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in a Time of Crisis

Constitutional Crisis and the Tenth Amendment:
Civil Disobedience, Founding Principles, and the State's Responsibility

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Abstract

This past year we have seen an unprecedented grab of power from the State to the federal levels. This has caused many Americans to voice their concerns through civil disobedience. Nevertheless, as we have seen from the summer of 2020 to the electoral vote on 6 January 2021, many Americans have gone beyond civil disobedience and rioted, causing loss of life and destruction of property for their beliefs.

The Founding Fathers were concerned with a central government that exceeded its powers and destroying the powers at the local or State level in favor of federal rule. In *Federalist no 45*, Madison wrote that there are few and defined roles and responsibilities that the federal government could exercise. This is key as today there is a divided America that has been growing since the early 1800s. This division is increasing at a dramatic rate within the United States through the push of many social theories. Part of this is because since 1919, America no longer sees itself as independent sovereign nations tied under a federalist Constitution, but a sovereign centralized government that can solve all the individual's needs.

Additionally, the States and the citizenry have abandoned the founding principles that Washington, Madison, Jefferson, and others discussed. Personal responsibility for actions described within the Declaration of Independence has been left to the wayside, and in 2021 the populace finds themselves asking and receiving money from the federal government, looking to the federal government as its savior. However, tensions are flaring in part to the pandemic and the restrictions that have been imposed; founding principles being ignored; and State's ignoring and flagrantly disregarding their Constitutional duties.

This paper addresses the concerns that have arisen over the last year by displaying civil disobedience and rioting. There needs to be a call for the rule of law's adherence, a return to the 'live and let live' mentality, and a call for federalist solutions within the growing divide of America. The main points of the paper seek to analyze the root causes for the recent surge in civil disobedience, what founding principles guide today's citizenry, and finally analyze the State's responsibility through the Constitution and Tenth amendment. In conclusion, the paper seeks to identify common solutions across the federalist experiment that could be implemented to return to the 'Great Experiment' that our Founding Fathers started.

Key Word: Tenth Amendment, Enumerated Powers, Nullification, Federalism, Founding Principles, Covenantal Founding, Critical Theory, Civil Disobedience, and State Sovereignty.

Constitutional Crisis and the Tenth Amendment: Civil Disobedience, Founding Principles, and the State's Responsibility

In the past fifteen months, glaring cracks have expanded within the United States political structure. We have seen through a global pandemic locked down communities due to the people's general welfare and common defense. This raises concerns at the foundational levels of the republic. The United States' founding fathers lived under the British Crown's tyranny, where the concerns were left to those in Parliament, and the citizenry received little to no concern. In the Declaration of Independence, Jefferson wrote that over time it became necessary for the colonies to separate from the British crown due to their inability to curtail injustices and application of the abuses of power. This separation was from the crown was to allow each of the colonies to receive their "equal station" with other nations in which the "Laws of Nature" and "Nature's God" provide for¹.

The subsequent amendment of the Articles of Confederation and the creation of the Constitution in 1787 revolutionized federal governments across the globe. For the United States, it reenforced Liberty, individual sovereignty, and limited government. However, over the last eighteen months, we have seen a dramatic increase in the erosion of individual liberties and the increase in a centralized government. The citizenry has lost faith in the fundamental principles of a representative government. Faith in elections was at an all-time low during the 2020 election. In 2019 the Pew Institute showed that two-thirds of the United States citizenry believe that the federal government and news media intentionally withhold information.² Other sites show that the process has continually increased in distrust across the federal government. According to Nicholas Goldberg, his Boston Herald article showed that over fifty-six percent of Americans were not confident in the electoral process.³ To further complicate matters, the 2020 election has many Americans still on edge, even breaking out in violence on 6 January 2021 when the electoral college votes were counted.⁴ This is because half the country that voted for one presidential candidate feels that their voices and concerns over election irregularities were not heard.

The founder's created a system of government that was to create a more perfect union, not 'the' perfect Union. That system has been under attack at an alarming rate. This article seeks to understand and address fundamental issues that are affecting the people and states. Those fundamental issues include the founding principles of the United States, central vs. enumerated government, State's sovereign

¹ Charles W. Eliot, ed., *American Historical Documents 1000-1904* (Danbury, Connecticut: Grolier Enterprises, 1990), 150.

² Lee Rainie and Andrew Perrin, "Key Findings about Americans' Declining Trust in Government and Each Other," *Pew Research Center* (July 22, 2019), accessed February 11, 2021, <https://www.pewresearch.org/fact-tank/2019/07/22/key-findings-about-americans-declining-trust-in-government-and-each-other/>.

³ Nicholas Goldberg, "U.S. Losing Faith in Fairness of Election Process," *MSN*, last modified November 3, 2020, accessed February 11, 2021, <https://www.msn.com/en-us/news/opinion/us-losing-faith-in-fairness-of-election-process/ar-BB1aEhf7>.

⁴ Andrew Restuccia and Ted Mann, "Jan. 6, 2021: How It Unfolded," *Wall Street Journal*, February 11, 2021, sec. Politics, accessed February 11, 2021, <https://www.wsj.com/articles/jan-6-2021-how-it-unfolded-11613047105>; Laurel Wamsley, "What We Know So Far: A Timeline Of Security Response At The Capitol On Jan. 6," *NPR.Org*, last modified January 15, 2021, accessed February 11, 2021, <https://www.npr.org/2021/01/15/956842958/what-we-know-so-far-a-timeline-of-security-at-the-capitol-on-january-6>; Shelly Tan, Youjin Shin, and Danielle Rindler, "How One of America's Ugliest Days Unraveled inside and Outside the Capitol," *Washington Post*, last modified January 9, 2021, accessed February 11, 2021, <https://www.washingtonpost.com/nation/interactive/2021/capitol-insurrection-visual-timeline/>.

responsibilities, current events, and finally, a discussion on the solutions available today during the unprecedented period of Executive Orders and Actions.

Founding Principles

If one were to listen to the news outlets and modern organizations today, we would hear that the founding fathers were out of touch, white, slave-owning, egotistical, misogynistic, xenophobic, transphobic, homophobic, and racist, to only name a few. However, these labels do not give us insight into the founding fathers' principles within founding documents. Modern perceptions blind the labels that modern society has placed on the founding fathers. To understand the founding documents and how they apply today, we must look at the principles at the time they were written. The Bible says that all have sinned and fallen short of the glory of God. This is true of the United States past leaders. They were flawed, misunderstood, or idealistic. Nevertheless, the framework of government that they have provided seeks to provide a more perfect union.

Patrick Henry once said, “Give me Liberty or give me death.” A few short months later, Liberty was enshrined in the Declaration of Independence, saying, “Life, Liberty and the pursuit of happiness.”⁵ It is through these principles that the government is created. Spalding discusses the founder's use of “certain unalienable rights” being listed as self-evident. These included a person’s own life, pursuit of one’s own dreams, right of conscience or religion, and finally, right of property.⁶ The founders, however, were concise. In the constitutional debates and subsequent *Federalist* and *Anti-Federalist Papers*, they expressly ensured that fundamental principles of Liberty, equality, natural rights, Rule of Law, and limited government be enshrined within the federal system.

Thomas Aquinas, Aristotle, Cicero, John Locke, and Algernon Sidney were entombed within Jefferson’s writing and was widely available to the founding fathers at the time of the debates. Nature describes that man is their own ruler and equal amongst each other.⁷ While Nature allows man to be equal, Montesquieu advocated that all law must come from God and, through Christianity’s teachings, was morally good. He also acknowledged that even if society did not believe in Christianity, it was vital to have moral standards to provide for its security.⁸ *Romans 2:14-15*, *Psalms 119*, and *Proverbs 30:24-28* discuss how the Laws are found in nature and written on man's hearts. According to John Adams, the law founded under religious, moral, and social obligations was what America was founded upon.⁹ Adams enshrined the thought by saying that “one indissoluble bond the principles of civil government with the principles of Christianity.”¹⁰

Nevertheless, Locke and Rousseau taught the same principles through social contract theory, which operates under the separation of public and private sectors. This division in sovereignty is found within the Constitution and is expressly limited so that government cannot become tyrannical.¹¹ This led to the development of the Rule of Law within the Constitution. The rule of law is the concept of

⁵ Eliot, *American Historical Documents 1000-1904*, 150.

⁶ Matthew Spalding, *We Still Hold These Truths*, Paperback edition. (Wilmington: ISI Books, 2019), 43.

⁷ *Ibid.*, 41.

⁸ John Eidsmoe, *Christianity and the Constitution: The Faith of Our Founding Fathers*, 5th printing. (Grand Rapids: Baker Book House, 1991), 54–56.

⁹ Charles B. Galloway, *Christianity and the American Commonwealth: The Influence in Making This Nation* (Powder Springs, Georgia: American Vision, 2005), 121.

¹⁰ *Ibid.*, 116.

¹¹ Felix Morley, *Freedom and Federalism*, Reprint. (Indianapolis, IN: Liberty Press, 1981), 38–39.

government, and citizenry is subject to the law as well as being protected by the law.¹² Which leads to self-reliance, assertive & spirited citizenry, knowledge of rights & responsibilities of citizenship, discriminate the spirit of Liberty from that of licentiousness.¹³

Life, Liberty, and the pursuit of happiness are self-evident, meaning that they cannot be taken away by anyone or anything. Jefferson wrote the Declaration of Independence and noted that governments are created and instilled by men and that governments are to protect those unalienable rights. However, it is also their right to alter or abolish the government and instill a new one founded upon the unalienable rights if the old government becomes destructive.¹⁴ To ensure that the United States would have to be altered for trivial issues, the founders established the federal government with enumerated powers.

Central vs. Enumerated Government

To understand the founding documents, we must look at the wording utilized. Judge Napolitano interprets three keywords found within the Constitution and utilized through the *Federalist* and *Anti-federalist* papers. These words are specific, enumerated, and delegated. It is essential to understand these words as they are at the heart of central vs. limited government. Specific means definitive or explicit, enumerated means things listed out, and delegated means that the power is assigned.¹⁵ Understanding the meaning of the words is vital in understanding the constitutionality of actions being taken by the Biden administration, especially as the executive branch has been issuing executive orders or actions on almost a bi-hourly basis since the inauguration over the first 14 days.¹⁶

When looking at the founders, we find in *Federalist 32* that complete national sovereignty would imply that all states were subordinate and dependent upon the national government and ignore the people's general will as a whole. Nevertheless, the Constitutional Convention was to create a partial union or consolidation. This, as Hamilton argued, was to ensure that the states retained their individual sovereignty over everything not expressly given to the federal government by the Constitution.¹⁷ Madison concurred with this assessment in *Federalist 62*, stating that the states would retain sovereignty and is the main reason why they were to each have two senators.¹⁸

The concern over personal liberties was at the forefront of the convention. Hamilton quotes philosopher Blackstone in *Federalist 84* by stating that if you remove a man of his life or estate, it is the greatest act of despotism and should notify the country that tyranny has arisen.¹⁹ The concern on a government overstepping its bounds was so great that they ensured that the federal government would only be granted enumerated powers.

¹² Spalding, *We Still Hold These Truths*, 83.

¹³ *Ibid.*, 139–142.

¹⁴ Eliot, *American Historical Documents 1000-1904*, 150.

¹⁵ Andrew P. Napolitano, *The Constitution in Exile: How the Federal Government Has Seized Power by Rewriting the Supreme Law of the Land* (Nashville, T.N.: Thomas Nelson, 2006), 11.

¹⁶ Joel B. Pollak, “Fundamental Change: 52 Executive Orders and Actions Already Put into Place by Joe Biden,” *Breitbart*, last modified February 8, 2021, accessed February 9, 2021, <https://www.breitbart.com/politics/2021/02/08/joe-biden-executive-orders-and-actions-thus-far/>.

¹⁷ Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Clinton Rossiter (Start Publishing Llc, 2013), 194.

¹⁸ *Ibid.*, 376.

¹⁹ *Ibid.*, 511.

The powers delegated by the purposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will for the most part be connected. The powers reserved to the several States will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people., and the internal order, improvement, and prosperity of the State.²⁰

This is reinforced in Madison's notes of the Constitutional Convention, where Mr. Sherman argued that the federal role was limited to defense, settling internal disputes between states, treaties with foreign nations, and regulating foreign currency and the revenue.²¹ This thought showed that there was distinct sovereignty to the states. The discussion in both the *Federalist* and *Anti-Federalist Papers* referred to this process as a federal system. The founders' system derived only two sources of sovereign power, that of national and State. Each of these two sources is sovereign that derives its authority from that of the People.²²

When asked about the security of individual liberties from the government, Madison in *Federalist 45* addressed the concern by stating, "The State governments will have the advantage of the federal government..."²³ However, there was a concern even from federalists such as Hamilton. *Federalist 31* warned that the federal government's unbridled taxation ability could lead to the development of a federal monopoly that would destroy state sovereignty. Additionally, in *Federalist 32* he went on to State that if power were not expressly given under the Constitution, it would be retained.²⁴ Nevertheless, Patrick Henry questioned the creation of the Constitution, reminding the delegates that this is not a democracy where individuals retain all sovereignty but that of a republic, and to that end, both the people and the States retain sovereignty.²⁵

The founders were clear that the State is self-governing and is equipped with inherent sovereignty. This allows each State to act independently from each other and the national government in the enumerated powers that were delegated and reserved.²⁶ *Federalist 39* gives the ability to understand state sovereignty.

Each State, in ratifying the Constitution, is considered as a sovereign body independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new Constitution will, if established, be a federal and not a national constitution.²⁷

This was codified within Article IV, allowing for the "Full Faith and Credit."²⁸ This Article and the subsequent subsections and clauses declare that states enter on equal footing with others. The founders

²⁰ Ibid., 289.

²¹ Edward J. Larson and Michael P. Winship, *The Constitutional Convention: A Narrative History from the Notes of James Madison*, Paperback Edition. (New York: Modern Library, 2005), 31.

²² Robert A. Heineman, Steven A. Peterson, and Thomas H. Rasmussen, *American Government*, Second. (New York: McGraw-Hill, 1995), 48.

²³ Ralph Ketcham, ed., *The Anti-Federalist Papers and the Constitutional Convention Debates*, 58615th edition. (New York, N.Y: Signet, 2003), 68; Hamilton, Madison, and Jay, *The Federalist Papers*, 287.

²⁴ Alison L. LaCroix, *The Ideological Origins of American Federalism* (Cambridge, MA: Harvard University Press, 2010), 189.

²⁵ Ketcham, *The Anti-Federalist Papers and the Constitutional Convention Debates*, 200.

²⁶ Laurence H. Tribe, *The Invisible Constitution* (New York: Oxford University Press, 2008), 103–104.

²⁷ Hamilton, Madison, and Jay, *The Federalist Papers*, 240.

²⁸ Spalding, *We Still Hold These Truths*, 109; Eliot, *American Historical Documents 1000-1904*, 190.

were so concerned about sovereignty that they made the amendment process difficult to attain on a whim. They codified the amendment process in Article V, requiring two-thirds of a combined House and Senate ratification by three-fourths of the states within the Union.²⁹ Nevertheless, we have seen that the federal government has consolidated power by side-stepping the requirements the founding fathers have detailed in the Constitutional Convention and subsequent debates.

In its attempt to expand power, the federal government has continued to usurp power and underwent massive expansion under the FDR administration. Under the New Deal, the federal government expanded its power over the states. According to Kelly, Harbison, and Belz, the New Deal had a three-fold effect in taking over public policy areas such as social programs and different labor markets through regulations, extinguishing the dual federalism that the founding fathers established, and the final aspect was creating a federal-state partnership with the federal government taking the lead.³⁰ This change within the republic took place when the whole nation was undergoing turmoil that it had not seen since the Revolutionary War. The previous three decades leading up to the New Deal saw global war, Spanish influenzas, drought, followed by famine and an economic crash. This led to the population seeking security from the government. The States did not alleviate their citizen's concerns, whereas the federal government promised they could provide for the population's social concerns as a whole. This led to what Benjamin Franklin warned about when he said that Liberty could not survive; those who want to give up safety for security for the citizenry would receive neither.³¹

With the founding fathers expressly limiting the federal government's ability to operate within in select field, it becomes vital to understand how the States can operate and counter federal encroachment that Madison said would only happen if the States let it. Most would assume that the power lies with the Tenth Amendment. However, as Taylor argues in *Know Your States' Rights*, the issue facing the Tenth amendment today is that of the Supreme Court ruling in favor of their own side. Thus, giving no way to stop the concentration of power.³² This can only be countered by what Jefferson and Madison wrote. This is found in the adopted Kentucky and Virginia Resolutions of 1798 that coined the term and philosophy of nullification or interposition.

State Responsibilities

States as discussed above, are equal sovereigns with each other and the federal or national government. Madison stated that “powers delegated by the purposed Constitution to the federal government are few and defined. Those which are to remain in State governments are numerous and indefinite.” This was to ensure that the sovereign states, former colonies of Britain, could exercise their individual sovereignty.³³ However, there were numerous issues within the federal government that the founders did not see. The federal government usurping power by using the commerce, general welfare, and common defense clauses within the Constitution to justify laws being passed that the power resides

²⁹ Spalding, *We Still Hold These Truths*, 110.

³⁰ Alfred H. Kelly, Winfred A. Harbison, and Herman Belz, *The American Constitution: Its Origins and Development*, 7th ed., vol. II (New York: W. W. Norton & Co., 1991), 501–502.

³¹ Robert Siegel, Richard Anderson, and Benjamin Wittes, “Ben Franklin’s Famous ‘Liberty, Safety’ Quote Lost Its Context In 21st Century,” *NPR.Org*, last modified March 2, 2015, accessed March 29, 2020, <https://www.npr.org/2015/03/02/390245038/ben-franklins-famous-liberty-safety-quote-lost-its-context-in-21st-century>; “Benjamin Franklin on the Trade off between Essential Liberty and Temporary Safety (1775),” *Online Library of Liberty*, last modified 2020, accessed March 29, 2020, <https://oll.libertyfund.org/quotes/484>.

³² Jeff Taylor, “Know Your States’ Rights,” *American Conservative* 10, no. 1 (January 2011): 44.

³³ Sean Patrick, *The Know Your Bill of Rights Book: Don’t Lose Your Constitutional Rights Learn Them!* (Oculus Publishers, 2012), 85–86, www.oculuspublishers.com.

with the State. Strang notes that the framers employed closure rules to ensure that the Constitution could not be undermined. One of these rules is the Tenth Amendment ensuring that the federal government would never be able to operate within an area that is not enumerated within the Constitution.³⁴

The Warren Court of 1954-1969 limited States roles and restricted their sovereign roles and scope.³⁵ This went against the Tenth Amendment because if the Constitution has enumerated powers, it is therefore inherent that the remaining powers must reside within another sovereign. Through different Articles of the Constitution, Strang shows that States themselves retain much of their sovereignty, such as territorial boundaries in Article IV section 3 and Article V, which protects the states from changes to the Constitution without consent.³⁶

The usurping of power by the federal government through passage of unconstitutional laws to coercively withholding funds to accept policy were things that the founders were vehemently against. Nevertheless, what are states to do when their sovereignty is threatened and removed. The answer to that lies with both Jefferson and Madison.

Nullification

Jefferson and Madison felt that it was the State's responsibility to place themselves between their people and the authority of Washington DC. Hamilton said the State needed to intercede and exercise its sovereignty.³⁷ This shows that when the government steps into roles not enumerated, the State must prevent the federal government from becoming a tyranny. The Declaration of Independence states it that:

Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive to these ends, it is the Right of the People to alter or to abolish it, and to institute new Government.³⁸

This expressly shows that the founders were instrumental in ensuring the lasting liberties they so dearly fought for. The States were concerned with creating the Constitution as they were fearful of a national government that would eventually take possession of sovereign rights.³⁹

The usurp of power first came in 1798 with the passage of the Alien and Sedition Acts. These acts violated the First Amendment. Jefferson's resulting action, then-Secretary of State, and James Madison established the policy that has become known as nullification or intercession. The policy has never been challenged within the Supreme Court.

In 1798 and 1799 Kentucky and Virginia issued what has become known as the Kentucky and Virginia Resolutions, affirming that each State in the Union is a sovereign and as co-sovereigns within the federal construct could invalidate laws that the federal government established when it oversteps their limited roles defined within the Constitution.⁴⁰ Jefferson's original draft of the Kentucky resolution stated, "where powers are assumed which have not been delegated, a nullification of the act is the right

³⁴ Lee J. Strang, *Originalism's Promise: A Natural Law Account of the American Constitution*, Paperback edition. (New York: Cambridge University Press, 2019), 55.

³⁵ David Brian Robertson, *Federalism and the Making of America*, Second. (New York: Routledge, Taylor & Francis Group, 2018), 166–167.

³⁶ Strang, *Originalism's Promise: A Natural Law Account of the American Constitution*, 72.

³⁷ Morley, *Freedom and Federalism*, 240–241.

³⁸ Eliot, *American Historical Documents 1000-1904*, 150.

³⁹ Ketcham, *The Anti-Federalist Papers and the Constitutional Convention Debates*, 66–67.

⁴⁰ Morley, *Freedom and Federalism*, 243.

remedy.”⁴¹ In the final resolution of 1799, Jefferson was quoted saying, “That the several States who formed that instrument [the Constitution] being sovereign and independent, have the unquestionable right to judge of the infraction; and, that a nullification of those sovereignties, of all unauthorized acts done under color of that instrument is the rightful remedy.”⁴² This policy has two different names. Jefferson's first called it nullification, but Madison utilized the words intercession in his draft of the Virginia Resolution.

As mentioned, the policy has never been tested in the Supreme Court. It has, however, been utilized as justification by states to challenge federal law. The recent successful account is that of the state initiatives for legalization of medical marijuana and CBD. Additionally, it was utilized by Wisconsin during the period of abolition to nullify the Fugitive Slave Act.⁴³ Another use was in 2011 when Idaho passed HB 117, which declared the Affordable Care Act void within the State of Idaho. This invoked their sovereign power as a state of powers that were not enumerated to the federal government.⁴⁴

During the Jackson Administration, the talk of the republic overstepping its authority was raised due to what was perceived as unjust taxation on the South. If left unchecked, Senator Calhoun stated that government can be “the most tyrannical and oppressive.”⁴⁵ He referred to a government like the United States currently has in Washington, where the party system has taken control of the government. The result of Calhoun’s resignation as Jackson’s Vice President was the issuance of the “South Carolina Exposition and Protest” putting forth nullification to what was perceived as an illegal tariff by the Jackson Administration.⁴⁶ This also happened under the Franklin D. Roosevelt (FDR) administration leaving no checks and balances within the federal government from 1933 through 1938. The people then felt that the New Deal measures were temporary to help the states get back on their feet and did not mean they would become permanent. In 1938, they caused the government to become split, with the executive and legislative being under diverse party leadership to try and help curb this.⁴⁷ While the states did not exercise nullification of any of the new social programs that the FDR administration implemented, it slowed the progress from complete federal dominance.

Secession

Another policy that the states have available to them is that of secession. This policy has the connotations of slavery, human rights abuse, and racism. However, secession as a policy was discussed by the founders and enshrined in the Declaration of Independence. In this document, Jefferson wrote that “when it becomes necessary for one people to dissolve the political bands that have connected them to another...” In this document, we see that the founders believed it was a right and duty if the government abused its power the abuses have been documented. The problem is that many secession movements believe that it is the only way and each believing they hold the moral high ground. However, as noted in

⁴¹ Ilaria Di Gioia, “When Liberty Subverts Federalism: Is Nullification of Federal Law Legitimate,” *Edinburgh Student Law Review* 2, no. 4 (2015 2013): 156.

⁴² Alfred H. Kelly, Winfred A. Harbison, and Herman Belz, *The American Constitution: Its Origins and Development*, 7th ed., vol. I (New York: W. W. Norton & Co., 1991), 134–135; Louis Fisher and Katy J. Harriger, *American Constitutional Law: Constitutional Structures Separated Powers and Federalism*, 11th edition., vol. 1 (Durham, North Carolina: Carolina Academic Press, 2016), 316–317.

⁴³ Taylor, “Know Your States’ Rights,” 44.

⁴⁴ James H. Read and Neal Allen, “Living, Dead, and Undead: Nullification Past and Present,” *American Political Thought* 1, no. 2 (September 2012): 263–264.

⁴⁵ Morley, *Freedom and Federalism*, 73.

⁴⁶ Larry Schweikart and Michael Allen, *A Patriot’s History of the United States: From Columbus’s Great Discovery to the War on Terror* (New York: Penguin Group, 2007), 210–211.

⁴⁷ *Ibid.*, 574.

the Declaration of Independence you must show a series of abuses of power. The case could be made that the federal government has abused the Tenth Amendment through enacting unconstitutional laws and taking sovereignty away from the State, but one must prove the actions. Morley uses the example of Federal Aid to Education as an unconstitutional act because it usurps local governments' responsibility.⁴⁸

Secession has consistently been within the thread of the United States. One of the oldest examples is that of the Green Mountain Republic, also known as Vermont. In 1777 Vermont seceded from New York and New Hampshire. Ultimately, they joined the Union in 1797.⁴⁹ Madison argued that each State's sovereign right to "interpose" and retain their sovereign liberties and rights.⁵⁰ Throughout the years leading up to the Civil War, secession was considered a valid use of state sovereignty. Connecticut and Massachusetts in 1808, South Carolina in 1832, Vermont in 1840, Massachusetts and Vermont in 1843 and 1850, Massachusetts declaring the Mexican War unconstitutional in 1846, and Wisconsin in 1859 was the significant examples of states that threatened secession before the Civil War.⁵¹ Kelly, Harbison, and Belz discuss the argument for secession rests on the Constitution being a compact amongst sovereigns, that the Constitutional Convention rejected the idea of state coercion, and that the people could resume their rights at any time.⁵²

In the post-Civil War Era, the United States has seen its share of secession. While it is not widely recognized today, there are four successful attempts at territory seceding from the United States. These were the Philippines in 1946, Micronesia and the Marshall Islands in 1986, and Palau in 1994.⁵³ This goes to show that secession is possible to happen in a peaceful manner. Nevertheless, it is essential to note that all four of these secession movements occurred separately from the continental United States.

Within the United States, much of the citizenry sees secession as a last resort at retaining their sovereignty. Vermont is the longest recorded case in that they have continuously sought secession off and on for over two hundred years, yet the irony is they did not support the south secession movement on moral grounds during the Civil War. Outside of Vermont, much of the secession movements cite that their state governments are not representing them. Southwest

⁴⁸ Morley, *Freedom and Federalism*, 25.

⁴⁹ Robert C. Black, "Book Review: If at First You Don't Secede, Try, Try Again," *New England Law Review* 39, no. 4 (2005 2004): 839–870; Charles T Morrissey, "Book Review: The Reluctant Republic: Vermont 1724-1791 by Frederic F. Van de Water," *The New England Quarterly* 48, no. 2 (June 1975): 313–314; Jesse McIntyre III, "A FEW LAWLESS VAGABONDS: Ethan Allen, the Republic of Vermont, and the American Revolution," *Military Review* 95, no. 3 (June 5, 2015): 107–107.

⁵⁰ Fisher and Harriger, *American Constitutional Law: Constitutional Structures Separated Powers and Federalism*, 1:316.

⁵¹ Donald W. Livingston, "The Very Idea of Secession," *Society* 35, no. 5 (August 1998): 38–48.

⁵² Kelly, Harbison, and Belz, *361; A155*, I:281–282.

⁵³ Ryan Griffiths, "Secession and the Invisible Hand of the International System," *Review of International Studies* 40, no. 3 (July 2014): 559–581.

Kansas movement,⁵⁴ South Illinois movement,⁵⁵ State of Jefferson,⁵⁶ and Texas⁵⁷ have all cited the loss of sovereignty and a train of abuses as reasons for wanting to secede. Outside of Vermont and Texas, many secession movements seek to form a new state within the Union due to current state failures.

The critical aspect of secession is that it is vital for there must be a continual train of unresolved abuses. Sunstein mentions that there must be an infringement on civil liberties, economic self-interest and exploitation, injustice, and self-determination.⁵⁸ Only then can secession be allowed. Jefferson even said that “If any state in the Union will declare that it prefers separation...to continuance in the Union, I have no hesitation in saying, ‘let them separate.’”⁵⁹ This is vital when looking at secession as a policy. Additionally, in *Federalist 31, 39, and 51*, Hamilton and Madison concur that the states are invested with complete sovereignty.⁶⁰

Current Events

As we have seen the founders' vision in conjunction with a dual sovereign government sharing equal powers, it is the State's responsibility to interpose and nullify unconstitutional laws that are being imposed against the Tenth amendment. For the last eighteen months, a global pandemic and heated presidential election have exposed cracks within our republic. This has become a cause of concern within the citizenry and requires the states to intercede and exercise their own sovereignty. We have seen

⁵⁴ Peter J McCormick, “The 1992 Secession Movement in Southwest Kansas,” *Great Plains Quarterly* 15, no. 4 (Fall 1995): 247–258.

⁵⁵ Edward McClell, “If Downstate Illinois Seceded,” *Chicago Magazine*, last modified October 15, 2020, accessed December 9, 2020, <http://www.chicagomag.com/city-life/October-2020/Illinois-Secession/>.

⁵⁶ Sarah Goodyear, “Meet the Gun-Totin’ Rebels Who Want to Split from California | NY Daily News,” last modified February 9, 2016, accessed December 12, 2020, <http://interactive.nydailynews.com/2016/02/state-of-jefferson-secessionists-california-gun-totin-rebels/>; “California County Votes for Secession from State, Cites Overregulation,” Text.Article, *Associated Press* (Fox News, March 25, 2015), last modified March 25, 2015, accessed December 9, 2020, <https://www.foxnews.com/politics/california-county-votes-for-secession-from-state-cites-overregulation>; “Another Northern California County Votes to Secede from State,” Text.Article, *Associated Press* (Fox News, March 25, 2015), last modified March 25, 2015, accessed December 9, 2020, <https://www.foxnews.com/politics/another-northern-california-county-votes-to-secede-from-state>; Reid Wilson, “California Secession Supporters File New Initiative,” Text, *TheHill*, last modified 15 February, accessed December 9, 2020, <https://thehill.com/homenews/state-watch/374092-california-secession-supporters-file-new-initiative>; Jared J Thomas, “The Dimensions of Secession in California.” (n.d.): 36.

⁵⁷ Alex Briseno, “Should Texas Be Its Own Nation Again? Secession Talk Returns with Proposed Texas Independence Referendum Act,” *Dallas News*, last modified December 8, 2020, accessed December 9, 2020, <https://www.dallasnews.com/news/politics/2020/12/08/secession-conversation-returns-with-texas-independence-referendum-act/>; Walter L. Buenger, “Secession Revisited: The Texas Experience,” *Civil War History* 30, no. 4 (1984): 293–305; Walter L. Buenger, *Secession and the Union in Texas* (University of Texas Press, 2012); Kyle Biedermann, “Texas Independence Referendum Act 87th,” n.d.; Libby Emmons, “BREAKING: Texas GOP Hints at Secession in Blistering Statement Following Supreme Court Rejection,” *The Post Millennial*, last modified December 11, 2020, accessed December 11, 2020, <https://thepostmillennial.com/breaking-texas-gop-hints-at-secession-in-statement-following-supreme-court-rejection>; Mary Claire Patton, “Can Texas Secede from the US?,” *KSAT*, last modified November 5, 2020, accessed December 9, 2020, <https://www.ksat.com/news/local/2020/11/05/can-texas-secede-from-the-us/>.

⁵⁸ Cass R. Sunstein, “Constitutionalism and Secession,” *The University of Chicago Law Review* 58, no. 2 (1991): 633–670.

⁵⁹ Livingston, “The Very Idea of Secession,” 41.

⁶⁰ Hamilton, Madison, and Jay, *The Federalist Papers*, 192, 240–241, 320–321.

numerous examples of the federal government's encroachments into the citizenry's liberties and the populace rising against the government.

Americans have seen their liberties stripped over the last twelve months sanctions, stay-at-home orders, and mask mandates have become the norm. Additionally, governments tell what businesses are allowed to be opened or closed and how many people may attend religious services, and where they can practice.⁶¹ This has caused many to rise up when other conditions are introduced. This would be enough in itself to cause troubles within countries, but the populace had started to lose faith in how elections are conducted at the same time. In 2019 a study at the Pew Research Center discovered that American's trust in government and each other was deteriorating, with both political parties believing that over seventy percent of those surveyed believe distrust in government was growing.⁶² Another study in 2020 found that the number of distrust in the elections rose from 54% in 2018 to 60% just before the 2020 election.⁶³ Then eight days after the presidential inauguration Governor Noem was still unsure if the election was conducted fairly at the federal level.⁶⁴

Another area of federal encroachment is upon the Second Amendment. The new Biden Administration has announced that they will act to reduce gun violence and enable “common sense” gun laws. Many of these gun laws include H.R. 30, H.R. 167, and H.R. 127 in which it would require a license for ammunition possession, registration of firearms, prohibition on certain types of ammunition, and many other requirements on the Second Amendment.⁶⁵ Then, on the Parkland Florida school shooting anniversary, Biden called to end immunity for gun manufacturers to be sued when a shooting occurs. Additionally, he called for restrictions on the amount of ammunition a person could carry.⁶⁶ To counter this, there have already been a call for Second Amendment sanctuaries.⁶⁷

The most significant event that has taken place over the last year is that of the increase in civil disobedience. Minneapolis started with the horrible death that sparked the Black Lives Matter Movement and ANTIFA protests and subsequent riots, which caused property damage and additional loss of life. Many of these rioters were released without bail or the bail was paid for by organizations that were setup by many politicians.⁶⁸ This continued from early May 2020 to the present-day, wherein Portland rioters

⁶¹ Micah W. Kubic, “Civil Liberty Concerns Amid the COVID-19 Pandemic,” *ACLU of Florida*, last modified March 27, 2020, accessed March 29, 2020, <https://www.aclufl.org/en/news/civil-liberty-concerns-amid-covid-19-pandemic>; Donald F. Kettl, “States Divided: The Implications of American Federalism for COVID-19,” *Public Administration Review* 80, no. 4 (2020): 595–602.

⁶² Rainie and Perrin, “Key Findings about Americans’ Declining Trust in Government and Each Other.”

⁶³ Goldberg, “U.S. Losing Faith in Fairness of Election Process.”

⁶⁴ Stephen Groves, “Noem Refuses to Say Whether Biden Victory Was Free and Fair,” *SFGATE*, last modified January 28, 2021, accessed February 11, 2021, <https://www.sfgate.com/news/article/Noem-refuses-to-say-whether-Biden-victory-was-15906180.php>.

⁶⁵ Masooma Haq, “White House Reassures Gun Control Groups It Will Fulfill ‘Ambitious’ Gun Control Agenda,” *Www.Theepochtimes.Com*, last modified February 12, 2021, accessed February 12, 2021, https://www.theepochtimes.com/white-house-reassures-gun-control-groups-it-will-fulfill-ambitious-gun-control-agenda_3695005.html.

⁶⁶ Zachary Stieber, “Biden Calls on Congress to Restrict Gun Ownership,” *Www.Theepochtimes.Com*, last modified February 14, 2021, accessed February 14, 2021, https://www.theepochtimes.com/biden-calls-on-congress-to-restrict-gun-ownership_3696206.html.

⁶⁷ Shawn E. Fields, “Second Amendment Sanctuaries,” *Northwestern University Law Review* 115, no. 2 (September 2020): 437–501.

⁶⁸ Hannah Bleau, “Antifa Mugshots: Several Portland Rioters Released Without Bail,” *Breitbart*, last modified September 8, 2020, accessed February 15, 2021, <https://www.breitbart.com/politics/2020/09/08/antifa-mugshots-several-portland-rioters-released-without-bail/>; Tyler O’Neil, “DHS Dispels Three Myths About the Riots in Portland,” last modified August 8, 2020, accessed February 15, 2021, <https://pjmedia.com/news-and-politics/tyler-o->

are now trying to break down police doors in broad daylight and have caused over \$2.3 million in damages.⁶⁹ However, violence is not only found on one side of the political spectrum. On 6 January, while Congress was fulfilling its constitutional duties, rioters broke into the capitol building, causing property damage and loss of life for their beliefs.⁷⁰

These riots have called for a reduction in the First Amendment. People have been removed from the public sphere. Even the sitting President was banned from all social media, and the press coverage was cut short if discussion of election violations were mentioned.⁷¹ This has even led to the call to remove one political party from their duly elected positions over their views and to express their constitutional authority.⁷²

The last item in the recent events is the expansion and issuance of over 52 decrees stating what will be done and what the states must do. In the first nineteen days, President Biden Ordered travel bans, mandated the wearing of masks, allowed illegal aliens to be counted in the census and not be deported, imposed environmental regulations that froze public lands in states, raised the federal minimum wage, dictated what speech was allowed and what was not in relation to a virus, committed to a 75 percent reduction in greenhouse gasses by 2025 and net-zero by 2035.⁷³ These actions and orders were executive fiats to the states dictating what they are allowed to do. He by-passed Congress on issues that were expressly Congress' to act upon and issues that fall within the Tenth Amendment he chooses to act unilaterally.

Since these actions, several states have acted upon these abuses of authority. State legislatures have voted to block all unconstitutional policies that the Biden Administration is implementing.⁷⁴ Other

neil/2020/08/08/dhs-exposes-the-horrible-truth-about-violent-antifa-riots-in-portland-n766311; Evita Duffy, "Black Lives Matter And Antifa Assault Trump Supporters After DC March," last modified November 15, 2020, accessed February 15, 2021, <https://thefederalist.com/2020/11/15/black-lives-matter-and-antifa-assault-trump-supporters-after-dc-march/>; Katie Pavlich, "New Study Shows Hundreds of BLM 'Protests' Turned Violent," *Townhall*, accessed February 15, 2021, <https://townhall.com/tipsheet/katiepavlich/2020/09/08/new-study-shows-majority-of-blm-protests-turned-violent-n2575801>; John Nolte, "Nolte: BLM Riots Are Most Costly Manmade Damage to U.S. Property Ever," *Breitbart*, last modified September 16, 2020, accessed February 15, 2021, <https://www.breitbart.com/politics/2020/09/16/nolte-blm-riots-are-officially-the-most-costly-manmade-damage-to-american-property-in-history/>.

⁶⁹ Michael Ruiz, "Portland Riots Caused at Least \$2.3M in Damage to Federal Buildings in City, State's US Attorney Says | Fox News," last modified ruary 2021, accessed February 15, 2021, <https://www.foxnews.com/us/portland-riots-at-least-2-3m-in-damage-federal-buildings>; Carlos Garcia, "Rioters Tried to Break down the Door to a Police Association in Portland in Broad Daylight," *TheBlaze*, last modified February 12, 2021, accessed February 15, 2021, <https://www.theblaze.com/news/portland-police-association-riot-vandalism>.

⁷⁰ Tan, Shin, and Rindler, "How One of America's Ugliest Days Unraveled inside and Outside the Capitol"; Wamsley, "What We Know So Far"; Restuccia and Mann, "Jan. 6, 2021."

⁷¹ Andrew Blake, "Pascrell to Pelosi: Don't Seat Republicans Who Supported Texas Lawsuit to Overturn Election," *The Washington Times*, last modified December 12, 2020, accessed December 13, 2020, <https://www.washingtontimes.com/news/2020/dec/12/rep-bill-pascrell-asks-house-leaders-not-seat-repu/>; Emily Tannenbaum, "Every Social Media Platform Donald Trump Is Banned From Using (So Far)," last modified January 10, 2021, accessed February 15, 2021, <https://www.msn.com/en-us/news/politics/every-social-media-platform-donald-trump-is-banned-from-using-so-far/ar-BB1cC52J>.

⁷² Phil Shiver, "Liberal Journalist Delivers Scathing Rebuke of the Left's New Politics of 'Social Control,'" *TheBlaze*, last modified February 9, 2021, accessed February 10, 2021, <https://www.theblaze.com/news/liberal-journalist-exposes-left-social-control>.

⁷³ Pollak, "Fundamental Change."

⁷⁴ Daniel Horowitz, "North Dakota House Votes to Block All Existing and Future Unconstitutional Federal Policies," *TheBlaze*, last modified February 12, 2021, accessed February 12, 2021, <https://www.theblaze.com/op>

states have filed for secession, such as Texas.⁷⁵ However, what solutions are available to the states when the government oversteps its authority.

Solutions

The immediate solution is for the United States to return to the original intent of the Constitution. This process will be challenging to achieve due to the coercive federalism that is permeating society. First, there needs to a return to personal accountability for their actions and life. For the States to return to the founders' dual federalism, we must look to the three-step process that Barton provides. He lists the three steps as identify wrong information and eliminate it, obtain and safeguard correct and original information, and finally act on proper information⁷⁶

One of the things that benefit the states was creating the “equal sovereignty principle” under Justice Roberts, which states that Congress cannot treat one State differently as they are both equal sovereigns. Treachout states that this concept has weak or no historical standing, according to Hasen and McConnell. Nevertheless, as we have seen in the above research, there is soundproof within the constitutional debates that show the states are equal sovereigns and the federal government.⁷⁷ Lee shows Treachout’s sourcing is wrong by utilizing Madison’s own words of *Federalist 51* that says “in the compound republic of America, the power surrendered by the people is first divided between two distinct governments...”⁷⁸ Additionally, the Bill of Rights was argued that they were not needed as the Constitution delegated enumerated powers to a national government. Madison even referenced this in *Federalist 45*. Nevertheless, as we have seen in 2021, even fundamental issues such as free speech is under attack from government officials and companies. Use of the Tenth Amendment that states.

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.⁷⁹

This means that State legislatures need to take back and guard their sovereignty in the legislation they introduce and enact. Each State is required to have a republican form of government with a valid constitution. This allows each State's people to operate differently from other states based upon their own views of individual sovereignty.

The next thing that needs to be done is for the citizenry to hold their elected officials accountable. In order to do this, they need to look to Senator Michael Lee from Utah. Senator Lee stated that when he was running for office, one could not vote for legislation if it could not be reconciled within the Constitution or the Constitutional debates.⁸⁰

ed/horowitz-north-dakota-house-votes-to-block-all-existing-and-future-unconstitutional-federal-policies; Phil Shiver, “South Dakota Republican Introduces Bill to Reject Biden’s Executive Orders,” *TheBlaze*, last modified February 9, 2021, accessed February 9, 2021, <https://www.theblaze.com/news/south-dakota-bill-reject-biden-executive-orders>.

⁷⁵ Biedermann, “Texas Independence Referendum Act 87th.”

⁷⁶ David Barton, *Original Intent: The Courts, the Constitution, & Religion*, 5th edition. (Aledo, TX: WallBuilder Press, 2011), 337–356.

⁷⁷ Zephyr Teachout, “NEOLIBERAL POLITICAL LAW” (2021): 218.

⁷⁸ Leonard Michael Lee, “What Happened to the Tenth Amendment?” (M.A., Mississippi State University, 2001), 17, accessed January 7, 2021, <http://search.proquest.com/docview/250668313/abstract/E7BDF3F884B646E0PQ/1>; Hamilton, Madison, and Jay, *The Federalist Papers*, 320.

⁷⁹ Lee, “What Happened to the Tenth Amendment?”; Eliot, *American Historical Documents 1000-1904*, 195.

⁸⁰ Joel Alicea, “Stare Decisis in an Originalist Congress,” *Harvard Journal of Law & Public Policy* 35, no. 2 (Spring 2012): 799.

Finally, the Rule of Law and common sense need to be returned to the government. George Washington turned down being king of the United States not once but twice. The belief in the United States as a republic of dual federalism was paramount. In federalist 40, Madison said, "...precious right of the people to 'abolish or alter their governments as to them shall seem most likely to effect their safety and happiness..."⁸¹ Washington told us in his farewell address the following:

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. Let it simply be asked: Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in courts of justice? And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle. ~ Farewell Address

This sentiment was that without a moral and religious foundation, no government would guarantee Liberty to its people. Men create governments, but God instills the law upon their hearts according to Romans 2:15 and Jeremiah 31:33 NIV. No matter what action is taken, the states must remember that the people instilled the government granting enumerated powers to the federal level retaining the rest at the state and local levels. As stated in *Federalist 31*, "The State governments by their original constitutions are invested with complete sovereignty."⁸²

⁸¹ Hamilton, Madison, and Jay, *The Federalist Papers*, 249.

⁸² *Ibid.*, 192.

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