Written by **Patrick Krey** on February 18, 2010

State vs. Federal: The Nullification Movement

"Are we going to be free men or are we going to be slaves to the federal government of the United States?" retired state trooper and current State Delegate Charles W. Carrico, Sr. asked of the 1,000-strong rally gathered on the steps of the Virginia state capitol in January. While the like-minded crowd reacted with enthusiasm, such a rhetorical question might strike the average American as overdramatic. Are U.S. citizens really becoming "slaves to the federal government"?

There can be no mistake that the present-day federal government bears little resemblance to the extremely limited national government designed by our Founders, where the majority of domestic governing was to be left to the state and local levels. Fast forward 200-plus years and now Americans face a seemingly unstoppable centralized leviathan based out of Washington. Consider the following mind-blowing facts about the current U.S. government:

• With about 2.0 million civilian employees, the federal government, excluding the Postal Service, is the nation's largest employer.

• The U.S. national debt is fast approaching $12.4 trillion, and Congress raised the debt limit by $1.9 trillion on February 4, opening the door for our debt to go above $14 trillion.

• Abroad, more than 190,000 U.S. troops and 115,000 civilian employees are massed in approximately 900 military facilities in 46 countries and territories, not to mention the 130,000 in Iraq and soon-to-be over 100,000 in Afghanistan.

The enormous size of the federal government is not very popular either. A Gallup poll conducted last September found that more than half of Americans believe that "the federal government has too much power." Unpopularity aside, keep in mind that history has well established that government cannot grow without a corresponding decline in the economy, peace, and the rule of law. One need look no further than past empires to see what fate awaits a citizenry that concentrates all its power in one central government. How is it then that the U.S. government has morphed from a limited Republic designed by the Constitution to a virtually all-powerful behemoth? How did the Constitution, which was designed to carefully define and limit the powers of the national government, become an open-ended grant of power to that very same government? Perhaps an answer can be found in the U.S. Supreme Court, the entity "conventional wisdom" believes is entrusted with the sole power to interpret the

Constitution.

A federal government website, "Ben's Guide to U.S. Government," contains a cartoon version of Ben Franklin explaining how our current system of government works. The site includes the following proclamation: "One of the Supreme Court's most important responsibilities is to decide cases that raise questions of constitutional interpretation. The Court decides if a law or government action violates the Constitution.… Since the Supreme Court stands as *the ultimate authority in constitutional interpretation*, its decisions can be changed only by another Supreme Court decision or by a constitutional amendment." (Emphasis added.)

What's wrong with this you might ask? *New York Times* best-selling author and historian Thomas Woods provided the answer clearly and concisely at the Campaign for Liberty's January 15 regional meeting when he discussed the views of Thomas Jefferson: "Jefferson's concern was that if we say the federal government has a monopoly on interpreting the Constitution, what do you think is going to happen? This is not brain surgery. If they have a monopoly on interpreting the Constitution, they're going to interpret it in their own favor. Surprise! Then we all scratch our heads and wonder, 'Why has the government gotten so completely out of control?'" Woods hammered home how completely preposterous it is for the Supreme Court to have the sole and final say on the extent of federal power with the following analogy: "If you enter into a contract with somebody, never, ever would you say that the other party in the contract can exclusively interpret what it means.… Obviously, if only one party in a contract can interpret it, it's going to interpret it in its own favor!"

The Rise of the "Tenthers"

Proponents of the 10th Amendment to the U.S. Constitution have been starting to rise up en masse to remind the national government of its proper constitutional role under the principles of federalism. This loose network of activists, widely referred to as the state sovereignty movement or Tenth Amendment movement, were given the derisive nickname "tenthers" by detractors, but in a witty reversal, they gladly adopted the label. The Tenth Amendment Center, the major hub online for state sovereignty activism, has even renamed its blog, "the tenther grapevine."

Typically, the response by some of the biggest names in the news media has been to actively disparage anyone who strictly adheres to the original understanding of the U.S. Constitution. David Shuster of MSNBC proclaimed that most "people in their right-thinking mind know that the Tenth Amendment is a bunch of baloney."

Fellow MSNBC news anchor Lawrence O'Donnell, filling in for Keith Olberman, also raged against what he ridiculed as "tenthers" — individuals who believe in the Jeffersonian principles of a government limited to the powers specifically enumerated within the four corners of our founding document: "The tenther movement … erroneously claims that the federal government cannot force changes in health care law on the states."

In O'Donnell's view, anyone who would make such a claim is clearly ignorant and trying to dredge up areas that are now settled law. But what can be more settled than the fact that words have meaning, and the Constitution means what it says? Consider the clear language of the 10th Amendment: "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." Yet Supreme Court justices and others ignore and circumvent language such as this, based on the absurd theory that the Constitution must be constantly redefined to fit our "enlightened times," with the power of constitutional interpretation vested solely with the federal government.

O'Donnell and similar critics should read some of the speeches of our seventh Vice President, John C. Calhoun, who warned that such a viewpoint would destroy the Republic and pave the way for tyranny. Calhoun addressed this directly in his Fort Hill address:

> Stripped of all its covering, the naked question is, whether ours is a federal or a consolidated government; a constitutional or absolute one; a government resting ultimately on the solid basis of the sovereignty of the States or on the unrestrained will of a majority; a form of government, as in all other unlimited ones, in which injustice, and violence, and force must finally prevail. Let it never be forgotten that, where the majority rules without restriction, the minority is the subject; and that, if we should absurdly attribute to the former the exclusive right of construing the Constitution, there would be, in fact, between the sovereign and subject, under such a government, no Constitution, or, at least, nothing deserving the name, or serving the legitimate object of so sacred an instrument.

Calhoun was but one of many of the most prominent advocates of state sovereignty throughout American history who were true believers in limited government. (For more of a historical explanation, see our article "Nullification in a Nutshell.")

Early last year, tenthers were instrumental in getting a number of state legislatures to introduce 10th Amendment resolutions that, while legally non-binding, not only invoked the 10th Amendment but stated: "This resolution serves as Notice and Demand to the federal government, as our agent, to cease and desist, effective immediately, mandates that are beyond the scope of these constitutionally delegated powers."

Oklahoma State Representative Charles Key was on the ground floor of the modern state sovereignty movement when it first started way back in the early '90s, and was successful last year in getting a new 10th Amendment resolution passed in the house legislature in Oklahoma. In an interview with *The New American*, Key explained the educational importance of the 10th Amendment resolutions. "I feel very strongly about this system of government that we have as it was originally created. I feel very strongly about how we have moved far away from that and that we need to return to it. I saw the resolution as both a statement and a tool for informing and educating people but primarily as a first step to correct the problem." Key explains that this first step is similar to a landlord delivering a notice of eviction to a tenant who has violated the terms of his lease. "If you've got a tenant that's not paying rent, you don't just show up one day with an empty truck. First, you serve notice. That's how we see these resolutions, as a notice to the federal government. And there definitely will be follow up." So that brings us to the next step: nullification.

No one ever accused the feds of being good listeners, so when some states passed these state sovereignty resolutions, the feds continued merrily on their unconstitutional path. States, however, are no longer just rolling over. Something exciting and unexpected is happening. States across the nation are either passing statutes or proposing amendments that directly conflict with federal statutes.

State nullification is actually an elaborate term for a simple concept that is taught to young children. When a child has a problem with another child who is verbally teasing him or her, they are often told "ignore them and they'll go away." State nullification basically follows this same directive. If the feds pass a law that a state deems to be outside the boundaries of its proper constitutional authority, the state will simply ignore the law and refuse to comply with it. This might sound revolutionary to some, but it shouldn't. It's already happened.

Nullification Illustrations

• *The REAL ID Act:* REAL ID was passed by a Republican Congress and signed into law by then-President George W. Bush in 2005, and the resistance to it illustrates a likely scenario for state nullification. More than two dozen states have passed laws or resolutions denouncing the act or refusing to comply with it. Have the feds responded by sending in federal agents with their guns blazing? Absolutely not! Instead, the feds were all too quick to chicken out and postpone enactment of the law. Michael Boldin, founder of the influential Tenth Amendment Center, writes, "Another indicator of victory for state-level nullification — the 2005 Real ID act was originally to be implemented in early 2008, and today, it's still in limbo. Going on 2 years later, with more than two dozen states passing laws and resolutions denouncing or flat-out refusing to comply — and D.C. has no choice but to continue backing off.... Why? With such massive resistance among the states, the Feds just have no way to enforce it."

REAL ID seems to have just been the start. As the nullification cat is out of the bag, states all across the nation are attempting to nullify federal laws covering such disparate topics as healthcare and firearms.

• *Healthcare:* Wisconsin's Grandsons of Liberty and other groups began lobbying state legislators to pursue healthcare nullification by proposing an amendment to the Wisconsin state constitution allowing the state to opt out of government healthcare. This effort isn't unique to Wisconsin, as activists in 28 other states are also involved in similar actions.

The National Conference of State Legislatures reports that members of at least 18 legislatures are submitting bills that would oppose or limit all or parts of federal healthcare reform efforts. Delegate Robert G. Marshall, the sponsor of Virginia legislation that would nullify Democratic healthcare legislation, said, "If this starts to roll across the United States, it's going to send a big signal to Congress: You are messing with things you have no power to do."

In Missouri, on January 13, 30 lawmakers and Lieutenant Governor Peter Kinder joined a rally at the state capitol to endorse an amendment to the state Constitution that would nullify any national healthcare plan that makes it mandatory for Americans to purchase health insurance. The Missouri amendment states:

> No law or rule shall compel, directly or indirectly or through penalties or fines, any person, employer, or health care provider to participate in any health care system. A person or employer may pay directly for lawful health care services and shall not be required to pay penalties or fines for paying directly for lawful health care services. A health care provider may accept direct payment for lawful health care services and shall not be required to pay penalties or fines for accepting direct payment from a person or employer for lawful health care services. Subject to reasonable and necessary rules that do not substantially limit a person's options, the purchase or sale of health insurance in private health care systems shall not be prohibited by law or rule.

The idea to amend state constitutions to nullify federal healthcare legislation first started at the Goldwater Institute in the state of Arizona, where it will be on the ballot later this year. Clint Bolick, a lawyer at the Goldwater Institute who helped devise the idea, said, "The measures are an opportunity for people to make their views known in a tangible way, to generate some rumble at the grass roots.... Our system of federalism was designed to ensure that the federal government acts only within the boundaries of its defined powers and that states may give broader protection to individual liberty than does the federal Constitution. The system can endure only if its principles are applied consistently."

This is just the beginning according to Wisconsin activist Tim Dake in an interview with *The New American*. He and the Grandsons of Liberty have their sights set on other targets for nullification. "Our group has actually hammered out a 12-item agenda we would like to see done legislatively in Wisconsin over the next two years. We're interested in a healthcare freedom amendment to nullify nationalized healthcare but we also want to nullify cap and trade, card check, as well as passing laws like the federal firearms freedom act."

• *Firearms Freedom Act:* While nullification legislation spreads like a wildfire, perhaps no other issue has generated as much controversy and excitement as the Firearms Freedom Act (FFA), which has been passed in Montana and Tennessee, has been proposed in Wyoming, and is being considered in 10 other states. The FFA openly challenges the federal contention that it has the authority to regulate firearms under the interstate commerce clause of the U.S. Constitution, by declaring that any firearms made and retained in-state are beyond the authority of Congress under its constitutional power to regulate commerce among the states.

The Montana FFA states that a "personal firearm, a firearm accessory, or ammunition that is manufactured commercially or privately in Montana and that remains within the borders of Montana is not subject to federal law or federal regulation, including registration, under the authority of congress to regulate interstate commerce. It is declared by the legislature that those items have not traveled in interstate commerce."

The U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE) informed all licensed arms dealers via an open letter that such legislation is unconstitutional under the supremacy clause. Government lawyers for the U.S. Department of Justice filed a brief in federal court against the FFA.

Timothy Baldwin, attorney and son of the 2008 Constitution Party presidential candidate Pastor Chuck Baldwin, is co-counsel in the federal litigation to validate the Montana FFA. In an interview with *The New American*, Timothy Baldwin explained what he thought of the -BATFE's response that the supremacy clause preempts any state legislation in this area. "That is simply an incorrect political position based upon the very nature and character of the Union in 1787. When the Ratifiers ratified the compact, it was understood to be what they called both concurrent powers and lines of sovereignty. The states were left with powers they did not concede. This was expressed through *The Federalist Papers*. When the federal government usurps those powers, it is the right of those people of those states to defend and repel those encroachments."

Possible Pitfalls

This is not to say that all is rosy and state nullification is on its way to restoring our constitutional republic. A number of nullification laws have been vetoed by Governors or stalled in state legislatures. If nullification is going to succeed, many in the movement have to be wise about their next steps. The state nullification movement definitely does have major obstacles obstructing its goal of returning the federal government to its constitutional limits.

Some activists are heading down the fruitless path of endless legal challenges in federal courts to validate their state nullification legislation. The Montana Shooting Sports Association and the Second Amendment Foundation filed a lawsuit in federal court to uphold the principles and terms of the Montana Firearms Freedom Act. While good-hearted, these groups are unnecessarily expending their time and energy. Just as Thomas Woods explained at the Campaign for Liberty conference, entrusting one party (the federal government) with the sole power to interpret a contract (U.S. Constitution) *is* the problem. Most observers familiar with the centralizing nature of the federal courts would be shocked if

the courts suddenly did a complete 180 and ruled that an act like the Freedom Firearms Act was constitutional. This was exactly why citizens took their battles to the state legislatures. If Montanans were serious about their sovereignty, they would simply start following the terms of the Freedom Firearms Act and ignore any federal directives.

This brings us to the next and biggest problem: How will the feds retaliate if states do start ignoring federal laws? The most likely scenario if states refuse to comply with federal mandates is the often used tactic of "power of the purse." An example of the feds using funding as an incentive for a state to play ball is the 1984 National Minimum Drinking Age Act, which required the states to uniformly raise their ages for purchase and public possession to 21 by October 1986 or lose 10 percent of their federal highway funds. The states all complied, and the rest is history. If states start resisting federal direction, the feds will utilize this tactic of threatening to bankrupt the states to silence the opposition. Can the feds blackmail the states into compliance?

Many of the 10th Amendment resolutions contain a reference to the U.S. Supreme Court's case *New York v. United States*, as precedent that the federal government cannot "commandeer States into the service of federal regulatory purpose" via funding. While Justice Sandra Day O'Connor did make this statement in her opinion, it was in regard to a specific clause of federal regulation that actually would have forced the states to "take title" to radioactive waste. The Court actually did rule that two other funding-related clauses were constitutional under the taxing and spending clause of the U.S. Constitution. Furthermore, in *Fullilove v. Klutznick*, the Court has ruled that "Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." Tenthers have another think coming if they think federal precedent is on their side.

Timothy Baldwin is concerned, but told *The New American* that such action will be more detrimental to the feds in the long run. "Certainly the strings that are attached to federal funding are conditioned on the states going along. They may attempt to use that, but what I believe is that they will reveal their hand. They're revealing that they are using federal funding as a method of enslaving the states. They will no longer have good faith in governing through the Constitution but rather are simply looking out for the power of the federal government. I think it will unravel for the federal government the more and more they press the issue."

But will state residents support this if they'll lose out on what many perceive as free cash? How would state residents react if a state that passes a healthcare nullification amendment loses out on all federal funding for popular programs?

Besides hoping to make D.C. appear like an extortionist by withholding federal funding, there is also another tactic states may use. A proposed state law entitled State Sovereignty and Federal Tax Funds Act, which has already been introduced in three states, would enable the states to interpose themselves between the federal tax collectors and state citizens. According to the Tenth Amendment Center, such "laws would require that all federal taxes come first to the state's Department of Revenue. A panel of legislators would assay the Constitutional appropriateness of the Federal Budget, and then forward to the federal government a percentage of the federal tax dollars that are delineated as legal and Constitutionally justified. The remainder of those dollars would be assigned to budgetary items that are currently funded through federal allocations and grants or returned to the people of the state." A bold move like this might stop the flow of money to the feds before they could even use it to force the states into submission. Again, tenthers will need to be wise about how they handle the political gamesmanship

with the feds because they risk alienating the average voter if their tactics are too aggressive or confrontational. Perhaps even the threat of such legislation might be enough to make the feds back off on their threats of cutting off funds.

Finally, another potential pitfall lies in the possibility of someone taking the state nullification movement too far in the wrong direction. The goal of nullification should simply be inaction when the feds want action; however, some newer nullification legislation has become more forceful. A Firearms Freedom Act has been introduced in New Hampshire that contains the following clause:

> Any official, agent, or employee of the government of the United States, or employee of a corporation providing services to the government of the United States that enforces or attempts to enforce a act, order, law, statute, rule or regulation of the government of the United States upon a personal firearm, a firearm accessory, or ammunition that is manufactured commercially or privately in New Hampshire and that remains within the State of New Hampshire shall be guilty of a class B felony.

The bill's prime sponsor, state Representative Daniel Itse, said, "This is about protecting the rights of our citizens when the federal government has no jurisdiction." This is the first FFA in the nation where federal officials could be criminally prosecuted for trying to enforce federal firearms laws. While that might sound good to some, the states need to be cautious about appearing as the aggressor. One false move could tarnish the state sovereignty movement and forever damage the cause in the court of public opinion. The key to successfully using nullification is to expose the federal government as the aggressive, unconstitutional usurper, and states would be wise to not directly confront them.

The Future of Nullification

While many mainstream media news articles on nullification paint it as a GOP tactic of merely paying lip-service to their anti-Obama base, nullification legislation appears to be cutting across the political spectrum. Some legislation is not limited to causes typically associated with the conservative movement. For instance, there is state nullification in the areas of marijuana decriminalization, as well as efforts to bring National Guard units home from unconstitutional wars overseas.

The "Bring the Guard Home" legislation, currently introduced in seven states and active in 20, was initially proposed by a liberal activist, but it is now being embraced by the grass roots from all walks of life. The proposed legislation would simply require a state's Governor, and/or the legislature, to evaluate the legality of orders for Guard deployments and first have an opportunity to either allow or deny the deployment. One can only imagine how popular such legislation will be considering that opposition to the war in Afghanistan has risen almost as high as 60 percent.

Many within the freedom movement are excited by the prospect of liberal grass-roots activists in blue states nullifying unconstitutional conservative federal actions, with conservative grass-roots activists in red states nullifying unconstitutional liberal federal actions.

If the tenthers continue to play it smart, there is a good chance the sovereignty movement will continue to thrive and grow. If it does, it will continue to spark debate over not only the proper separation of power between state and federal governments but who decides when the federal government oversteps its proper authority and how to rein in the federal government when it does overstep. All of America will be watching to see how the federal and state governments actually react to these measures. As more states become involved in the surging nullification movement, the feds will find themselves faced with a veritable uprising of noncompliant states. The strong potential for the nullification movement to

move far beyond partisan politics means that even if control of the capital shifts back and forth among the two main political parties, D.C. might begrudgingly find itself limited to doing only what's allowed in the Constitution.

Related article:

Nullification in a Nutshell