drivers nullify speed limits on highways every day simply because they aren’t willing to drive as slow as the government mandates. It requires no government action to nullify a federally-required speed limit.

And it is ultimately individual action that serves as the lynchpin for nullification of federal marijuana prohibition – along with every other nullification action.

Before there was any organized political action, individual human action set the stage for nullifying federal marijuana prohibition. People in California were already using, buying, growing and selling cannabis for both medical and recreational purposes long before voters approved Prop 215.

State legalization in 1996, even with its limited medical scope, cracked open the door for more, and the market responded. Today, Californians have thrown that door wide open. They now use, buy, grow and sell marijuana in even larger numbers. Businesses have taken root in communities, and farmers have embraced the crop.

The underground market eventually created enough pressure to get Prop. 215 approved. Passage of the law
facilitated the growth of the market by creating a legal space and allowing people to do what they were already doing without fear of state prosecution. As the market grew, the state legislature passed new laws loosening restrictions further. That allowed the market to grow more, creating a positive feedback loop that spread throughout the U.S. and continues today.

And as the market grew further and further, it became more and more difficult for the feds to put a dent in it.

This demonstrates an important truth - when given even just a little room to flourish, markets are more powerful than government.

Abolitionist Lysander Spooner nailed it. The key is resistance.

“The right of the people, therefore, to resist an unconstitutional law, is absolute and unqualified, from the moment the law is enacted.”

He called resistance “a constitutional right.”

“And the exercise of the right is neither rebellion against the constitution, nor revolution—it is a maintenance of the
constitution itself, by *keeping the government within the constitution*.”

A lot of people argue that you need to gain institutional political power before you can resist. As one person put it, “The great paradox is that in order to diffuse power, you must first acquire it.”

This is wrong. This strategy brings us back to “vote the bums out.”

The paradox is that forcing a diffusion of power is actually a centralization of power. In order to diffuse power, you must resist it first.

At the Tenth Amendment Center, we talk a lot about resisting overreaching federal power through state and local action. This leads people to believe they have to consolidate power at the state or local level. Having political allies in state and local government certainly helps, but it’s not necessary. And it’s certainly not the first step.
STEP BY STEP

Nullification of federal marijuana prohibition demonstrates another important truth - we don’t win liberty in a day.
We’ve seen tremendous progress in nullifying the feds on cannabis in the 25 years since Californians approved Prop. 215. But there is still more work to do.

Advancing liberty is a game of inches.

In his 1791 Opinion on the Constitutionality of a National Bank, Thomas Jefferson called the Tenth Amendment a line in the sand.

“I consider the foundation of the Constitution as laid on this ground: That ‘all powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, are reserved to the States or to the people.’ [10th Amendment] To take a single step beyond the boundaries thus specifically drawn around the powers of Congress is to take possession of a boundless field of power, no longer susceptible of any definition.” [Emphasis added]

Sadly, over the years, the federal government has taken hundreds, if not thousands, of steps beyond those specifically drawn boundaries.

Today, we face arguably the biggest and most powerful government in the history of the world.
That can feel overwhelming.

But Jefferson gave us another bit of advice in a 1790 letter to the Rev. Charles Clay that can help us proceed with confidence.

“The ground of liberty is to be gained by inches, that we must be contented to secure what we can get from time to time, and eternally press forward for what is yet to get. It takes time to persuade men to do even what is for their own good.” [Emphasis added]

To be blunt, anyone promising a silver bullet is lying to you.

Jefferson understood this.


That’s how we build a strong foundation for the Constitution and liberty.

Consider this short expression for example. You can find it on most pages of our website and on official TAC membership cards.
“Concordia res parvae crescent.”

John Dickinson wrote those words in response to the Townshend Acts of 1767. It’s a Latin phrase meaning “small things grow great by concord.”

And it’s something we value immensely every single day here at the TAC.

In May 1765, when most attention was being paid to the hated Stamp Act, King George III gave Royal Assent to the Quartering Act requiring the colonies to house British soldiers in barracks provided and paid for by the colonies.

If those barracks were too small to house all the British soldiers, then the colonies or the specific localities in question were required to accommodate them in local “inns, livery stables, ale-houses, victualling-houses, and the houses of sellers of wine.”

And should there still be soldiers without accommodation after all these “publick houses” were filled, the colonies were then required to “take, hire and make fit” for these soldiers, “such and so many uninhabited houses, outhouses, barns or other buildings, as shall be necessary” to house the rest.
However, the New York colonial assembly didn’t like being commandeered to provide and pay to house British troops, so it refused to comply with the law.

More than two years later, the first of the Townshend Acts, the New York Restraining Act, suspended the assembly and governor of New York by prohibiting them from passing any new bills until they agreed to comply with the Quartering Act 1765.

In effect, this left all decision-making outside the colony.

This sounds familiar, doesn’t it?

The most influential response to the acts came from John Dickinson, widely known as “the Penman of the Revolution.” Opposing the new Acts, he wrote a series of 12 essays known as “Letters from a Farmer in Pennsylvania.”

These quickly became the most widely-read documents on American liberty until the publication of Thomas Paine’s *Common Sense* in January, 1776.

In the first of his Letters, Dickinson spent time discussing the New York Restraining Act. He wrote:
“Whoever seriously considers the matter, must perceive that a dreadful stroke is aimed at the liberty of these colonies. I say, of these colonies; for the cause of one is the cause of all. If the parliament may lawfully deprive New York of any of her rights, it may deprive any, or all the other colonies of their rights; and nothing can possibly so much encourage such attempts, as a mutual inattention to the interests of each other. To divide, and thus to destroy, is the first political maxim in attacking those, who are powerful by their union.”

He continued on to say that, in essence, the rightful response at that moment would have been for other colonial assemblies to at least pass non-binding resolutions informing Parliament that the act was a violation of rights and that it should be repealed.

Why?

His answer came through clearly at the end of this first letter, where he signed off with that Latin phrase mentioned above, *Concordia res parvae crescent*.

Small things grow great by concord.

We’ve seen this strategy play out as states slowly pushed
back against federal marijuana prohibition. And we apply this same strategy every single day to everything we do.

As we've pointed out, the federal government depends on the states to do almost everything it does. When states start refusing to cooperate, things start not getting done. This chips away at federal power.

Inch by inch.
PART 2: TRACKING PROGRESS

In the sections ahead, we’ll cover prominent state and local actions during the 2022 legislative sessions that open the door to undermining federal power -- first steps, second steps and beyond.
In 2005, President George W. Bush signed the REAL ID Act into law, essentially creating a national ID system and putting the onus of implementation - and the funding for it - on each state.

Since its original implementation date of May 2008, the Department of Homeland Security (DHS) has faced massive noncompliance from states - and millions of people. After delaying enforcement multiple times over nearly 15 years, it seemed set to finally go into full effect in May 2023.

But in December 2022, DHS extended the compliance deadline yet again, announcing it would not
begin enforcing REAL ID requirements until May 2025.

Practically speaking, postponing enforcement means that people with non-compliant driver’s licenses or ID cards will still be able to use them at airport TSA checkpoints for another two years. At least.

And there are millions of them.

The New York Times reported that mass non-compliance was the key to this latest postponement:

“Federal authorities determined that not enough citizens were ready for the change,” said Dan Velez, the New England spokesman for the T.S.A., “and made the decision to extend the deadline two more years.”

In other words, the federal government does not want the political fallout it would face by effectively banning millions of people from domestic air travel.

Research shows that in states where people are given the option to get a REAL ID-compliant license, compliance is often quite low. For example, only 17 percent of IDs in Kentucky are REAL ID compliant. And figures indicate that even California has just over 37 percent compliance, while the most recent numbers from DHS put compliance at only 43 percent nationwide.
Texas, on the other hand, which doesn’t offer residents there an option, reports compliance of approximately 85 percent.

Velez told the New York Times that states dragging their heels on full implementation - and likely just giving people an option - has created significant issues for federal enforcement.

“Real ID progress over the past two years has been significantly hindered by state driver’s licensing agencies,” Mr. Velez said. “The extension is necessary to give states the needed time to ensure their residents obtain a Real ID-compliant license or identification card.”

As noted above, this isn’t the first time the feds have put off the enforcement deadline. In fact, the DHS has delayed the full implementation of REAL ID multiple times since Congress passed the act in 2005 with an original implementation date of 2008.

After Bush signed REAL ID into law, states rebelled for several reasons, including privacy concerns and constitutional issues, along with the fact that Congress didn’t provide any funding for the mandates it expects states to implement.

Many states simply chose not to act. Half of the states
passed resolutions objecting to the law or signaling that they would not comply. New Hampshire, Missouri, Maine, Oklahoma and others took things a step further, passing laws expressly prohibiting compliance with the national ID standards.

In Montana, Gov. Brian Schweitzer told NPR it’s best to just tell the feds to “go to hell.”

“Well, we are putting up with the federal government on so many fronts, and nearly every month they come out with another harebrained scheme, an unfunded mandate to tell us that our life is going to be better if we’ll just buckle under on some other kind of rule or regulation. And we usually just play along for a while, we ignore them for as long as we can, and we try not to bring it to a head. But if it comes to a head, we found that it’s best to just tell them to go to hell and run the state the way you want to run your state. And unfortunately, this time around, they have - they really got a harebrained scheme.”

Over the years, the federal government has used various pressure tactics, including the threat of turning states into virtual no-fly zones to compel the adoption of REAL ID. But even with badgering and threats, the feds have found it difficult to coerce states into compliance.
By any conceivable measure, the implementation of REAL ID has been an abject failure because of this widespread state inaction and resistance.

In 2016, the feds ratcheted up their bullying tactics, specifically threatening to stop accepting noncompliant licenses at TSA security checkpoints. This would effectively ground travelers from states that refuse to comply with the unconstitutional national ID scheme. On Oct. 13, 2016, DHS sent letters to five states denying their request for time extensions to bring their driver’s licenses in compliance with REAL ID. At the time, the DHS set a 2018 deadline but still allowed for individual state extensions.

Instead of standing their ground, some state politicians began to cave. Idaho reversed its ban on REAL ID implementation in 2016. Oklahoma followed suit the next year. At least six other states reversed course during this time period.

In 2010, Utah Gov. Gary Herbert signed a law banning REAL ID implementation, calling the act “inimical to the security and well-being of the people of this state.”

But almost as soon as the political climate changed in Washington D.C., so did Herbert’s view on REAL ID, later
doing an about-face and signing legislation implementing the act.

Even with a number of states making these half-hearted efforts to oppose the ID system, foot-dragging and public pushback have still hindered the process to the point that the feds will now be facing a delay of 17 years, at least.

As Joe Wolverton noted, “Constitutionalists will immediately recognize the real problems with REAL ID.”

First, the federal government has no authority to mandate such national identification documents. This federal overreach is such an obvious act of usurpation that all state legislators should stand shoulder-to-shoulder in their resistance to such despotic designs.

Second, REAL ID taps into the ever-growing federal surveillance state that ignores the limits imposed on the government by the Fourth Amendment. Wolverton put it like this:

Next, there is another aspect of the federal REAL ID program that is perhaps more pernicious than the requirement of carrying paper’s proving you have the government’s permission to travel. This threat to liberty
comes through the connection of REAL ID to the growing federal surveillance apparatus.

At the American Institute for Economic Research (AIER), Peter C. Earle called REAL ID “the last mile in the ability of the state to track individuals in real-time.”

“With various electronic, social media, and cellphone tracking measures, there is always a delay; and one can choose not to use social media, not to own a cellphone, and opt into other methods of extricating oneself from the prying eyes of the NSA or other government agencies. But the Real ID – in particular, coupled with biometrics – fulfills Orwellian conceptions of the total surveillance state.”

Earle warned that the “worst US government infringements upon life, and liberty” will be “vastly easier and more efficient to accomplish with the imposition of a mandatory identification requirement.”

He predicted that the national ID card will be an easy tool to link compliance with various programs, and what might even look like a social credit score:

Census data, drug prescriptions, and even library borrowing choices and habits are likely to eventually be linked with
personal data associated with the new ID requirement. And if the Real ID is eventually accessible by the private sector, many individuals with innocuously-tainted personal histories may become effectively unemployable.

The federal government’s struggle to implement REAL ID for what will be at least 17 years reveals a dirty little secret – the feds can’t do much of anything when states and people refuse to cooperate in wide numbers.

This was the blueprint James Madison gave in Federalist #46 to resist “unwarrantable” or even unpopular federal acts. He said that a “refusal to cooperate with officers of the union” would create impediments and obstructions that would stymie federal actions.

Here’s something that should be unsurprising: James Madison was right, as this has certainly proved true when it comes to the REAL ID Act.

But we also see another less pleasant reality in this saga. We can’t trust politicians to hold the line on their own.

State legislators and governors held the feds almost completely at bay for over a decade. It wasn’t until they started to cave and reverse course that REAL ID gained
any momentum toward implementation in the first place.

And even then, the federal government has still faced a rocky road because 57% of the public has refused to get on board - for one reason or another.

In the end, it takes public action to stop government overreach. As John Dickinson noted, it’s ultimately up to the “supreme sovereignty of the people.”

Even when politicians do the right thing, the people must remain vigilant. We can't just turn our heads and hope elected politicians will continue to do the right thing in the future.

The fate of REAL ID in 2025 and beyond rest with the people themselves.
Since 2021, we’ve seen a reinvigorated effort to push back against federal gun control on a state level.

During the last legislative sessions, two more states passed modest Second Amendment Preservation Acts (SAPA) that set the foundation to nullify some federal gun control in practice and effect within the borders of those states. Several states also enacted permitless carry.

We also began to see the practical impact of the SAPA law passed last year in Missouri.
Our Strategy

The ATF employs about 2,600 special agents. Historically, this workforce has investigated between 8,000 and 10,000 cases per year.

There is no way that a relatively small group of people can impose federal gun laws on more than 300 million people encompassing 3,794,083 square miles without state and local cooperation. As Judge Andrew Napolitano has said, banning state and local assistance with the enforcement of federal gun laws in a single state will make federal enforcement of tighter federal gun laws “nearly impossible” in that state.

As with many other issues, our strategy takes a step-by-step approach, with each step building on the last. The ultimate goal is to render all federal gun control unenforceable and effectively null and void within the states.

Each step is likely to be unique to the political realities in each state. As Thomas Jefferson advised James Madison the day after the passage of the Kentucky Resolutions of 1798:
I inclose you a copy of the draught of the Kentuckey resolves. I think we should distinctly affirm all the important principles they contain, so as to hold to that ground in future, and leave the matter in such a train as that we may not be committed absolutely to push the matter to extremities, & yet may be free to push as far as events will render prudent. [emphasis added]

In 2014, Idaho took the first step, with former Gov. Butch Otter signing S.1332 into law.

Practically speaking, the law sets the stage for state and local police any federal gun control measures enacted or implemented after the date of the act, including the federal bump stock ban of 2018.

In 2015, former Indiana Gov. Mike Pence signed a bill that “Repeals the prohibition against manufacturing, importing, selling, or possessing sawed-off shotguns.”

A Montana law passed in 2021 prohibits police officers, state employees, and employees of any political subdivision of the state from enforcing, assisting in the enforcement of, or otherwise cooperating in the enforcement of any new “federal ban” on firearms, magazines, or ammunition.
HB258 broadly defines a “federal ban” as “a federal law, executive order, rule, regulation that is enacted, adopted, or becomes effective on or after January 1, 2021, or a new and more restrictive interpretation of an existing law that existed on January 1, 2021, that infringes upon, calls in question, or prohibits, restricts, or requires individual licensure for or registration of the purchase, ownership, possession, transfer, or use of any firearm, any magazine or other ammunition feeding device, or other firearm accessory.”

The law also prohibits Montana from participating in federal enforcement actions and prohibits the expenditure or allocation of public funds or resources for such enforcement.

A 2021 law in Texas decriminalized firearm sound suppressors under state law. Under the law, state agencies are also banned from adopting any rule, order, ordinance, or policy to enforce a federal statute, order, rule, or regulation that purports to regulate a firearm suppressor that does not exist under state law.

The law also repealed a provision in current state law that made it an offense to possess, manufacture, transport, repair or sell a firearm suppressor unless it is registered
by the National Firearms Registration and Transfer Record.

Also in 2021, Idaho clarified and expanded on the 2014 law, adding provisions prohibiting “all Idaho government entities” from “using any personnel, funds, or other resources to enforce, administer, or support the enforcement of any executive order, agency order, treaty, law, rule, or regulation of the United States government upon a firearm, firearm component, firearm accessory, or ammunition if contrary to the provisions of section 11, Article I of the Constitution of the state of Idaho.”

[emphasis added]

The Idaho Constitution provides strong protections for the right to keep and bear arms. It prohibits any laws that “impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony.”

The enactment of S1205 effectively bars the state from enforcing any federal gun laws in effect after Jan. 1, 2021, that do the same.
Missouri and Arizona

In 2021, significant laws barring enforcement of both future and current gun control passed in Arizona and Missouri.

After eight years of tireless effort by dedicated grassroots activists, Missouri Gov. Mike Parson signed the Second Amendment Preservation Act (SAPA) into law.

Rep. Jered Taylor filed House Bill 85 (HB85), with companions sponsored by Rep. Bishop Davidson and Sen. Eric Burlison. The law bans any entity or person, including any public officer or employee of the state and its political subdivisions, from enforcing any past, present or future federal “acts, laws, executive orders, administrative orders, court orders, rules, regulations, statutes, or ordinances” that infringe on the right to keep and bear arms.

Significantly, the legislation includes a specific list of infringing acts that the state cannot enforce. This ensures the decision won't be left to the discretion of law enforcement officers or judges.

The Missouri 2nd Amendment Preservation Act is working
so well – ending state and local enforcement of federal gun control – that the DOJ repeatedly pointed out how well it’s working in its lawsuit against the state.

Much of the DOJ’s complaint focuses on severed federal enforcement relationships, noting that SAPA “severely impairs federal criminal law enforcement operations within the State of Missouri.” The DOJ said, “Missouri House Bill 85 makes enforcement of federal firearms Laws more difficult...”

This was exactly the point of passing the law!

The Arizona law takes a more moderate approach but is built on the same foundation – a ban on state enforcement of purely federal gun control.

Rep. Leo Biasiucci (R) introduced House Bill 2111 (HB2111) along with 16 cosponsors. The law bans the state and all political subdivisions of the state from “using any personnel or financial resources to enforce, administer or cooperate with any act, law, treaty, order, rule or regulation of the United States government that is inconsistent with any law” of the state of Arizona regarding the regulation of firearms.
While the law doesn’t end all gun control in Arizona immediately, it represents a massive shift in strategy going forward. Practically speaking, the new law did the following upon enactment:

- Bans state and local enforcement of any federal gun control measures on the books that don’t have concurrent measures in law in the state of Arizona.
- Bans state and local enforcement of any new gun control measures that might come from Washington D.C. in the future that aren’t on the books in Arizona.
- Shifts the focus and attention to any remaining gun control measures on the books in state law.
- Encourages gun rights activists to work in future legislative sessions to repeal those state-level gun control measures as a follow-up.

Each state-level gun control repeal will now represent a one-two punch, not only ending state enforcement, but automatically ending support for any concurrent federal gun control measure as soon as the state law repeal goes into effect.

**Pushing Forward in ‘22**

Despite a number of states considering SAPA bills, we
didn’t see any sweeping bans on the enforcement of federal gun control pass in 2022. But there were some efforts at the state level to limit the infringement of our natural right to self-defense. Two states took the first step with modest partial bans and Iowa voters amended the state constitution to include a provision protecting the right to keep and bear arms.

In November 2022, Iowa voters passed Amendment 1 by a 65–35 percent margin.

The constitutional amendment adds the following language to the Iowa state constitution:

“Right to keep and bear arms. Sec. 1A. The right of the people to keep and bear arms shall not be infringed. The sovereign state of Iowa affirms and recognizes this right to be a fundamental individual right. Any and all restrictions of this right shall be subject to strict scrutiny.”

The amendment will make it more difficult for the state to implement gun control and also foster an environment more hostile to federal gun control.

The “strict scrutiny” language in the new amendment will make it very difficult for the state to pass gun control laws
and will potentially lead to state courts overturning many existing state and local gun regulations.

Strict scrutiny is the highest legal standard used by courts to determine constitutional questions. Under the strict scrutiny doctrine in the new amendment, the government will have to prove any state or local law relating to firearms in Iowa furthers a “compelling governmental interest.” Additionally, any law must be narrowly tailored to achieve that interest.

The new state constitutional amendment won’t directly impact federal gun control, but it will subtly undermine federal efforts to regulate guns in the state. As we've seen with marijuana and industrial hemp, a federal regulation becomes ineffective when states ignore it and pass laws encouraging the prohibited activity anyway.

The federal government lacks the enforcement power necessary to maintain its ban, and people will willingly take on the small risk of federal sanctions if they know the state will not interfere. This increases when the state actively encourages “the market.”

Less restrictive state gun laws will likely have a similar impact on federal gun laws. It will make it that much more
difficult for the feds to enforce any future federal gun control, and increase the likelihood that states with few limits will simply refuse to cooperate with federal enforcement efforts.

Alabama Gov. Kay Ivey signed SB2 into law prohibiting state and local enforcement of federal gun control by executive order.

The law prohibits any official, officer, employee, or agent of the state or a political subdivision of the state from enforcing or administering any executive order issued by the president that “limits or restricts the ownership, use, or possession of firearms, ammunition, or firearm accessories by law-abiding residents of the state.” The bill also bans the expenditure of state or local funds for the enforcement of the same.

There are two potential loopholes in SB2.

First, the legislation does not define “law-abiding residents.” This could potentially create a problem because one could argue a person in possession of a firearm accessory banned by the federal government is not “law-abiding.” This is why the Missouri Second Amendment Preservation Act specifically defined a law-abiding citizen
as “a person who is not otherwise precluded under state law from possessing a firearm.”

There is also the possibility that state and local law enforcement agents will claim they didn’t know that a given federal firearm regulation was implemented by “executive order.”

In practice, the president generally signs an order instructing the ATF to make a certain rule or interpret a particular act in a specific way. For instance, the EO may say, “The ATF is directed to make rules prohibiting the possession of X under the authority of the National Firearms Act of 1934.” The ATF then draws up the specific rule. A corrupt – or even uninformed – law enforcement officer could argue he didn’t know the regulation was initiated by an EO. He'll simply say, “it's an ATF rule under the NFA of 1934.”

This is why it’s important that laws banning enforcement are as specific as possible in describing the actions being banned.

However, if SB2 is implemented under the intent of the text, as noted throughout the legislative process in hearings and debates, it can set the foundation to bring
enforcement of some federal gun control to an end in Alabama.

New Hampshire Gov. Chris Sununu signed HB1178, a law that purports to ban state and local enforcement of federal gun control, but with a loophole that, at best, significantly narrows its scope.

The law bans the “state and its political subdivisions, or any person acting under the color of state, county, or municipal law from using any personnel or financial resources to enforce, administer, or cooperate with any law, act, rule, order, or regulation of the United States Government or Executive Order of the President of the United States that is inconsistent with any New Hampshire law regarding the regulation of firearms, ammunition, magazines or the ammunition feeding devices, firearm components, firearms supplies, or knives.”

The legislation further stipulates that “silence in the New Hampshire Revised Statutes Annotated pertaining to a matter regulated by federal law shall be construed as an inconsistency for the purposes of this chapter.”

This language would have created a strong prohibition against state or local enforcement of federal gun control.
But an amendment created a loophole that will, in its best reading, significantly narrow the practical effect of the law.

“In light of the long-standing practice of cooperation between federal, state, and local law enforcement agencies, nothing in this chapter shall prevent a state, county, or local official from cooperating with or rendering aid or assistance to federal officials in any circumstance where there is reasonable suspicion to believe that a person who is the subject of an investigation for violation of federal firearms law covered by [this law] also has committed, is committing, or is about to commit a violation of New Hampshire law or a violation of a federal law, regulation, order, or practice not covered by [this law].”

As amended and passed into law, HB1178 only bans state and local enforcement of federal gun control when the enforcement actions are related to federal gun control alone. But in practice, that almost never happens.

State and local enforcement support is almost always part of some other operation in conjunction with the feds - usually prosecution of the unconstitutional war on drugs. The amendment will allow this to continue unabated. In effect, the amendment says if local police are working
with the feds to enforce anything else along with federal gun control, they can do it as they have been all along.

This new law could stop a narrow range of state and local enforcement of federal gun control, representing a small first step for the state. But with the amendment, it will mostly maintain the status quo.

**Second Amendment Sanctuaries: The Worst of the Worst**

The loopholes in both the Alabama and New Hampshire laws serve as a cautionary tale. State efforts purporting to limit enforcement of federal gun control are often little more than political posturing. Over the last couple of years, several states have passed bills claiming to create "Second Amendment Sanctuaries" that, in practice, create sanctuaries for absolutely nothing.

These laws were sold as bold moves against federal gun control, but in reality, they don’t ban any specific action, or they include language that opens significant loopholes. One new law even asks permission from the feds to stop enforcing federal gun control.

Here are the worst of the worst so-called 2nd Amendment “Sanctuary” laws passed over the last couple of years.
North Dakota

This law has decent provisions banning enforcement of some future federal gun control, but it includes language that could open a pretty significant loophole. State or local agents can cooperate with the enforcement of banned future federal gun control if a federal court finds probable cause that “a national security threat exists.” It also gives law enforcement plenty of wiggle room to continue working on joint state/federal task forces when federal gun control is “incidentally” enforced.

“This section does not prohibit an agency or political subdivision of the state or a law enforcement officer or individual employed by an agency or political subdivision of the state from providing assistance to a federal agency or official for an offense not related to firearms or an offense to which firearms are incidental, including a drug offense, homicide, assault, kidnapping, sex offense, or human trafficking.”

With the exceptions and continued partnering with federal task forces, it’s hard to predict just how effective the ban on enforcement will play out in practice. In our view, it’s likely to be almost completely ineffective.
Arkansas

This is another law that might ban enforcement of some future federal gun control, but some convoluted language in the bill makes it very unlikely it will actually play out that way in practice.

The law prohibits public officers and employees of the state and its political subdivisions from “enforcing or assisting federal agencies or officers in the enforcement of any federal statute, executive order, or federal agency directive that conflicts with Arkansas Constitution, Article 2, § 5, or any Arkansas law.”

The bill declares a “federal ban” null and void in the state of Arkansas. A federal ban is broadly defined as “a federal law, executive order, rule, or regulation that is enacted, adopted, or becomes effective on or after January 1, 2021, that infringes upon, calls into question, or prohibits, restricts, or requires individual licensure for or registration of the purchase, ownership, possession, transfer, or use of any firearm, any magazine or other ammunition feeding device, or other firearm accessory.”

The bill also includes a list of federal actions that would qualify as “a federal ban.”
So far, so good, at least on the surface.

However, much of the language of the bill is extremely convoluted and could leave a loophole for law enforcement officers to continue enforcing federal gun control. It specifically bars state and local agents from enforcing acts that “conflict with Arkansas Constitution, Article 2, § 5, or any Arkansas law.”

Law enforcement agencies are likely to hold the view that “it’s not the job of a law enforcement officer to determine what’s constitutional or not.” And in practice, that means law enforcement agents will almost certainly continue helping in the enforcement of all federal gun control in Arkansas until a court tells them to do otherwise.

It appears that the bill intends to link the definition of a “federal ban” with acts state and local agents would be prohibited from enforcing. But the term “federal ban” does not appear in the clause prohibiting enforcement. The most generous reading of the bill would prohibit state and local officials from enforcing any federal action included in the definition of a federal ban. But the tangled language makes it difficult to determine how the law would be interpreted in practice.
A leading grassroots activist in Arkansas called the bill “smoke and mirrors.” Until we see otherwise, we absolutely agree.

**West Virginia**

This “Second Amendment Preservation Act” will likely serve only to **protect most federal gun control**. The law’s saving grace is that it does prohibit state enforcement of any potential federal “red flag laws” in West Virginia. Other than that, the law is a tangled web of convoluted language, promising a lot, but delivering almost nothing.

The law includes provisions that appear to block state and local police from enforcing federal gun control under the anti-commandeering doctrine.

“No agency of this state, political subdivision of this state, or employee of an agency, or political subdivision of this state, acting in his or her official capacity, may be commandeered by the United States government under an executive order or action of the President of the United States or under an act of the Congress of the United States. Federal commandeering of West Virginia law-enforcement for purposes of enforcement of federal firearms laws is prohibited.”
But the twisted definition of anti-commandeering in the bill makes this provision utterly meaningless.

“Commandeering” means taking control of or seizing the assets, personnel, or operations of an agency of this state, or of a political subdivision of this state, or the employees of an agency or political subdivision of this state without the express authority for the control having been formally given by the state or political subdivision of the state.

This never happens.

The feds don’t just go grab some local cops and force them to enforce federal gun control. State and local police do this voluntarily. The feds ask for help. State and local police provide it. And under this West Virginia law, they will be free to continue doing so.

**Texas**

Gov. Greg Abbott said that signing HB2622 into law would make his state a “2nd Amendment Sanctuary,” but doesn’t come close.

The law does appear to ban the state and local police from the enforcement of most future federal gun control that
“imposes a prohibition, restriction, or other regulation that does not exist under the laws of this state.” However, a loophole in the bill will allow continued support for the enforcement of any future gun control as well – as long as it’s done under existing state-federal task force agreements, which virtually every locality in the state already has.

**Oklahoma**

A law purporting to make Oklahoma a “Second Amendment Sanctuary State” did no such thing and it will have little or no practical effect. It is basically a non-binding resolution.

The 2021 law declares the following:

“Any federal, state, county or municipal act, law, executive order, administrative order, court order, rule, policy or regulation ordering the buy-back, confiscation or surrender of firearms, firearm accessories or ammunition from law-abiding citizens of this state shall be considered an infringement on the rights of citizens to keep and bear arms as guaranteed by the Second Amendment of the Constitution of the United States and Article II, Section 26 of the Constitution of Oklahoma.”
Under the law, it is now “the duty of the courts and law enforcement agencies of this state to protect the rights of law-abiding citizens to keep and to bear arms within the borders of this state and to protect these rights from the infringement provided under the provisions of this act.”

The law includes no express or clear prohibition on enforcement. It directs courts and law enforcement agencies to perform a broadly defined “duty,” but does not specify any action or prohibition to fulfill it. Lacking any specific actions or prohibition on actions for police or courts to follow, it’s almost certain they will take no action at all, instead deferring to the federal courts on any question of constitutionality.

**Wyoming**

The Wyoming Second Amendment Protection Act, signed as law in early 2022, purports to restrict the enforcement of federal gun control. However, due to massive loopholes, it will do nothing to protect the Second Amendment in practice and effect.

Under the law, the state or any political subdivision of the state is prohibited from using “personnel or funds appropriated by the legislature of the state of Wyoming or
any other source of funds that originated within the state to enforce, administer or cooperate with any unconstitutional act, law, treaty, judicial or executive order, rule or regulation of the United States government that infringes on or impedes the free exercise of individual rights guaranteed under the Second Amendment to the Constitution.”

There are two significant problems with this language that make the proposed law utterly ineffective in practice.

1. **It doesn’t tell law enforcement to stop doing anything they’re currently doing.**
   
   Without specific instructions to stop enforcing specific federal gun control measures, merely telling law enforcement to not enforce unconstitutional federal gun control means nothing changes in practice and effect. State and local law enforcement agents and agencies will continue to defer to the courts to rule something unconstitutional before ending enforcement. As we’ve seen for many years, without specifically defining what types of federal actions the state can no longer help enforce, the status quo doesn’t change.

2. **The language only prohibits the use of state**
appropriations to enforce federal gun control.
Even if there was a concrete prohibition on enforcement, this text leaves the door open for the state of Wyoming to use federal funds to enforce federal gun control. With billions of dollars flowing into state and local law enforcement agencies from federal sources, this almost certainly ensures Wyoming police will continue to assist the feds in enforcement even with the passage of this law. In fact, the language was likely written to specifically allow state and local law enforcement to work on federal task forces to enforce federal gun control.

During the process, the House also rejected amendments that would have given the bill some practical impact and decided instead to grandstand – like politicians in so many other states – on a 2nd Amendment “protection” act that protects little more than the status quo.

**Tennessee**

A Tennessee law is the worst of the worst. It literally begs for permission to stop state and local enforcement of federal gun control.

The Tennessee legislature actually passed two laws
relating to federal gun control in 2021, neither of which will have any practical effect.

In 2015, Tennessee enacted a law that bans Tennessee state or local public funds, personnel, or property from being used for the “implementation, regulation, or enforcement of any federal law, executive order, rule or regulation regulating the ownership, use, or possession of firearms, ammunition, or firearm accessories” if such use “would result in the violation of Tennessee statutory or common law or the Constitution of Tennessee.”

The problem with this law is that it lacks any method to determine if a specific federal action violates the Tennessee constitution or a Tennessee law. For full effect, it needs to define specific acts that violate the state constitution.

The first follow-up law passed in 2021, sponsored by Sen. Mike Bell (R-Riceville) and Rep. Todd Warner (R-Chapel Hill), features language virtually identical to the 2015 law. It’s inexplicable why this was even introduced if the law was already on the books.

Meanwhile, Sen. Joey Hensley (R-Hohenwald) and Rep. Scotty Campbell (R-Mountain City) sponsored the so-
called “Tennessee Second Amendment Sanctuary Act.” And once again, we have a sanctuary for nothing.

Instead of defining specific acts that violate the state constitution to effectuate the 2015 statute, SB1335/HB928 created a process to determine constitutionality – get an opinion from the U.S. or Tennessee Supreme Court. The new law added the following language to the current law.

“Pursuant to the sovereign authority of this state, a law, treaty, executive order, rule, or regulation of the United States government that has been found by the supreme court of the United States or the Tennessee supreme court to violate Article I, § 26 of the Constitution of Tennessee or the Second Amendment to the United States Constitution is null, void, and unenforceable in this state.”

In other words, the state will continue to enforce all federal gun control until a court gives them permission to stop.

**Police Opposition**

Quite frankly, we would have probably had even more success in state and local efforts to nullify federal gun control if it weren’t for one big hurdle - law enforcement
lobby groups.

The biggest opponents of bills to end state and local enforcement of federal gun control have been sheriff’s associations, police chief associations, and other groups representing law enforcement. They have gotten these bills killed in some states, and significantly watered down in others.

For instance, the Missouri Sheriffs’ Association aggressively lobbied to stop the Missouri Second Amendment Preservation Act. The lobbying group claimed that banning Missouri law enforcement from enforcing current federal gun control – and anything new from the Biden administration – will stop them from “catching criminals.”

Law enforcement pressure was also almost certainly a factor in the creation of loopholes in both the Alabama and New Hampshire laws passed this year.

In fact, there is similar law enforcement opposition in every single state where measures to end enforcement of federal gun control are introduced.

Why?
Because, as they repeatedly tell the public in hearings on these bills, they don’t want to “jeopardize” their relationships with their “federal partners.” That is more important than the Constitution, it seems. After all, there is no money or power in standing up for the Second Amendment.

As we saw in Missouri, cops claim it’s a matter of “public safety.” If they don’t work with the feds, dangerous criminals will go free, they say.

This is a total crock.

State and local police can go after dangerous criminals under state laws. But they like using federal gun charges to ratchet up penalties and as a bargaining chip to force plea deals. They also like the money and toys that go along with working with the feds. And almost all of these partnerships revolve around the federal “war on drugs,” which, by the way, is also unconstitutional.

As a result, we basically have a national police force today. It operates under euphemisms such as “joint task forces” and “state/federal partnerships.” The bottom line is your local cops work for the feds – and as feds as members of these task forces – every single day. They like it that way.
And they aren’t about to risk those partnerships so you can keep your AR-15. And many of the “pro-2nd Amendment” politicians in state legislatures will suddenly drop the “pro” as soon as it requires any limitation on the war on drugs.

We see the evidence of this every single day as we watch these lobbies oppose every effort to stop the enforcement of federal gun control, and Republican politicians bow to the pressure.

We will certainly have to continue battling these powerful lobbies as we continue to fight federal gun control.

**Permitless Carry**

Indirect action at the state and local levels can also help protect the right to keep and bear arms from federal infringement even if it doesn’t directly challenge the enforcement of federal gun laws.

Georgia, Ohio, Indiana, and Alabama all passed bills legalizing permitless carry in 2022 despite law enforcement opposition in every state. In fact, the sponsor of the Alabama bill said Mobile Sheriff Sam Cochran fired **him last spring** because he sponsored constitutional carry
legislation.

Permitless carry not only expands freedom within the state; it also helps foster an environment hostile to federal gun control. The widespread passage of such laws subtly undermines federal efforts to regulate guns.

As we’ve seen with marijuana and industrial hemp, a federal regulation becomes ineffective when states ignore it and pass laws encouraging the prohibited activity anyway. The federal government lacks the manpower and resources necessary to maintain its ban, and people will willingly take on the small risk of federal sanctions if they know the state will not interfere. This increases when the state actively encourages “the market.”

Less restrictive state gun laws have the potential to cause a similar impact on federal gun laws. They make it much more difficult for the feds to enforce any future federal gun control, and increase the likelihood that states with few limits will simply refuse to cooperate with federal enforcement efforts.

**Big Picture**

The current administration, like those before it, has
continued to ramp up federal gun control.

In the past year, the ATF has been finalizing new regulations based on executive orders issued by the president to criminalize “pistol braces” and to require registration of popular “80 percent lowers” – homemade firearms.

The Biden administration has also continued a trend of aggressive federal gun control enforcement, with numbers at or near record levels.

You might assume things have gotten drastically worse for gun owners since President Donald Trump left office. But in politics, perception often trumps reality.

The perception was that with a Republican in the White House, we didn’t have to worry about the feds violating the Second Amendment. Only now, with a Democrat in control, do we need to worry. By and large, Trump was widely viewed as a “gun guy,” even garnering an endorsement from the NRA.

In fact, Trump was demonstrably worse on federal gun control than even Barack Obama. Biden is simply carrying on this legacy.
During a public appearance in 2019, President Trump proudly reminded us about his gun control credentials, bragging that his administration implemented new gun control and conducted more enforcement actions than anyone in history.

“At my direction, the DOJ banned bump stocks. Last year we prosecuted a record number of firearms offenses,” Trump boasted.

This wasn’t just rhetoric. In each of the first three years of the Trump administration, the ATF ramped up enforcement of federal gun control to record levels.

The president didn’t back off his commitment to enforcing gun laws in fiscal 2020, even with the pandemic.

And throughout his entire term, the Trump administration was far more aggressive in enforcing federal gun laws than someone more known for his “gun grabber” credentials, Barack Obama.

And Trump did something even Obama wasn’t able to do. He enacted new federal gun control with the implementation of a “bump-stock” ban.
And make no mistake; all federal gun control laws are unconstitutional.

This brings up another important point. Even without new federal gun control, the U.S. government enforces a myriad of unconstitutional federal gun control measures every day.

Federal gun control laws have been in effect more or less since the enactment of the National Firearms Act (NFA) in 1934. It set up excise taxes for the manufacturing and transfer of certain firearms and requires permits for the ownership of certain weapons. On top of that, we have the Gun Control Act of 1968, the Firearm Owners’ Protection Act of 1986 (FOPA), the Undetectable Firearms Act of 1988, the Brady Handgun Violence Prevention Act of 1993, and more.

In simplest terms, the Second Amendment is not in force.

We should never back off efforts to stop the enforcement of unconstitutional federal gun control, no matter which party is in control.
As we have already highlighted, marijuana is the granddaddy of the modern nullification movement.

On no other issue do we find state-by-state resistance to federal power so advanced, well-funded, supported, and successful. Beginning in California with the legalization of cannabis for medical use in 1996, states have advanced the issue every year. This has happened in spite of a 2005 Supreme Court opinion supporting federal prohibition, at least 12 years of relentless year-to-year increase in spending and enforcement efforts by
the federal government through three presidential administrations, and ongoing, complete prohibition at the federal level.

At the time of this report, 37 states have legalized marijuana for medical use, and 21 states along with Washington D.C. have expanded on these efforts, legalizing marijuana for adult recreational use.

Additionally, at least 13 states have decriminalized marijuana possession. Over 50 localities in a dozen states have enacted municipal laws or resolutions either fully or partially decriminalizing minor cannabis possession offenses.

All of this is being done despite federal prohibition on the same.

**Moving Forward Step-By-Step**

The movement to nullify federal marijuana prohibition is a great example of a step-by-step process.

In California, individual and local action started over 20 years before the passage of Proposition 215 in 1996. From there, other states followed California’s lead. Many states
started with modest medical programs and then expanded them over the years.

We’ve seen the same progression when it comes to adult-use marijuana.

Each year, new state laws and the loosening of old laws help expand the market, and each expansion further nullifies the unconstitutional federal ban in practice and effect.

With state and local actions accounting for as much as 99 percent of all enforcement efforts according to the FBI, the feds rely heavily on state and local help to fight the “drug war.” That help has rapidly evaporated in the last few years with marijuana legalization and decriminalization.

The data bears this out. Federal marijuana trafficking convictions have fallen significantly since the enactment of cannabis legalization by the states. According to a fact sheet issued by the United States Sentencing Commission (USSC), federal marijuana trafficking sentences are down 70.9 percent since 2016 and over 80 percent since 2012 when Colorado and Washington became the first states to legalize marijuana.
Since our last report, the movement has continued to grow (pun intended).

In November 2020, New Jersey, Montana and Arizona all legalized recreational marijuana through ballot measures. Arizona voters passed Prop. 207 to legalize cannabis for adult use by a 59.8-40.2 margin. Montana voters approved Ballot measure I-190 by a 56.6-43.4 margin. New Jersey voters said “yes” to Public Question No. 1 by a 66.9-33.1 margin.

South Dakota voters also approved a constitutional amendment to legalize marijuana for adult use during the November 2020 election. A judge struck down the measure in a lawsuit supported by Gov. Kristi Noem.

Rhode Island became the 19th state to legalize marijuana for adult use when Gov. Dan McKee signed S2430/H5793 into law in May 2022.

Under the new law, which went into immediate effect, the sale and possession of up to 1 ounce of cannabis are legalized for adults ages 21 and older, with no more than 10 ounces for personal use kept at a person’s residence. The new law also legalizes the home cultivation of up to six plants. It also facilitates the automatic review and
expungement of past criminal records. Under the measure, records must be vacated no later than by July 1, 2024.

The law provides for 33 cannabis retail facilities to operate within the state. The state's existing medical cannabis providers also will be able to apply for licenses to sell cannabis products to adults.

Mississippi finally legalized medical marijuana during the 2022 legislative session with the enactment of Senate Bill 2095.

Mississippi voters overwhelmingly voted to legalize medical marijuana during the 2020 general election, but the state Supreme Court struck down the initiative. Sen. Kevin Blackwell (R) and a bipartisan coalition of nine senators worked to get legalization done through the legislature. Under the law, patients with about two dozen specific medical conditions will qualify for medical marijuana with a doctor’s recommendation. Regulators will have the power to add additional conditions.

In November 2022, two more states legalized adult-use marijuana through ballot initiatives. Missouri voters approved Amendment 3 by a 53–47 percent margin, and
Maryland voters said yes to Question 4 by a 66–34 percent margin. Earlier in the year, Maryland Gov. Larry Hogan allowed a bill to become law without his signature that creates a regulatory structure for the state's marijuana businesses. With the passage of Question 4, that bill went into effect.

Several states expanded their marijuana laws to give consumers and patients better access. This demonstrates an important strategic point. Once a state legalizes marijuana – even if only in a very limited way – it tends to eventually expand and grow. As the state tears down some barriers, markets develop and demand expands. That creates pressure to further relax state law.

The following new laws passed during the 2022 legislative session represent a further erosion of unconstitutional federal marijuana prohibition.

California led the way in legalizing medical marijuana and it has continued to find innovative ways to expand the market. Most recently, the California legislature approved some tax relief for cannabis farmers. The new law makes several changes to the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA) including the repeal of the cultivation tax.
The state currently levies a flat-rate cultivation tax of $10.08 per dry-weight ounce of cannabis flower and $3 per dry-weight ounce for leaves. There is also a 15 percent excise tax levied at the retail level. The new law eliminates the cultivation tax.

Gov. Gavin Newsom also signed a bill into law that will help expand the market for cannabis beverages. The new law creates a specific definition for cannabis beverages. Under the old law, cannabis beverages were included in the definition of edibles. Testifying in support of the bill, the Cannabis Beverage Association said that the old law put cannabis beverages in a regulatory no man’s land.

Lumping beverages in with solid edibles made it difficult to develop consistent testing standards and a sensible regulatory structure. In effect, the new law allows the market for cannabis beverages to expand.

A new Vermont law will help farmers and small producers operate in the state’s marijuana market. Under the law, the state will regulate the activities of a licensed small cannabis cultivator as “farming,” amend the criteria regarding the area for cultivating cannabis commercially and for personal cultivation, and allow licensed cultivators to purchase and sell seeds and immature plants to one
another and for licensed wholesalers to sell such products to licensed cultivators.

These changes to the program take a step toward relieving small farmers from the regulatory burden under the current law and making it easier for them to participate in the legal cannabis market.

In Maine, a bill that will allow retail marijuana businesses to offer home delivery and curbside pickup of cannabis products went into effect without the governor's signature. The new law allows licensed marijuana retailers to deliver cannabis products to residential buildings with some restrictions. The law allows delivery “regardless of whether the municipality has approved the operation of marijuana stores.” This expands access to marijuana throughout the entire state. The law also allows cannabis retailers to offer curbside pickup.

Since legalizing medical marijuana in 2015, Louisiana has expanded its program several times.

During the 2022 legislative session, Gov. John Bel Edwards signed two bills that together will allow medical marijuana patients from outside Louisiana to obtain medicinal cannabis in the state, taking a jab at the federal
government’s claim to vast power over such activity under a twisted reading of the Commerce Clause.

In many states, the decriminalization of marijuana is the first step. Decrim doesn’t make marijuana legal, but it does change possession from a criminal charge to a civil offense punishable by a fine. Decriminalization policies also tend to de-prioritize policing for marijuana-related offenses.

Five cities in Texas along with five cities in Ohio decriminalized the possession of small amounts of marijuana during the 2022 general election.

As marijuana becomes more accepted – and more states, localities, and individuals simply ignore the federal prohibition, the feds become less able to enforce their unconstitutional laws.

After more than two decades of state, local and individual resistance and nullification, the federal government’s unconstitutional prohibition of cannabis is coming to an end. It’s only a matter of time before the states and the people put the final nails in the coffin.
You simply cannot grasp the economic big-picture without understanding how Fed monetary policy drives the boom-bust cycle. The effects of all other government policies happen within the Fed’s monetary framework. Money-printing and interest rate manipulations fuel booms - and the inevitable attempts to return to “normalcy” consistently precipitate busts.

In simplest terms, easy money blows up bubbles. Bubbles pop and set off a crisis. Wash. Rinse. Repeat.

We saw this play out with the inflation of the dot-com...
bubble in the 1990s, and the inevitable bust in 2001, followed up by the housing bubble and the 2008 financial crisis. The coronavirus pandemic gave the central bank just the excuse it needed to blow up another massive bubble. In late 2022, the air was begging to come out.

The Fed not only drives the economic boom-bust cycle; it also enables out-of-control government spending. In fact, it is the engine that powers the biggest, most powerful government in the history of the world.

The fiscal 2021 budget deficit was the second-largest in history, coming in at $2.78 trillion. The only bigger deficit was the prior year during the pandemic lockdowns. The U.S. government set a spending record in 2021 and continued the spending spree into 2022, despite COVID-era programs falling off the books. With increased tax revenue flowing into the Treasury as the economy "recovers" from the pandemic, the deficit will shrink to just under $1 trillion in 2022. But that is still close to the deficits the Obama administration ran during the Great Recession.

In February 2022, the national debt blew past $30 trillion. And of course, there is no sign that the borrowing and spending will slow down any time soon.
Republicans blame Joe Biden for the excessive federal spending. He’s certainly contributing to the problem with his $6 trillion spending plan for 2022, the “Build Back Better” Bill, and the biggest military spending bill in history.

But President Trump was a profligate spender as well. To put it into some historical perspective, the national debt topped $22 trillion in February 2019. When President Trump took office in January 2017, the debt was at $19.95 trillion. That represented a $2.06 trillion increase in debt in just over two years.

Trump was no fiscal conservative and no strict constitutionalist. Not even close. And it should be obvious that spending was already out of control even before the pandemic lockdowns, and before Trump and Biden. The response to the pandemic simply gave them another excuse to put spending into overdrive with three rounds of stimulus and more.

This kind of spending would be impossible if the Federal Reserve was not monetizing the debt.

What does this mean?
In simple terms, the Fed buys debt with money created out of thin air and holds the bonds on its own balance sheet. In effect, the central bank puts its big, fat thumb on the bond market to enable federal government borrowing.

Case in point, in the spring of 2020, as the country’s economy was effectively locked down due to coronavirus, the Federal Reserve monetized 100 percent of the new debt taken on by the U.S. government.

What does this mean in practice?

In March and April 2020, the U.S. Treasury Department issued $1.56 trillion in debt securities to fund Uncle Sam’s massive coronavirus spending spree. Meanwhile, in March, the Fed bought $1.2 trillion in Treasury bonds. The central bank slowed its roll a bit in April, but still purchased $526 billion in U.S. bonds. That brought the two-month total to $1.56 trillion.

In effect, the Federal Reserve bought all of the debt issued by the U.S. government in March and April with money created out of thin air.

Granted, the central bank doesn’t buy bonds directly from the U.S. Treasury. That would be “illegal.” Instead, it
purchases Treasuries on the open market. But by inserting itself into the bond market, the Fed creates artificial demand for Treasuries. This keeps prices up and interest rates low.

Without the Fed interjecting itself into the market, there would not be sufficient demand to fund all of the government borrowing. Minus the central bank, there wouldn’t be enough buyers.

In many ways, government spending is merely a symptom. The bigger problem is a federal government that has grown far beyond its intended scope. Politicians with no respect for constitutional limits drive the spending, and the Federal Reserve enables it.

In fact, without the central bank backstopping federal borrowing, and printing money out of thin air, the federal government would find it nearly impossible to finance the unconstitutional federal welfare and warfare state.

For many years, Ron Paul spearheaded efforts to end - or at least audit - the Fed on a federal level. But the powers-that-be in Washington D.C. will almost certainly never let that happen. Nevertheless, we see some successful efforts at the state level that chip away at the Federal Reserve’s
monopoly on money. These efforts continued to grow in 2022.

Through the passage of laws that encourage and incentivize the use of gold and silver in daily transactions by the general public, state action has the potential to create a wide-reaching impact and set the foundation to nullify the Fed’s monopoly power over the monetary system.

There are a number of concrete steps being taken to expand the market for gold and silver as money.

1. Recognize Gold and Silver as Legal Tender

In 2011, Utah became the first state in modern times to do what they should have been doing all along. That is, formally recognize gold and silver coins issued by the United States as legal tender. In practice, the value is based on the market price of the metal, not the coin’s face value.

The impact of this is multi-tiered. Many forms of gold and silver inside the Beehive State are now recognized to be what they were always supposed to be – legal tender under Article I, Section 10 of the United States
Constitution.

The Utah law protects gold and silver's role as money and fosters their use – creating a first-hand opportunity for the state's 3 million residents to experience the superiority of sound money. The educational impact of millions of people coming in direct contact with sound money over time cannot be overstated.

The law has also had a practical effect, opening the door for the development of a gold and silver market in Utah. With some legal hurdles cleared away by the state, Alpine Gold Exchange set up the state's first gold “bank.”

Alpine offers publicly available accounts denominated in gold and silver dollars. In just a short time, it grew 700 percent in assets under management and makes up at least 2 percent of the market for U.S gold and silver coins. You don’t even have to live in Utah to open an account, and an account holder can conduct business in gold and silver with any other account holder across the country.

Alpine Gold Exchange has also issued Goldbacks, a local, voluntary medium of exchange. Goldbacks are dollar-denominated notes made from physical gold. The company created a process that turns pure gold into a
spendable physical form. These bills denominated at $1, $5, $10, $25 and $50 contain small amounts of gold and can be used in everyday transactions.

In 2022, Utah exempted Goldbacks from state sales tax. The passage of this law removes a barrier to using goldbacks in everyday transactions.

The law exempts “sales of a note, leaf, foil, or film, if the item: (a) is used as currency; (b) does not constitute legal tender of a state, the United States, or a foreign nation; and (c) has a gold, silver, or platinum metallic content of 50% or more, exclusive of any transparent polymer holder, coating, or encasement.”

Wyoming and Oklahoma have also officially recognized gold and silver as legal tender. As a next step, entrepreneurs should explore creating goldbacks, and companies similar to Alpine Gold Exchange in these states.

2. Eliminate Sales Taxes and Capital Gains Taxes on the Exchange of Money

Imagine if you asked a grocery clerk to break a $5 bill and you were charged a 35-cent tax. Silly, right? After all, you
were only exchanging one form of money for another. But that's essentially what a sales tax on gold and silver does.

Sales and capital gains taxes treat gold and silver as property instead of money. They also raise transaction costs, creating a barrier to using gold and silver in everyday transactions, and for their competition with federal reserve notes. Repealing taxes is a crucial step toward the use of specie as money.

As Sound Money Defense League policy director JP Cortez testified during a committee hearing on a bill in Wyoming in 2018, charging taxes on money itself is beyond the pale.

“In effect, states that collect taxes on purchases of precious metals are inherently saying gold and silver are not money at all.”

In 2022, Tennessee became the 42nd state to repeal sales taxes on the sale of gold, silver and other precious metal bullion. This is an important first step toward creating currency competition and breaking the Fed’s monopoly on money.

During the 2022 session, Alabama and Virginia extended and expanded their temporary moratorium on sales taxes
applied to the sale of precious metal bullion.

Alabama expanded its sales tax exemption on gold, silver, platinum and palladium bullion passed in 2018 from five years to 10. It also lowered the level of precious metal content necessary to qualify as “bullion” under the law from 90 percent to 80 percent.

In Virginia, a 2018 law exempted the sale of gold, silver, and platinum bullion or legal tender coins over $1,000 from the state sales tax. That exemption was scheduled to sunset on June 30, 2022. The new law extends the sunset date to 2025.

A separate law went a step further and removed the $1,000 limit so all bullion transactions will be tax-free until 2025.

While repealing state sales taxes on precious metals may seem like a relatively small step, it removes one barrier to owning gold and silver, and eliminates a penalty on the use of gold and silver as money.

“We ought not to tax money – and that’s a good idea. It makes no sense to tax money,” former U.S. Rep. Ron Paul said during testimony in support of an Arizona bill that
repealed capital gains taxes on gold and silver in that state back in 2017.

“Paper is not money, it’s fraud,” he continued.

Paul raised another important point: sound money is not just about monetary policy and investing. It's ultimately about the size and scope of government.

3. Establish State Gold Depositories

The Texas Bullion Depository officially opened for business in 2018. The creation of a state bullion depository in Texas represents a power shift away from the federal government to the state, and it provides a blueprint that could ultimately end the Fed.


The depository provides a secure place for individuals, businesses, cities, counties, government agencies, and even other countries to store gold and other precious metals.
You don’t have to be a Texas resident to use the depository. Any U.S. citizen can set up an account online and then ship or personally deliver metal to the facility. The Texas Bullion Depository accepts gold, silver, platinum, rhodium and palladium.

The law also creates a mechanism to facilitate the everyday use of gold and silver in business transactions.

While the depository does not currently have a system in place to execute transactions with gold and silver, it remains part of the long-term plan. According to an article in the *Star-Telegram*, state officials want a facility “with an e-commerce component that also provides for secure physical storage for bullion.”

Ultimately, depositors would be able to use a bullion-funded debit card that seamlessly converts gold and silver to fiat currency in the background. This will enable them to make instant purchases wherever credit and debit cards are accepted.

By making gold and silver available for regular, daily transactions by the general public, the depository has the potential for a wide-reaching effect. In practice, the Texas Bullion Depository could operate much like the privately-
owned Alpine Gold Exchange already established in Utah.

In 2019, Texas passed a constitutional amendment and enabling legislation that exempts precious metals stored in the Texas Bullion Depository from certain taxes. The enactment of this law ensures there won’t be any additional barriers to using gold and silver stored in the depository for everyday financial transactions.

Alpine Gold Exchange and the Texas bullion depository offer a strategy for other states to follow. If the majority of states controlled their own supply of gold, it would conceivably make the Federal Reserve completely irrelevant, and set the foundation for the people to nullify the federal reserve’s monopoly on money in practice and effect.

In 2016, both houses of the Tennessee legislature unanimously passed a resolution in support of creating a depository in the Volunteer State. Gov. Bill Haslam signed the resolution. Despite overwhelming support, the legislature did not follow up with any steps to establish a depository in any of the following four years.

In 2021, the Tennessee legislature finally took another small step forward. The law required the Tennessee
advisory commission on intergovernmental relations (TACIR) to study the feasibility of creating a state gold depository, including whether other states or jurisdictions have created a gold depository, and to report its findings to the leadership of the state House and Senate no later than January 1, 2022.

TACIR released its report on Dec. 1, 2021. The results were not promising for those hoping to see a depository in Tennessee in the short term.

"The report finds that, given the factors that make storing precious metals in Tennessee less attractive to both institutional and individual investors than storing it in other states, and the fact that no institutional investment funds seem inclined, at this point, to buy or store gold in Tennessee, there does not appear to be enough demand for a state gold depository to be viable."

The report mentioned the state sales tax on gold and silver bullion as “one factor that stands in the way of the viability of a depository in Tennessee. With the repeal of the sales tax in 2022, that barrier was knocked down. But the report also said, “But a sales tax exemption on its own may not generate enough demand to cover the high cost of building and operating a depository.”
The Big Picture

The United States Constitution states in Article I, Section 10 that, “No State shall...make any Thing but gold and silver Coin a Tender in Payment of Debts.”

Currently, all debts and taxes in states around the country are either paid with Federal Reserve notes (dollars), authorized as legal tender by Congress, or with coins issued by the U.S. Treasury – almost none of which contain gold or silver.

In a paper for the Mises Institute, constitutional tender expert Professor William Greene said that when people in multiple states actually start using gold and silver instead of Federal Reserve Notes, it could effectively nullify the Federal Reserve and end the federal government’s monopoly on money.

“Over time, as residents of the state use both Federal Reserve notes and silver and gold coins, the fact that the coins hold their value more than Federal Reserve notes do will lead to a ‘reverse Gresham’s Law’ effect, where good money (gold and silver coins) will drive out bad money (Federal Reserve notes). As this happens, a cascade of events can begin to occur, including the flow of real wealth toward the state’s
treasury, an influx of banking business from outside of the state – as people in other states carry out their desire to bank with sound money – and an eventual outcry against the use of Federal Reserve notes for any transactions."

Once things get to that point, Federal Reserve notes would become largely unwanted and irrelevant for ordinary people.

All of these state efforts open the door for a serious push-back against the Fed and its monopoly on money. But state action alone won’t accomplish the goal. Ultimately, it will be up to everyday people to take advantage of these state laws and actually start using gold and silver as money.
The United States are rapidly evolving into a centralized, national police state.

Through incentives and strings created by federal funding, along with the proliferation of joint task forces that combine state, local and federal policing into one conglomerate, the feds have effectively created a nationalized police force that prioritizes the war on drugs, federal gun control, and other federal policies above local peacekeeping.

The federal government was never intended to exercise wide-ranging “police powers” in the first
place. There are just five broad categories where the Constitution delegated to Congress the power to enact criminal laws. All other police powers were left to the states and the people.

The creation of every other federal crime violates the Constitution, as does every federal law enforcement agency operating outside of the clear constitutional limits.

In other words, virtually the entire federal law enforcement apparatus is unconstitutional.

While police reform efforts in Washington D.C. have fallen flat, we continue to see a growing number of successes at the state and local levels.

As the Founders repeatedly advised, this is the most effective path forward.

State and local governments can end police nationalization by simply withdrawing from the various federal programs that centralize policing authority in Washington D.C.

Over the last several years, a number of states did just that, opting out of federal programs to militarize police, ending participation in a federal asset forfeiture program, creating
state laws to circumvent Supreme Court opinions that give police leeway to violate individual rights without fear of punishment, and prohibiting “no-knock” warrants despite several Supreme Court opinions that give police legal cover for conducting such raids.

**Asset Forfeiture**

Asset forfeiture is the process by which governments confiscate a person’s property, generally after asserting it was involved in criminal activity or that it was the proceeds from a crime.

Police often seize property as part of the investigative process. In many states, they don’t even have to make an arrest. For instance, officers might let a person go, but seize a car they suspect was used to facilitate an “illegal” gun sale, or cash they thought somebody got from selling drugs.

Once police seize property, it becomes subject to the judicial process. If the government prevails, it keeps the assets. How the case proceeds through the legal process depends on the laws of the state.

There are two types of asset forfeiture: criminal and civil.
In a criminal forfeiture process, police must first convict the owner of the property of a crime before they can permanently confiscate their property. After a conviction, prosecutors then must prove the asset was connected to the crime. If they prevail, the state takes permanent control of those assets.

This process itself isn’t particularly problematic, even if many of the criminal laws in question are constitutionally dubious, at best. The process, however, maintains the essential requirements of a presumption of innocence and due process.

On the other hand, civil asset forfeiture does not require a guilty verdict. In some states, it doesn’t even require the owner to face criminal charges. In this process, the **property itself** is literally charged with a crime and is the subject of the legal proceeding.

Property owners must then prove that the property wasn’t involved in criminal activity in order to get it back. This flips due process on its head, forcing the owner to establish the property’s “innocence.” This shifts the burden of proof from the state to the citizen.

This process has produced some odd-sounding court case
names including, *State of Texas v. One 2004 Chevrolet Silverado* and *United States v. One Solid Gold Object in Form of a Rooster*.

The federal government and many states have civil asset forfeiture processes. The Institute for Justice (IJ) says, “Civil forfeiture laws pose some of the greatest threats to property rights in the nation today, too often making it easy and lucrative for law enforcement to take and keep property – regardless of the owner’s guilt or innocence.”

How is asset forfeiture lucrative?

In many states, law enforcement agencies get to keep some or all of the proceeds from forfeitures. This creates a perverse “policing for profit” motive. Forfeiture proceeds often supplement or increase department budgets and even serve as an indispensable funding source. As a result, law enforcement agencies become incentivized to seize as much property as possible.

In response, there is a growing movement to reform asset forfeiture laws. Several states have ended civil asset forfeiture altogether, replacing it with a criminal forfeiture process. Some jurisdictions have also addressed the policing for profit motive by barring law enforcement
agencies from keeping asset forfeiture proceeds. Instead, they must be deposited in the general fund or some other non-law enforcement-related account.

While some people believe the Supreme Court “ended asset forfeiture, its opinion in *Timbs v. Indiana* ended nothing. Without further action, civil asset forfeiture remains.

Additionally, as law professor Ilya Somin noted, the Court left an important issue unresolved. What exactly counts as “excessive” in the civil forfeiture context?

“That is likely to be a hotly contested issue in the lower federal courts over the next few years. The ultimate effect of today’s decision depends in large part on how that question is resolved. If courts rule that only a few unusually extreme cases qualify as excessive, the impact of *Timbs* might be relatively marginal.”

Going forward, opponents of civil asset forfeiture could wait and see how lower federal courts will address this “over the next few years,” or they can do what a number of states have already taken steps to do, end the practice on a state level.
**Equitable Sharing**

Police have a federal loophole they use to continue cashing in on asset forfeiture even when states reform their systems and do away with the monetary incentives - or even when they do away with civil asset forfeiture completely.

“Equitable Sharing” incentivizes prosecutors to bypass more stringent state asset forfeiture laws by passing cases off to the federal government.

Both the Department of Justice and the Department of the Treasury operate the program. It works like this: state and local police work the case and then claim it involves federal law or crosses into federal jurisdiction.

Through a process known as “adoption,” the federal government prosecutes the forfeiture case under federal law and splits the proceeds with the local police. Through this program, state and local law enforcement agencies receive up to 80 percent of the take.

The equitable sharing program also provides the federal government with a powerful way to influence local policing priorities. The lure of federal money incentivizes
state and local law enforcement agencies to focus on federal agendas instead of local needs. For example, the feds dangle asset forfeiture funds in front of local police to entice them to prioritize the drug war and federal gun control enforcement.

Until a few years ago, California was a prime example of how equitable sharing undermines state-level restrictions on civil asset forfeiture. The state has some of the strongest restrictions in the country, but state and local police were circumventing the state restrictions by passing cases to the feds and accessing the equitable sharing program.

According to a report by II, Policing for Profit, California ranked as the worst offender of all states in the country between 2000 and 2013. In other words, California law enforcement was passing off a lot of cases to the feds and collecting the loot. In 2016, the state closed the loophole in the vast majority of cases.

Under former Attorney General Jeff Sessions, the federal government tried to ramp up equitable sharing. In July 2017, Sessions issued a policy directive for the Department of Justice (DOJ) that reiterated full support for the equitable sharing program, directed federal law
enforcement agencies to aggressively utilize it, and set the stage to expand it in the future.

This policy remains in effect today.

In fiscal 2021, the federal government distributed over $135.7 million to state and local law enforcement agencies through equitable sharing programs. The good news is that this was down significantly from the $243.9 million distributed the previous year.

This perhaps reflects the fact that several states beyond California have opted out of much of the equitable sharing program in recent years. These include New Mexico, Maine, Arizona, Utah, Colorado, Ohio, and Nebraska.

Even as states reform asset forfeiture laws to require a conviction before the forfeiture process can move forward, it is imperative that they include language closing the federal loophole.

Without provisions barring state and local law enforcement agencies from passing off cases to the federal government, even the best state reforms will prove to be largely ineffective.
No-Knock Warrants

A series of Supreme Court opinions also give police across the U.S. legal cover for conducting “no-knock” raids.

In the 1995 case Wilson v. Arkansas, the Supreme Court established that police must peacefully knock, announce their presence, and allow time for the occupants to open the door before entering a home to serve a warrant. But the Court allowed for “exigent circumstance” - exceptions if police fear violence, if the suspect is a flight risk, or if officers fear the suspect will destroy evidence.

As journalist Radley Balko notes, police utilize this exception to the fullest extent, “simply declaring in search warrant affidavits that all drug dealers are a threat to dispose of evidence, flee or assault the officers at the door.”

The SCOTUS eliminated this blanket exception in Richards v. Wisconsin (1997) requiring police to show why a specific individual is a threat to dispose of evidence, commit an act of violence or flee from police. But even with the opinion, the bar for obtaining a no-knock warrant remains low.
“In order to justify a ‘no-knock’ entry, the police must have a **reasonable suspicion** that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.” [Emphasis added]

Reasonable suspicion is an extremely low legal bar to meet. Through this exception, police can justify no-knock entry on any warrant application. In effect, the parameters in the SCOTUS opinion make no-knock the norm instead of the exception.

A third Supreme Court opinion effectively eliminated the consequences for violating the “knock and announce” requirement – even **without** a no-knock warrant.

In *Hudson v. Michigan* (2006), the High Court held that evidence seized in violation of knock and announce was not subject to the exclusionary rule. In other words, police could still use the evidence in court even though they technically gathered it illegally.

Significantly, were it not for the incorporation doctrine, where the federal government supposedly protects the people of the states from states violating the Bill of Rights,
these cases would have never gone to federal court in the first place. And more importantly, we wouldn’t have these blanket rules for all 50 states.

Without specific restrictions under state law, police officers generally operate within the parameters set by the Supreme Court. By passing restrictions on no-knock warrants, states set standards that go beyond the Supreme Court limits and nullify the SCOTUS opinions in practice and effect.

During the 2021 legislative session, Connecticut, Tennessee and Washington state all passed laws to prohibit or significantly restrict no-knock warrants.

Restrictions on no-knock warrants in Tennessee were particularly significant. The reform passed unanimously through both houses of the Republican-dominated legislature that tends to defer to powerful policy lobbies.

At the local level, a number of cities and counties banned or severely limited the use of no-knock warrants, including Lexington, Kentucky; Pittsburgh, Pennsylvania; Killeen, Texas; and Pomona, California all banned or severely limited the use of no-knock warrants.
In 2022, Austin, Texas, and St. Louis, Missouri, joined the ranks of cities banning no-knock warrants.

Several states introduced legislation to ban no-knock warrants in 2022, but as with other issues, aggressive law enforcement lobbying killed these bills. Police claim they need “no-knock” warrants to pursue murderers and violent criminals. But, this rarely seems to be the case. In reality, no-knock warrants are a tool that law enforcement used to beef up the war on drugs in the 1980s, and cops have continued to use them mainly for that purpose ever since.

**Qualified Immunity**

The number of high-profile cases involving police who used excessive force and violated individual rights without any consequences brought the issue of qualified immunity to the forefront.

Qualified immunity is a legal doctrine that shields cops from liability for actions taken in the line of duty unless they violate rights “clearly established” by existing judicial precedent. No statute exists granting qualified immunity, and nothing in the Constitution does either. The Supreme Court created the doctrine out of thin air and then
effectively imposed it on all 50 states through the incorporation doctrine.

The very existence of qualified immunity reinforces an ugly truth. We can’t trust the federal government to protect our rights. It almost always defers to government power.

In practice, qualified immunity makes it extremely difficult to legally punish government agents for using excessive force or committing other acts of misconduct. As Supreme Court Justice Byron White wrote in the 1986 case Malley v. Briggs, qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.” Reuters called it “a highly effective shield in thousands of lawsuits seeking to hold cops accountable for using excessive force.”

The rationale for federalizing state and local police misconduct cases was well-intentioned. When Congress passed the Civil Rights Act of 1871, it was next to impossible for African-Americans to get a fair shake in many state courts, and government officials could abuse their rights with virtual impunity.

But the end result of centralizing power in the federal
government was far worse in the long run. Now it’s next to impossible for any person in any state to get a fair shake when challenging police misconduct. The federal courts have cemented a system in place that gives law enforcement officers almost complete immunity, and allows them to violate any individual’s rights with virtual impunity.

As John Taylor of Caroline put it, “There are no rights where there are no remedies, or where the remedies depend upon the will of the aggressor.”

Through the incorporation doctrine that applies the federal Bill of Rights to state and local governments, this system protects police officers in every city, county and state in the U.S. from Honolulu, Hawaii to West Quoddy Head, Maine.

The lesson here is pretty clear. Government protects its own. In the long run, centralized power almost never benefits the average person. And we cannot count on federal courts to protect our rights.

The only way around this is to decentralize the legal system and devolve power back to the states. A number of states have attempted to do this by creating a process to
sue in state court when government agents use excessive force or take other actions that violate individual rights without the possibility of “qualified immunity” as a defense.

In the summer of 2020, Colorado became the first state to create a cause of action in state court to sue police officers when they infringe on “any constitutional right secured by the bill of rights of the Colorado constitution.” The law specifically states that qualified immunity “is not a defense” to such civil action. New Mexico followed suit in 2021 with the passage of HB4.

California also took a step toward limiting qualified immunity in 2021. SB2 amended Tom Bane Civil Rights Act. It was originally enacted to address “hate crimes,” but it has also been used to sue police officers who violate individual rights.

Qualified immunity is not a defense under the law, but according to Mission Local, it still grants police officers immunity for certain major offenses and courts have read loopholes into the law that give cops almost complete immunity. SB2 closed the loopholes in the current law by amending Civil Code section 52.1 to render those protections inapplicable. This created a legitimate
alternative pathway to sue law enforcement officers for violating basic rights.

In practice today, people sue police for using excessive force or other types of misconduct through the federal court system under the U.S. Bill of Rights. But with the federal qualified immunity defense, it is nearly impossible to hold law enforcement officers responsible for actions taken in the line of duty.

These laws in Colorado, New Mexico and California create an alternative path through the state courts, with no qualified immunity hurdle.

It remains unclear how the state legal process will play out in practice.

The first question is whether people will actually utilize the state courts instead of the federal process. Under the original constitutional system, most cases would have never been a federal issue to begin with. Regulation of police powers was clearly reserved to the states, not the federal government. But with the advent of the incorporation doctrine, people reflexively run to federal courts. But by removing the qualified immunity hurdle, it could incentivize people to take advantage of the state
system instead.

The second question is if police officers will be able to have cases removed to federal jurisdiction in order to take advantage of federally-imposed qualified immunity.

State and local law enforcement officers working on joint state/federal task forces almost certainly will. They are deputized as federal agents.

For law enforcement officers not operating with a federal task force, it seems unlikely they will be able to remove the case to federal court initially, but that door could open on appeal.

It might be possible for officers to have their case removed to federal court to consider U.S. constitutional ramifications. But even then, federal courts might have to respect the state law prohibiting qualified immunity as a defense. The federal court would likely have to apply the state law as the state intended, even though the federal court might well be able to decide whether or not a U.S. constitutional violation had taken place.

But as of today, all of this is hypothetical.
Regardless, a process operating totally under the state constitution will be much less likely to end up in federal court than a process that depends on the U.S. Constitution and the Bill of Rights. The state process will make it more difficult for police to simply side-step civil suits by declaring sovereign immunity upfront.

After Colorado, New Mexico and California created a state process to circumvent qualified immunity, powerful police lobbies organized to oppose the movement. Several states, including New Jersey, Florida, Maryland, Washington, West Virginia, Vermont, Hawaii, Illinois, West Virginia, New York, Oklahoma, Missouri and Rhode Island considered bills to create a state process to hold police accountable in 2022, but none advanced in the face of massive law enforcement opposition.

**Police Militarization**

Images of armored vehicles filled with battle-ready cops toting automatic weapons during the Ferguson protests in 2014 brought the issue of federal militarization of local police into public consciousness, but the federal government has been arming local police with military-grade weapons for over two decades.
Under Section 1033 of the National Defense Authorization Act for Fiscal Year 1997, along with other programs like the Department of Homeland Security (DHS) “Homeland Security Grant Program” and the Edward Byrne Justice Assistance Grant (JAG) program, the federal government equips local police with free military weaponry and battlefield-ready equipment or simply hands out billions of dollars for them to buy it.

Through these programs, local police departments procure military-grade weapons, including automatic assault rifles, body armor and mine-resistant armored vehicles (MRAPs) – essentially unarmed tanks. Police departments can even get their hands on military helicopters, drones, and other high-tech surveillance gear, including wiretapping equipment, geolocation tracking devices, cell phone jamming equipment and high-tech cameras.

Proponents of police militarization always talk about “protecting” police officers and the danger of terrorism. But the main function of local police militarization revolves around the unconstitutional “war on drugs.” After all, wars require soldiers, and the federal government doesn't have the manpower to fight alone. The feds need state and local police to serve as foot soldiers in their
drug war. Militarization, combined with asset forfeiture cash, incentivizes the necessary cooperation.

In fact, a 2015 survey of applications made to these and other federal programs by state and local law enforcement agencies revealed the drug war was by far the most common reason given for needing to militarize police officers.

Federal militarization of police has had wide-ranging impacts and fundamentally changed policing. Law enforcement has evolved from “protect and serve” to “command and control.”

In August 2017, President Trump issued an executive order that gave a push to local police militarization. Trump’s action rescinded an Obama-era policy meant to provide greater transparency and oversight around the Department of Defense 1033 program and other federal resources that provide military weapons to local police.

In May 2022, Biden issued an executive order reinstating the Obama-era limits. But the Obama “reform” was nothing more than window-dressing in the first place.

In practice, the Obama EO did little to stem the flow of
military equipment to state and local law enforcement agencies.

Even with the Obama-era limits back in place, the 1033 program remains essentially intact. Military gear continues to pour into local police agencies, just as it did when Obama was in the White House.

The multiple federal flip-flops underscore the importance of putting limits on police militarization at the state and local levels. Federal policy tends to change depending on the party in power. Whatever limits this or the next president imposes through executive order can be undone with a stroke of a future president’s pen.

The only way to effectively end federal militarization of police for good is by permanently withdrawing the states from these federal programs.

There are two steps state and local governments can take to take on police militarization today.

The first is to require police to get local government approval before they can procure military equipment from federal programs. While this does not stop law enforcement agencies from obtaining military gear, it
does bring the process into the open. It creates a framework for accountability and transparency, and it also provides a foundation for activists to step in and stop the procurement of military equipment by pressuring local government officials to vote no.

The second step is to withdraw the state or locality from the programs completely by banning the acquisition of military equipment entirely.

A third option is a combination of both approaches (banning specific equipment and requiring local approval for all others).

In 2021, Washington state took the most aggressive approach with the passage of HB1054, banning law enforcement agencies from acquiring a long list of military gear.

Maryland took a more limited approach, banning the acquisition of a smaller list of military equipment with the passage of SB600.

California took the first step with the passage of AB481. Under the law, police departments are required to develop a detailed military equipment use policy and present it in
an open meeting before obtaining military equipment. After the public meeting, the local governing body will either approve or deny the acquisition.

Law enforcement agencies are also required to get local government approval prior to May 1, 2022, in order to continue using military equipment already in the department’s possession as of Jan. 1, 2022.

As a result of AB481, a San Francisco Police Department (SFPD) plan to arm robots - some federally-funded - with lethal force was brought to public attention before implementation. Swift and massive public backlash pressured the Board of Supervisors to quickly reverse course after initially approving the SFPD proposal. The 8-3 vote in support of the “killer robots” was quickly flipped when the Board voted unanimously to explicitly ban the use of robots in such a fashion, at least for now.

But the battle isn’t over. The board sent the issue back to the Rules Committee for further review and public comment. That means the full board could still approve a revised policy allowing robots to use lethal force in the future.

For the time being, however, despite SFPD’s wishes, they
are currently banned from arming robots with a deadly force option.

The Board's surprising u-turn underscores the power of sunlight coupled with dedicated grassroots activism.

The law enacted by AB481 is relatively narrow in scope and doesn't do anything to stop the federal militarization of police. But it does make the process of acquiring military-grade equipment more transparent. Prior to the enactment of this law, law enforcement agencies in California often acquired military equipment without anybody even knowing, much less approving it.

As reported in the San Francisco Chronicle:

The vote was the result of a new state law that requires police departments to inventory equipment including certain guns, grenades, armored vehicles and battering rams and to seek explicit approval for their use. So far, only San Francisco and Oakland have discussed lethal robots as part of that law. Oakland police wanted to arm robots with shotguns but backed down in the face of public opposition, instead opting for pepper spray.

Of course, transparency alone doesn't stop government
actions. Oftentimes, government bodies simply rubber-stamp police requests. But when grassroots activists get involved, they can drive change, as we saw with this killer robot policy.

Transparency sets the stage. It provides a means for the community to know exactly what its government is doing. As the old saying goes, sunlight is the best antiseptic. But ultimately, substantive changes in policy requires human action.

Initially, the San Francisco Board of Supervisors was set to rubber-stamp law enforcement’s request for killer robots – even with public disclosure. But when activists got wind of the proposal and took action, they were able to exert enough pressure on government officials to reverse the bad policy.

Without AB481, nobody would have known about the killer robots. But without the concerted effort of concerned individuals pressuring government officials, they would have gotten killer robots anyway.

**The Big Picture**

Despite all of the protests and promises of police reform
after the deaths of people at the hands of federally-funded local police, the federal government has plunged ahead unabated in expanding the ever-growing national police state.

This has been going on for decades. The “war on drugs” and the “war on terror” gave the feds more excuses to exert even more and more influence on local police departments. In the same way the federal government has unconstitutionally controlled education, healthcare, environmental regulation, the economy, and more, it has also increasingly monopolized local law enforcement, something the federal government has no authority to do under the Constitution.

Given the federal government’s track record on everything else it controls, we should be wary of this movement to nationalize policing. It won’t end well.

The Trump administration used the protests in the wake of deaths as an excuse to further insert the federal government into local policing. President Biden talked about reforms, but that has really been nothing more than grandstanding to appease his base. In fact, the proposed 2022 White House budget more than doubled funding for a federal program that doles out money to state and local
police departments to hire law enforcement officers. The proposed 2023 budget includes another $32.2 billion of unconstitutional federal funding for local police. This despite Democrats talking about “defunding” the police. Meanwhile, efforts to end qualified immunity in Congress failed to produce any concrete results.

The only way Washington D.C. can reform policing is for the federal government to butt out. It’s clear that despite all of the talk, it will never do so.

As already mentioned, the federal government’s constant insertion of itself into local policing has fundamentally changed law enforcement for the worse. It has created a national police state dynamic that can only be rolled back by the kind of state and local action outlined above.
As we’ve seen throughout this report, the federal government intrudes on our lives in countless ways, but perhaps nowhere is it as personal as when it tries to regulate what we can and can’t put in our own bodies.

The FDA has grown increasingly aggressive in enforcing both food and drug laws. It not only asserts the power to regulate interstate commerce; it also often asserts the authority to regulate food and drugs within state lines.

But the FDA faces the same problem as every other federal agency. It does not
have the personnel or resources to enforce all of its regulatory edicts without state and local support. By refusing to cooperate with FDA rules and regulations, and by passing laws that encourage the growth of markets in federally-prohibited items, state and local action can nullify onerous FDA mandates in practice and effect.

**Markets Work**

Food freedom flourishes in states where government regulators simply get out of the way. The proof is in the pudding – and the raw milk.

Food freedom laws generally exempt small food-producing businesses from onerous regulations and licensing requirements. These businesses can sell directly to the consumer from homes, farms, or ranches, as well as at farmers’ markets and roadside stands.

According to a *Forbes* article, hundreds of local businesses have sprouted up across three states that have passed food freedom laws in recent years – all without a single report of foodborne illness.

Wyoming enacted the first such law in 2015. The expansive law even allows poultry farmers with fewer than 1,000
birds to sell chicken and turkey, along with products made from their birds. It also authorizes the sale of raw milk, rabbit meat and most farm-raised fish.

Rep. Tyler Lindholm sponsored the Wyoming Food Freedom Act. He said his state now has the best artisan food laws in the nation.

“When it comes to local foods being produced by local people directly sold to consumers, Wyoming stands far above the rest.”

Following Wyoming’s lead, North Dakota and Utah passed similar laws. In 2017, Maine enacted a law that gives local governments the authority to enact ordinances regulating local food distribution without state interference.

States with food freedom laws have undeniably seen a boom in the number of small, local food producers.

Food freedom laws not only open markets, expand consumer choice, and create opportunities for farmers and entrepreneurs; they take a step toward restoring the United States’ original political structure. Instead of top-down, centralized regulatory schemes, these laws encourage local control, and they can set the foundation
to nullify federal regulatory schemes in effect by hindering enforcement of federal regulations.

While state law does not bind the FDA, the passage of food freedom laws creates an environment hostile to federal food regulation in those states as well. And because the state does not interfere with local food producers, that means it will not enforce FDA mandates either. Should the feds want to enforce food laws in states with food freedom laws, they have to figure out how to do so by themselves.

**Raw Milk**

The federal regulation of raw milk reveals just how deeply the federal government is involved in local food issues.

FDA officials insist unpasteurized milk poses a health risk because of its susceptibility to contamination from cow manure, a source of E. coli. The agency’s position represents more than a matter of opinion. In 1987, the feds implemented 21 CFR 1240.61(a), providing that, “no person shall cause to be delivered into interstate commerce or shall sell, otherwise distribute, or hold for sale or other distribution after shipment in interstate commerce any milk or milk product in final package form for direct human
consumption unless the product has been pasteurized.”

Not only do the Feds ban the transportation of raw milk across state lines; they also claim the authority to ban unpasteurized milk within the borders of a state.

“It is within HHS’s authority...to institute an intrastate ban [on unpasteurized milk] as well,” FDA officials wrote in response to a Farm-to-Consumer Legal Defense Fund lawsuit against the agency over the interstate ban.

The FDA clearly wants a complete prohibition of raw milk. Some insiders say it’s only a matter of time before the feds try to institute an absolute ban. Armed raids by FDA agents on companies like Rawesome Foods back in 2011, and Amish farms in recent years also indicate this scenario may not be too far off.

However, states can undermine federal prohibition schemes by legalizing raw milk sales within their borders.

As we've seen with marijuana and industrial hemp, an intrastate ban becomes ineffective when states ignore it and pass laws encouraging the prohibited activity anyway. The federal government lacks the enforcement power necessary to maintain its ban, and people are more likely
to take on the small risk of federal sanctions if they know the state will not interfere. This increases when the state actively encourages the market.

In the same way, removing state barriers to raw milk consumption, sale and production undoubtedly spurs the creation of new markets for unpasteurized dairy products, no matter what the feds claim the power to do.

This kind of response could ultimately nullify the interstate ban in practice and effect as well. If all 50 states legalize raw milk, markets within the states could easily grow to the point that local sales would render the federal ban on interstate commerce almost pointless.

And history indicates the feds likely do not have the resources to stop people from transporting raw milk across state lines either - especially if multiple states start legalizing it. Growing markets can overwhelm federal enforcement attempts.

Currently, at least 10 states allow raw milk sales in retail stores, and 18 states allow sales on the farm where the milk was produced. Eight states have legalized herd-share agreements and six states don’t prohibit them.
In 2021, Alaska took a first step with the passage of HB22. The law legalizes raw milk through contracts granting part ownership of livestock, commonly known as herd shares. Under the law, consumers can pay a farmer a fee for a “share” in either an individual animal or a herd of animals. In return, the consumer gets access to unpasteurized milk produced by the animals.

Prior to the enactment of HB22, it was illegal to sell raw milk to the public in Alaska. It could only be sold to a milk processing plant, or for animal food.

Also passed in 2021, the Montana Local Food Choice Act prohibits a state or local government agency from requiring licensure, permitting, certification, packaging, labeling, or inspection that pertains to the preparation, serving, use, consumption, delivery, or storage of homemade food or homemade food products.

Provisions in the new statute effectively legalize the sale of raw milk and raw milk products directly from the producer to a consumer if the producer keeps no more than five lactating cows, 10 lactating goats, or 10 lactating sheep on the farm for the production of milk. Sales are now allowed at a farm, ranch, home, office, or “traditional community social event,” including farmer’s markets, neighborhood
gatherings and sporting events.

Vermont expanded on previous provisions in 2021 with passage of H218. The law expands current raw milk sales by amending the previous law to allow for sale by farm stands and community-supported agricultural organizations (CSA’s). This further builds on the previous expansion of raw milk sales passed in 2019.

In 2022, Georgia joined the list of states allowing limited raw milk sales when Gov. Brian Kemp signed a bill into law legalizing the sale of raw milk direct from the producer to the consumer. Under the law, raw milk for human consumption can be sold, offered for sale, or delivered by the producer directly to the consuming public as long as the producer and distributor are licensed and conform to state law. The legislation includes safety and labeling standards that licensed sellers will have to follow. Under the prior law, the sale of raw milk for human consumption was illegal in Georgia.

Other states should follow the lead of those that have legalized raw milk, and work to expand current laws in states where it is already legal.

CBD
Many people are under the impression that CBD is completely legal now due to the fact that it’s available all over, and the 2018 federal farm bill legalized industrial hemp. But this is not the case.

With the passage of that farm bill, the federal government now treats industrial hemp as an agricultural commodity instead of a controlled substance. While the DEA no longer has the authority to regulate or prohibit hemp, the provisions of the farm bill have no bearing on FDA rules and regulations regarding CBD. In fact, a section in the farm bill makes this explicit.

Section 297D, paragraph (c)(1) “Regulations and Guidelines; Effect on Other Law” states “nothing in this subtitle shall affect or modify the Federal Food, Drug, and Cosmetic Act.”

So, practically speaking, the passage of the farm bill does not mean CBD is now federally legal in all 50 states, as some hemp supporters claim. In fact, the FDA still maintains a strict prohibition on the sale of CBD in the entire country. The FDA classifies CBD as “a drug for which substantial clinical investigations have been instituted.” Under federal law, that designation means the FDA maintains full control over the substance and it
cannot be marketed as a “dietary supplement.”

To date, the FDA has only approved one product with cannabidiol as an active ingredient – Epidiolex, a medicine for the treatment of seizures. The agency maintains that the sale of CBD or **any food product containing the substance is illegal.**

The FDA further declares, “It is a prohibited act to introduce or deliver for introduction into interstate commerce any food (including any animal food or feed) to which THC or CBD has been added.” Under the federal definition of “interstate commerce,” this includes virtually all CBD products.

The FDA held its first public meeting relating to CBD in May 2019. FDA principal deputy commissioner Amy Abernethy said there is a need to “further clarify the regulatory framework to reduce confusion in the market,” and “Key questions about product safety need to be addressed. Data are needed to determine safety thresholds for CBD.”

The FDA evaluation process is ongoing. In March 2020, FDA Commissioner Dr. Stephen Hahn delivered a report to Congress on CBD.
“FDA is currently evaluating issuance of a risk-based enforcement policy that would provide greater transparency and clarity regarding factors FDA intends to take into account in prioritizing enforcement decisions. Any enforcement policy would need to balance the goals of protecting the public and providing more clarity to industry and the public regarding FDA’s enforcement priorities while FDA takes potential steps to establish a clear regulatory pathway.”

According to NutraIngredients, food and dietary supplement industry stakeholders said the report offers “little hope of a timely regulatory solution.”

In May 2022, the FDA reiterated that the sale of CBD products is not considered legal from a federal standpoint.

“The FDA has not approved any human or animal products containing CBD other than one prescription drug product to treat rare, severe forms of epilepsy in children. Therefore, all other CBD products intended for use as a drug are considered unapproved drugs and are illegal to sell.”

In effect, the agency will almost certainly continue to prohibit the sale of CBD and its addition to food and beverages even with the passage of the 2018 farm bill.
While farmers can now legally grow hemp for commercial purposes, including the production of fiber, biofuel, building products, paper, clothes and even food products that don’t contain CBD, the sale of cannabinol or food products containing CBD remains federally illegal, as it has been all along, unless the FDA changes its policy or Congress passes legislation specifically legalizing CBD.

States can undermine FDA regulation of CBD by simply making it legal within their borders and refusing to enforce the agency’s regulations.

Over the last few years, at least 11 states (Arkansas, Florida, Maine, New Mexico, Texas, Virginia, West Virginia, Wyoming, Ohio, Oklahoma and New York) passed laws creating regulatory structures for the manufacture and sale of CBD. These laws open the door to the production and sale of CBD products produced in the state regardless of continued federal prohibition.

And at least 12 states expressly authorize CBD as an additive in food products, despite the FDA’s explicit prohibition.

California joined that list in late 2021 with the passage of AB45. The law allows cannabinoids and other hemp
extracts to be added to dietary supplements, food, beverages, cosmetics and pet food, despite FDA prohibition on the same. The law declares that a dietary supplement, food, beverage, cosmetic, or pet food is not adulterated by the inclusion of industrial hemp or cannabinoids, extracts, or derivatives from industrial hemp as long as it meets state specifications. The enactment of this legislation effectively ends state prohibition on the sale of CBD and CBD products based on federal law.

Without state cooperation, the FDA will likely have trouble regulating CBD at all.

The power of markets and the state action that supports them was apparent even before Congress legalized industrial hemp. With so many states simply ignoring prohibition, there was a booming market for CBD well-before the 2018 farm bill was even debated in Congress.

In fact, despite past and ongoing federal prohibition, CBD is everywhere.

A New York Times article asserted that “with CBD popping up in nearly everything - bath bombs, ice cream, dog treats - it is hard to overstate the speed at which CBD has
moved from the Burning Man margins to the cultural center.”

This was happening when both the DEA and FDA prohibited CBD. It will undoubtedly continue as long as market demand remains and states don’t interfere. The FDA can’t effectively enforce prohibition without the assistance of state and local officials.

According to the FDA, the agency prioritizes enforcement based on a number of factors, including “agency resources and the threat to public health. FDA also may consult with its federal and state partners in making decisions about whether to initiate a federal enforcement action.”

Even when both the FDA and DEA were theoretically enforcing federal laws and regulations banning CBD, state and local action had already nullified federal prohibition in practice and effect.

There’s no reason to think that won’t continue as long as states maintain the same stance on CBD as they did before 2018. Simply put, the federal government lacks the personnel and resources to crack down on CBD – even if the FDA wants to.
As we’ve already discussed, the federal government is in the process of creating a national police state. But you can’t have a police state without a robust surveillance state.

Edward Snowden describes a wholesale breakdown of the constitutional system that shredded the Fourth Amendment.

“So, it should come as no surprise that government spying in the U.S. has become increasingly Orwellian.”

“Had constitutional oversight mechanisms been functioning properly, this extremist interpretation of...”
the Fourth Amendment – effectively holding that the very act of using modern technologies is tantamount to a surrender of your privacy rights – would have been rejected by Congress and the courts.”

Reading Snowden’s outline of the constitutional breakdown that supports the surveillance state, it’s glaringly clear that we can’t count on the federal government to limit the power of the federal government. Every branch of the federal government shares culpability.

As Snowden points out, “Congress willingly abandoned its supervisory role” over the intelligence community. Meanwhile, the failure of the judicial branch was just as egregious. The FISA Court created to oversee foreign surveillance approved 99 percent of the surveillance requests brought before it, “a rate more suggestive of a ministerial rubber stamp than a deliberative judicial process.”

But Snowden described the executive branch as the primary cause of the “constitutional breach.”

“The president’s office, through the Justice Department, had committed the original sin of secretly issuing directives that authorized mass surveillance in the wake of 9/11. Executive
overreach has only continued in the decades since, with administrations of both parties seeking to act unilaterally and establish policy directives that circumvent law – policy directives that cannot be challenged, since their classification keeps them from being publicly known.”

In effect, all three branches of the federal government failed “deliberately and with coordination” creating what Snowden called a “culture of impunity.”

“It was time to face the fact that the IC (intelligence community) believed themselves above the law, and given how broken the process was, they were right. The IC had come to understand the rules of our system better than the people who had created it, and they used the knowledge to their advantage.

“They'd hacked the Constitution.”

Nearly a decade since Edward Snowden released the first documents exposing the extent of NSA spying to the world, the surveillance state has only gotten bigger.

Although NSA spying remains the most high-profile warrantless surveillance program, the federal government has created a national surveillance network that extends
well-beyond the operation of this single agency.

Other federal agencies, including the FBI, the DoD, and the DEA lead the push with the NSA. But they could never run their rapidly-expanding surveillance network without the willing cooperation of state and local law enforcement agencies.

Over the years, the feds have implemented a very effective scheme to expand surveillance within the borders of the United States.

Thanks to federal dollars, local police have access to a mind-boggling array of surveillance equipment. And the federal funding process usually allows law enforcement agencies to obtain this high-tech, extremely intrusive technology without any local process for approval or oversight.

Members of the community, and even elected officials, often don’t know their police departments possess technology capable of sweeping up massive amounts of electronic data, phone calls and location information. All without a warrant, based upon probable cause, of course.

In return for this federal money, state and local police
make the information they gather through their
surveillance programs available nationwide through
federal databases. The feds, along with police in other
jurisdictions, can share and tap into vast amounts of
information gathered at the state and local level through
fusion centers and a system known as the “information
sharing environment” or ISE.

Both were sold as tools to combat terrorism, but that is
not how they are being used. The ACLU pointed to a
bipartisan congressional report to demonstrate the true
nature of government fusion centers.

“They haven’t contributed anything meaningful to
counterterrorism efforts. Instead, they have largely served as
police surveillance and information sharing nodes for law
enforcement efforts targeting the frequent subjects of police
attention: Black and brown people, immigrants, dissidents,
and the poor.”

Fusion centers operate within the broader ISE. According
to its website, the ISE “provides analysts, operators, and
investigators with information needed to enhance national
security. These analysts, operators, and investigators...
have mission needs to collaborate and share information
with each other and with private sector partners and our
foreign allies.”

In other words, ISE serves as a conduit for the sharing of information gathered without a warrant. Known ISE partners include the Office of Director of National Intelligence which oversees 17 federal agencies and organizations, including the NSA. ISE utilizes these partnerships to collect and share data on the millions of unwitting people they track.

In effect, these federal entities facilitate a surveillance state integrated with virtually every state and local agency in the country. As a result, efforts to opt out of these programs and protect privacy at the state and local level have a significant spillover effect to the national level.

Last year, the Maine House passed a bill to defund the state’s only fusion center, but after intense lobbying against it by federal, state and local law enforcement groups, the effort was quickly killed in the Senate.

Efforts to withdraw from fusion centers are likely to grow in the coming years. Meanwhile, there are other efforts at both the state and local levels to limit surveillance and undermine federal spying.
State Constitutions

You don’t have to rely exclusively on the Fourth Amendment to protect your right to privacy and block intrusive government surveillance.

Every state constitution has a provision similar to the Fourth Amendment, prohibiting warrantless search and seizure by state and local government agents. This provides an avenue to block, or at least limit, state and local surveillance without relying on federal judges. Oftentimes, state courts have established more strict interpretations of these state constitutional provisions than their federal counterparts, providing stronger legal protections for the right to privacy.

Some states have expanded their state constitutional provisions on searches and seizures to explicitly include electronic data.

Practically speaking, inclusion of electronic communications and data in a state’s constitutional prohibition on unreasonable searches and seizures means state and local police are required to obtain a judicial warrant, supported by probable cause, before accessing cell phones and other electronic devices regardless of any
legislative statute. It also sets the foundation to help prevent law enforcement from accessing private information through third parties.

Missouri was the first state to do this with the passage of Amendment 9 in 2014. A similar state constitutional amendment to protect “private and personal information” passed in New Hampshire in 2018.

During the general election in 2022, Montana amended its constitution to require the government to obtain a search warrant in order to access a person’s electronic data or electronic communication. Voters overwhelmingly approved the measure by an 82-18 percent margin.

As the ACLU pointed out in an article supporting the New Hampshire amendment, without protections explicitly enshrined in the state constitution, the right to electronic data privacy exists at the whims of state legislators.

“Without state constitutional protections, privacy is not the ... default setting. Rather, it needs to be repeatedly established, protected, and defended by the state legislature each time a new surveillance technology or method is established, which is a common occurrence in our modern technological world. State legislators should not play an
endless game of Whack-A-Mole against threats to their residents’ privacy. Relying exclusively on piecemeal statutes or search and seizure provisions written before the dawn of the internet is no way ... to protect privacy.”

Beyond constitutional amendments, there are robust grassroots efforts that focus on four major state-federal surveillance partnerships.

**Stingrays and Electronic Data Collection**

Cell site simulators, more commonly called “stingrays,” are portable devices or software tools used for cell phone surveillance and location tracking. They essentially spoof cell phone towers, tricking any device within range into connecting to the stingray instead of the cell tower, allowing law enforcement to sweep up all communications content within range of that tower.

The stingray will also locate and track any person in possession of a phone or other electronic device that tries to connect to the tower.

The feds promote the technology in the name of “anti-terrorism” efforts, and often provide grants of equipment or money to buy it to state and local law enforcement
agencies. Some jurisdictions also use civil asset forfeiture money to fund stingrays, keeping the spending off the books.

The feds often require the agencies acquiring this technology to sign non-disclosure agreements (NDA). This throws a giant shroud over the program, even preventing judges, prosecutors and defense attorneys from getting information about the use of stingrays in court. With NDAs in place, most police departments refuse to release any information on the use of cell site simulators. But information that has leaked out reveals police typically use the technology for routine criminal investigations, not terrorism cases.

Law enforcement agencies also obtain electronic data from third parties including web servers and cell phone companies. They often access this information without a warrant. Once a law enforcement agency has the data, it can distribute it widely through fusion centers and the ISE.

State and local laws imposing warrant requirements and limiting data sharing hinder the broader surveillance state. In a nutshell, without state and local cooperation, the feds have a much more difficult time gathering
information. If there is no data gathered, or if local agencies are prohibited from sharing it, the data can’t be stored in federal databases.

In 2015, California, Washington State, and Louisiana were the first states to pass laws specifically limiting stingray surveillance, and the push to curtail the warrantless use of these devices has grown since. In 2017, Illinois imposed the most sweeping restrictions on stingrays to date.

Several states including Florida, Mississippi, Oklahoma and Rhode Island considered bills to limit stingray surveillance in 2022, but none made it through the legislative process.

**Facial Recognition and Biometric Surveillance**

Facial recognition is the newest frontier in the national surveillance state. Over the last few years, the federal government has spearheaded a drive to rapidly expand the use of this invasive technology.

At the same time, some state and local governments have aggressively pushed back.

A 2019 report revealed that the federal government has turned state drivers' license photos into a giant facial
recognition database, putting virtually every driver in America in a perpetual electronic police lineup. The revelations generated widespread outrage, but this story isn’t new. The federal government has been developing a massive, nationwide facial recognition system for years.

The FBI rolled out its facial recognition program in the fall of 2014, with the goal of building a giant biometric database with pictures provided by the states and corporate friends.

In 2016, the Center on Privacy and Technology at Georgetown Law released “The Perpetual Lineup,” a massive report on law enforcement use of facial recognition technology in the U.S. You can read the complete report at perpetuallineup.org.

The organization conducted a year-long investigation and collected more than 15,000 pages of documents through more than 100 public records requests. The report paints a disturbing picture of intense cooperation between the federal government and state and local law enforcement to develop a massive facial recognition database.

“Face recognition is a powerful technology that requires strict oversight. But those controls, by and large, don’t
exist today,” report co-author Clare Garvie said. “With only a few exceptions, there are no laws governing police use of the technology, no standards ensuring its accuracy, and no systems checking for bias. It’s a wild west.”

There are many technical and legal problems with facial recognition, including significant concerns about the accuracy of the technology, particularly when reading the facial features of people of color. During a test run by the ACLU of Northern California, facial recognition misidentified 26 members of the California legislature as people in a database of arrest photos.

Although we might joke that identifying these politicians as criminals is probably high accuracy, the impact on everyday people can be extremely detrimental, and even life-altering.

With facial recognition technology, police and other government officials have the capability to track individuals in real-time. These systems allow law enforcement agents to use video cameras and continually scan everybody who walks by.

As with all surveillance technology, the federal government is involved in both funding it and actively
working with state and local law enforcement agencies to implement it.

In response, there is a growing movement to ban or limit the use of facial recognition technology at both the state and local levels. And it has had an impact.

We saw how effective state bans on facial recognition can be after California enacted a law in 2019 that prohibits police from installing, activating, or using any biometric surveillance system in connection with an officer camera or data collected by an officer camera. This includes body-worn and handheld devices. After its enactment, San Diego shut down one of the largest facial recognition programs in the country in order to comply with the law.

In 2022, Colorado Gov. Jared Polis signed a bill that places some limits on the use of facial recognition technology.

The law prohibits Colorado law enforcement agencies from engaging in ongoing surveillance, conducting real-time or near real-time identification, or from starting persistent tracking using facial recognition without a warrant in most situations. In order to obtain a warrant, police must first establish probable cause and show that the use of facial recognition is necessary to develop leads.
in an investigation.

Building on momentum gained in 2020, a number of local jurisdictions also banned or limited facial recognition technology in the past two years, including, but not limited to Hamden, Connecticut; King County, Washington; Worcester, Massachusetts; and Minneapolis, Minnesota.

**ALPR/License Plate Tracking**

As reported in the *Wall Street Journal*, the federal government, via the Drug Enforcement Agency (DEA), tracks the location of millions of vehicles through data provided by Automatic Licence Plate Readers (ALPRs) operated on a state and local level. They’ve engaged in this for nearly 15 years, all without a warrant, or even public notice of the policy.

State and local law enforcement agencies operate most of these tracking systems, which are often paid for by federal grant money. The DEA then taps into the local database to track the whereabouts of millions of people – for the “crime” of driving – without having to operate a huge network itself.
ALPRs can scan, capture and record up to 1800 license plates every minute and store them in massive databases, along with date, time and location information.

Records obtained by the Electronic Frontier Foundation (EFF) through open records requests encompassed information compiled by 200 law enforcement agencies that utilize ALPRs. The data revealed more than 2.5 billion license plate scans in just two years (2016 and 2017).

Perhaps more concerning, this gigantic sample of license plate scans reveals that 99.5 percent of this data was collected regardless of whether the vehicle or its owner was suspected of being involved in criminal activity. On average, agencies share this data with a minimum of 160 other agencies. In some cases, agencies share this data with as many as 800 other agencies.

Police generally configure ALPRs to store the photograph, the license plate number, and the date, time, and location of a vehicle’s license plate, which is bad enough. But according to records obtained by the ACLU via a Freedom of Information Act request, these systems also regularly capture photographs of drivers and their passengers.

With the FBI’s facial recognition program and the federal
government building a giant biometric database with pictures provided by the states and corporate friends, the feds can potentially access stored photographs of drivers and passengers, along with detailed data revealing their location and activities. With this kind of information, government agents can easily find individuals without warrants or oversight, for any reason whatsoever.

Private companies are becoming important players in license plate tracking. Many local police departments are contracting with private vendors such as Vigilant Solutions. These companies provide hardware, software and databases, allowing law enforcement agencies to create massive ALPR networks without the hassle of running the systems themselves.

In spring 2022, a San Diego Times report revealed that police departments using automatic license plate readers (ALPRs) in conjunction with Vigilant Solutions databases are likely sharing information with the feds.

And they might not even know it.

According to the report, the Chula Vista Police Department shared the image, location, date and time of each vehicle photographed by the city’s ALPRs with over
800 subscribers to the Vigilant system - including federal agencies.

Since a majority of federal license plate tracking data comes from state and local law enforcement, laws banning or even restricting ALPR use are essential. As more states pass such laws, the end result becomes more clear. No data equals no federal license plate tracking program.

Currently, only six states have placed significant restrictions on the use of ALPRs.

Legislatures in a handful of states considered bills to limit ALPR use and data sharing in 2022, but none made it through the legislative process.

Activists are expected to push several states to consider similar restrictions in the next legislative session.

A California bill would have taken a step backward, explicitly authorizing ALPR data sharing with the feds. Fortunately, the legislation died in committee.

**Drones**

Drones, or Unmanned Aerial Vehicles (UAV), serve as
highly effective surveillance tools. According to a report by the EFF, drones can be equipped with various types of spy gear that can collect high-definition video and still images day and night.

Drones can be equipped with technology allowing them to intercept cell phone calls, determine GPS locations, and gather license plate information. They can also be used to determine whether individuals are carrying guns. Synthetic-aperture radar can identify changes in the landscape, such as footprints and tire tracks. Some drones are even equipped with facial recognition.

According to the Atlas of Surveillance (a project of the EFF and the University of Nevada), at least 1,172 law enforcement agencies nationwide use drones.

Mandatory reporting from the state of Minnesota reveals how police departments use drones. The EFF summarized the findings.

“According to the report, 93 law enforcement agencies from across the state deployed drones 1,171 times in 2020 - with an accumulative price tag of almost $1 million. The report shows that the vast majority of the drone deployments are not used for the public safety disasters that so many
departments use to justify drone use. Rather, almost half (506) were just for the purpose of “training officers.” Other uses included information collection based on reasonable suspicion of unspecified crimes (185), requests from other government agencies unrelated to law enforcement (41), road crash investigation (39), and preparation for and monitoring of public events (6 and 12, respectively). There were zero deployments to counter the risk of terrorism. Police deployed drones 352 times in the aftermath of an “emergency” and 27 times for “disaster” response.”

As is the case with other surveillance technologies, much of the funding for drones at the state and local level comes from the federal government, in and of itself a constitutional violation. In return, federal agencies tap into the information gathered by state and local law enforcement.

In 2013, Virginia and Florida kicked off the effort to limit drone surveillance.

Virginia put a temporary ban on the use of drones by police that year, and Florida became the first state to enact permanent restrictions on the use of unmanned aircraft by law enforcement agencies requiring a warrant for most drone surveillance.
From those modest beginnings, 19 states – Alaska, Florida, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Montana, Nevada, North Carolina, North Dakota, Oregon, Tennessee, Texas, Utah, Vermont, Virginia, and Wisconsin – now require law enforcement agencies in certain circumstances to obtain a search warrant to use drones for surveillance or to conduct a search.

These are all starting points, and further limits will be required going forward.

Utah did just that in 2022.

In 2014, Utah passed a law requiring police to get a warrant before conducting drone surveillance in most situations. A law passed this year clarifies that the law applies “to any imaging surveillance device, as defined in Section 77-23d-102 when used in conjunction with an unmanned aircraft system.” This includes “radar, sonar, infrared, or other remote sensing or detection technology.”

In effect, the enactment of HB259 clarifies that this type of technology cannot be used in conjunction with a drone without a warrant.
Going Local

States and localities can limit the expansion of the surveillance state by making it more difficult for police departments to acquire invasive surveillance technology.

Creating a framework of oversight and transparency around surveillance technology and programs is a crucial step toward protecting privacy.

Utah took this approach with the passage of HB243. In effect, the new law creates a process to review state and local surveillance technology and to halt the use of surveillance tech that doesn’t meet acceptable standards.

The law creates the position of “state privacy officer” along with the Personal Privacy Oversight Committee within the office of the state auditor. The committee will have the authority to review government use of surveillance technology and require state or city agencies to terminate the use of such technology if they fail to meet minimum acceptable standards. This will be subject to a legislative override. The committee will be responsible for developing guiding standards for best practices with respect to government privacy policy, technology uses related to personal privacy, and data
security. This information will be available to the public creating an environment of transparency around surveillance tech.

Another approach is to require local government approval before police departments can purchase or use surveillance gear.

For instance, in late 2021, the Boston City Council passed a bill requiring the Boston Police Department to get council approval before acquiring or using new surveillance technology. It also must get approval before using existing technology in a new way.

While the ordinance doesn’t end the use of surveillance technology, it takes a first step toward limiting the surveillance state by ensuring surveillance technology is acquired and operated with transparency and oversight.

It also gives residents a say in the process and provides an avenue to limit the proliferation of surveillance technology.

The San Diego City Council passed a similar ordinance but included a big loophole inserted under pressure from San Diego Police Chief Dave Nisleit. The amended language
exempts police officers working on federal task forces from the oversight and transparency requirements.

The oversight and transparency ordinance passed in Boston and other cities was based on CCOPS model legislation developed by the ACLU with input from the Tenth Amendment Center and many other organizations. Boston is one of at least 22 cities that have passed similar measures.

Several cities, including San Francisco and Oakland, subsequently expanded their ordinances to ban facial recognition.

This kind of local action also puts pressure on the state legislature. If enough cities pass local ordinances, it becomes more likely the state will act by imposing warrant requirements, limiting the use of certain types of surveillance equipment, and even banning some spy gear altogether.

Starting with a more easily-manageable local effort, activists can take on Big Brother through a bottom-up strategy that builds momentum with each small step forward.
We Were Warned

Orwell's 1984 was written as a warning, but it seems federal, state and local governments have adopted it as an instruction manual. With a vast array of high-tech gadgetry at their disposal, law enforcement agencies at every level monitor us, snoop on us, listen to us, vacuum up and store reams of our private data, and spy on all of us with almost total impunity.

Sen. Frank Church warned us about this Orwellian nightmare in 1975.

“If this government ever became a tyranny, if a dictator ever took charge in this country, the technological capacity that the intelligence community has given the government could enable it to impose total tyranny, and there would be no way to fight back.” [emphasis added]

Total tyranny.

Stop and think about this for a moment. Church issued this warning nearly 50 years ago. He was talking about the potential for “total tyranny” before widespread public access to the internet, before cell phones, and before the proliferation of email. Today, the technological capacity of
the NSA, along with surveillance tools in the hands of state, local and federal law enforcement agencies, exceed anything he could have imagined.

In 1975, Church insisted Congress needed to take action to make sure the NSA and other agencies with surveillance powers operate legally and with accountability.

Congress never acted.

In fact, it has doubled down on federal surveillance with the Patriot Act and other laws expanding federal spying since 9/11.

**Pushing Back Through State Action**

Edward Snowden put warrantless federal spying by the NSA and other federal intelligence agencies in the spotlight when he released reams of documents beginning in 2013. This created a public outcry, but it led to little in the way of reform in Washington D.C. The revelations were swept under the rug and basically forgotten.

As talk about limiting surveillance at the federal level swirled, we took things in a different direction and asked a
key question: if Congress won’t rein in out-of-control spy agencies, is there anything that states can do?

It seemed like an impossible task. After all, what can a state like Utah do to stop a powerful federal intelligence agency?

As it turns out, quite a bit.

As we dug deeper, we discovered the NSA has an Achilles heel. In 2006, reports surfaced indicating that the NSA had maxed out its capacity of the Baltimore-area power grid.

To get around the physical limitation of the amount of power required to monitor virtually every piece of communication around the globe, the NSA started searching for new locations with their own power supplies and other resources. The NSA chose the Utah Data Center in Bluffdale due to the access to cheap utilities, primarily water. These water-cooled supercomputers require millions of gallons of water per week just to function.

But here’s a little secret they don’t want you to know: No water = No NSA data center.

The water provided to the Utah Data Center comes from a
political subdivision of the state of Utah. They have the authority to turn that water off.

The situation is similar at many other locations, including a massive NSA facility in San Antonio, where electricity is provided by a political subdivision of the state of Texas.

Based on these revelations, we drafted the Fourth Amendment Protection Act. Since then, a dozen states have considered legislation to ban “material support or resources” to NSA mass surveillance programs over the last four years.

In 2014, California Gov. Jerry Brown signed SB828 into law, laying the foundation for the state to turn off water, electricity and other resources to any federal agency engaged in mass warrantless surveillance. The California law needs additional steps for effectuation by defining specifically what actions constitute “illegal and unconstitutional.” As a next step, the legislature needs to amend the current law or pass new legislation that puts the prohibition of state cooperation into immediate effect.

In 2018, Michigan built on this foundation with the passage of HB4430. The law prohibits the state and its political subdivisions from assisting, participating with, or
providing “material support or resources, to a federal agency to enable it to collect, or to facilitate in the collection or use of a person’s electronic data,” without a warrant or under a few other carefully defined exceptions.

The original, legal definition of “material support or resources” included providing tangible support such as money, goods, and materials and also less concrete support, such as “personnel” and “training.” Section 805 of the PATRIOT Act expanded that definition to include “expert advice or assistance.”

Practically speaking, the legislation will almost certainly stop the NSA from ever setting up a new facility in Michigan - assuming of course Michiganders follow through and enforce the law.

The same approach can help stop the NSA from expanding in other states, too. By passing this legislation, a state becomes much less attractive for the NSA because they will not be able to access state or local water or power supplies.

If enough states step up and pass the Fourth Amendment Protection Act, we can literally box them in and set the stage to shut them down.
DEFEND THE GUARD

War is one of the few truly national policy areas. But if you think states can’t take any action to impact foreign policy, you’re mistaken.

In fact, states can make it difficult for the feds to continue to drag the U.S. into unconstitutional wars with the passage of “Defend the Guard” legislation.

This bill would prohibit the deployment of state National Guard troops in “active duty combat” unless Congress has passed a declaration of war or taken official action pursuant to Article 1, Section 8, Clause 15 of the United States Constitution to explicitly...
call forth the National Guard for one of three enumerated purposes in the Constitution –

- Execute the laws of the Union
- Repel an invasion
- Suppress an insurrection

The legislation specifically defines “active duty combat” as participation in an armed conflict, performance of a hazardous service relating to an armed conflict in a foreign state, or performance of a duty through an instrumentality of war.

Guard troops have played significant roles in all modern overseas conflicts, with well over 650,000 deployed since 2001.

Military.com reports that “Guard and Reserve units made up about 45 percent of the total force sent to Iraq and Afghanistan, and received about 18.4 percent of the casualties.”

Since none of these missions were pursuant to a Constitutional declaration of war or any of the three expressly-delegated purposes in the Constitution, the Defend the Guard Act would have prohibited many of
those deployments.

Looking at the big picture, the passage of this law in any state would force the federal government to only use the Guard for expressly-delegated purposes authorized by the Constitution.

At other times, the states’ Guard units would remain where they belong -- at home, supporting and protecting their home states.

In 2019–20, a coalition of veterans called “Bring Our Troops Home” began pushing Defend the Guard across the country. In 2022, the legislation was introduced in more states than ever before.

While getting this bill passed won’t be easy, and will continue to face fierce opposition from the establishment, it certainly is, as Daniel Webster once noted, “one of the reasons state governments even exist.”

Webster made this observation in an 1814 speech on the floor of Congress where he urged actions similar to the Defend the Guard Act.

“The operation of measures thus unconstitutional and illegal
ought to be prevented by a resort to other measures which
are both constitutional and legal. It will be the solemn duty
of the State governments to protect their own authority
over their own militia, and to interpose between their
citizens and arbitrary power. These are among the objects
for which the State governments exist.”

Article I, Section 8, Clauses 15 and 16 make up the “militia
clauses” of the Constitution. Clause 16 authorizes
Congress to “provide for organizing, arming, and
disciplining, the Militia.”

In the Dick Act of 1903, Congress organized the militia
into today’s National Guard, limiting the part of the militia
that could be called into federal service rather than the
“entire body of people,” which makes up the totality of the
“militia.”

Thus, today’s National Guard is governed by the “militia
clauses” of the Constitution, and this view is confirmed by
the National Guard itself.

During state ratifying conventions, proponents of the
Constitution, including James Madison and Edmund
Randolph, repeatedly assured the people that this power
to call forth the militia into federal service would be
limited to those very specific situations, and not for general purposes, like helping victims of a disease outbreak or engaging in “kinetic military actions.”

It is this limited Constitutional structure that advocates of the Defend the Guard Act seek to restore.

Delegate Pat McGeehan began introducing Defend the Guard legislation in West Virginia in 2015. Although not the first to do so, he certainly helped improve the original legislation and bring attention to the issue.

He said the states have a powerful opportunity to force a return to the proper Constitutional operation of war powers:

“For decades, the power of war has long been abused by this supreme executive, and unfortunately our men and women in uniform have been sent off into harm’s way over and over. If the U.S. Congress is unwilling to reclaim its constitutional obligation, then the states themselves must act to correct the erosion of constitutional law.”

McGeehan served as an Air Force intelligence officer with tours in Afghanistan and the Middle East. He called war the most serious enterprise a government can engage in.
“It’s near and dear to my heart because it’s been clear to me that over the last two decades we’ve had this sort of status quo where it is somehow acceptable for unilateral action to be taken not by just the executive, but also the Pentagon to send our men and women in the Armed Forces overseas into undeclared wars and unending wars.”

**Big Picture**

The Biden administration oversaw a pullout of U.S. forces from Afghanistan but the wars are far from over.

Even as American troops were leaving Afghanistan, the Biden administration was quietly ramping up bombing in Somalia.

This underscores an important truth — Presidents come and presidents go, but the wars just keep marching on.

James Madison warned that you can’t have liberty and perpetual war.

“If all the enemies to public liberty war is, perhaps, the most to be dreaded because it comprises and develops the germ of every other.”
We have not heeded his warning.

The results should have been predictable -- Madison told us what would happen.

“War is the parent of armies; from these proceed debts and taxes; and armies, and debts, and taxes are the known instruments for bringing the many under the domination of the few.” [emphasis added]

These wars not only take a tremendous toll in human lives; they squander our treasure. Just consider the nearly two-decade war in Afghanistan.

According to the Cost of War Project by the Watson Institute at Brown University, the U.S. spent $2.26 trillion on the war in Afghanistan. That comes to over $300 million spent every single day over the span of two decades.

This is precisely why the Constitution carefully separated the power to initiate war and the power to execute it. James Madison wrote in detail about constitutional war powers in his Letters of Helvidius.

“In the general distribution of powers, we find that of
declaring war expressly vested in the congress, where every other legislative power is declared to be vested; and without any other qualification than what is common to every other legislative act. The constitutional idea of this power would seem then clearly to be, that it is of a legislative and not an executive nature.

Those who are to conduct a war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws.”

In yet another example of the federal government going off the rails, the president now has almost complete control over matters of war and peace.

Without any restraint from Congress – the representatives of the people – one president after another has dragged America into undeclared war after undeclared war. This has been going on for decades no matter which party has controlled the White House.

Sometimes Congress rubber-stamps executive action
with unconstitutional, open-ended authorizations “for the use of military force.”

But over the last several years, presidents have abandoned even this formality. It’s proof of the old adage, “Give government an inch and they always take a mile.”

We must realize the lessons of history and heed the wisdom of our Founding Fathers, before – as the ancient Romans eventually did – we’re forced to learn the hard way.
You can sum up the core philosophy of the Tenth Amendment Center in one phrase:

**The Constitution: Every issue, every time. No exceptions, no excuses.**

But we always run into that hard truth, simply having a constitution isn’t enough.

That’s how James Madison described things in *Federalist No. 48*:

>a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the
powers of government in the same hands.

The Constitution doesn’t enforce itself – it never has, and it never will.

As Thomas Jefferson put it, people are only free when they exercise their rights – whether the government wants them to, or not:

“A free people claim their rights as derived from the laws of nature, and not as a gift of their chief magistrate.”

With this in mind, protecting your liberty is actually up to the people – and for most of the founders and old revolutionaries, it was a duty, not just a good idea.

Samuel Adams said,

“It is the duty of everyone to use his utmost exertions in promoting the cause of liberty.”

John Dickinson wrote about duty as well, and noted that defending the constitution is ultimately up to the “supreme sovereignty of the people”

He continued,
“IT IS THEIR DUTY TO WATCH, AND THEIR RIGHT TO TAKE CARE, THAT THE CONSTITUTION BE PRESERVED; OR IN THE ROMAN PHRASE ON PERILOUS OCCASIONS—TO PROVIDE, THAT THE REPUBLIC RECEIVE NO DAMAGE.”

Every effort to get the federal government to stay within its limits through political action in Washington D.C. has failed – from voting the bums out to suing in federal court.

You need an outside entity.

The nullification movement through state, local and individual action serves as that enforcement mechanism.

After years of relying on parchment barriers and expecting the federal government to limit itself, we’re now facing the biggest government in history.

But as this report shows, we’re making progress and gaining ground for liberty, step-by-step. Or as Thomas Jefferson put it “the ground of liberty is to be gained by inches.”

Even though we’ve racked up some wins, as Samuel Adams advised, now is definitely not the time to let up.
“Instead of sitting down satisfied with the efforts we have already made, which is the wish of our enemies, the necessity of the times, more than ever, calls for our utmost circumspection, deliberation, fortitude, and perseverance. Let us remember that ‘if we suffer tamely a lawless attack upon our liberty, we encourage it, and involve others in our doom.’” [emphasis added]

Going from the largest government in history to a true “land of the free” won’t be easy, and it won’t happen quickly.

We won’t win liberty in a day. Not even close.

In fact, we’re really just getting started. Following Jefferson’s wisdom, we will continue to be “contented to secure what we can get from time to time, and eternally press forward for what is yet to get.”

After all, Jefferson was right: “It takes time to persuade men to do even what is for their own good.”

Moving forward, we continue our work to teach people not just the proper role of government under the constitution - and the value of advancing liberty - but how to defend both, without relying on the government to
somehow, magically limit itself.

Brick by brick. Person by person.

Building a strong foundation for the Constitution and liberty.

Samuel Adams may have summed it up best.

"The truth is, all might be free if they valued freedom, and defended it as they ought."
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.