Written by **Bruce Walker** on January 28, 2011

Va. Passes Intrastate Commerce Act to Rein in Federal Govt

The State of Virginia — home of George Washington, Patrick Henry, James Madison, Thomas Jefferson, and James Monroe — was once an indispensable part of the American Republic. Although the nation might have grown and flourished if Rhode Island or Georgia had not ratified the Constitution, there is little doubt that if Virginia had stayed separate from these United States — recalling that Virginia then was also West Virginia, Kentucky and much of the frontier — America might well have dissolved into several smaller nations.

The Old Dominion State has a rich heritage of defending the true purposes of the Constitution. When the Federalists passed the Alien and Sedition Acts in 1798, in clear violation of the First Amendment, it was not the Supreme Court or the ACLU which vindicated America's rights. The legislature of Virginia, following that of its sister state, Kentucky, passed a resolution rejecting the authority of Congress to make such laws. (See: "Kentucky and Virginia Resolutions.")

One of the few enumerated powers granted to Congress (i.e., the federal government as only Congress has the power to legislate) was the power to pass laws regulating interstate commerce. Clause 3 or Section 8 of Article I delegates to Congress the power to regulate Commerce with Foreign Nations, and among the several States, and with Indian Tribes. This clause made a great deal of sense. Our nation could have no rational system of tariffs and trade with other nations if each state set its own independent rules, and interstate commerce could easily boil down to destructive squabbles and trade wars among the states.

The Interstate Commerce Clause, however, has been expanded far beyond its original purposes by Congress, beginning with a vigorous stretching during President Franklin Roosevelt's New Deal. Today, almost anything which affects interstate commerce is subject to federal regulation. Because buying apples from a local farmers fruit stand may in some hypothetical, microscopic fashion affect the sale of apples across state lines, this surreally broad interpretation of the Clause has extended federal power far beyond anything the Founding Fathers intended.

In an effort to rein in such overreach, on January 26 the Virginia House of Delegates passed the Intrastate Commerce Act, HB 1438, by a resounding vote of 65 to 33 although it may run into rough weather in the Democrat-controlled upper chamber. What affirmation is Virginia seeking? The salient language of its new Act reads:

> all goods produced or manufactured within the Commonwealth [of Virginia], when such goods are held, retained, or maintained in the Commonwealth, shall not be subject to federal law, federal regulation, or the constitutional power of the United States to regulate interstate commerce.

The Virginia approach to resisting federal intrusion on the constitutional rights of states appears to be

taking the predictable path of deferring final decision on the issue to the federal judiciary. Although considered by Jefferson the least dangerous branch of government, the U.S. Supreme Court of today has grown into the equivalent of a high priesthood which believes it can interpret the Constitution more precisely than other Americans. So now the question of the constitutionality of Virginia's new statute will wind its way through the federal court system. While some federal district court will eventually address the issue, and then the federal circuit court, there is no certainty that the U.S. Supreme Court will ever agree to hear the case thus there is no guarantee that Virginia will ever receive the courtesy of either the validation or rejection of its statute.

But more than merely an affirmation of the inherent limitations of the Interstate Commerce Clause is involved in Virginias state legislative bill. Whatever that Clause might have meant when the Constitution was ratified, America's founding document was soon amended, precisely because states feared that constitutional restrictions on federal power were not clear enough. Among those ten familiar amendments in the Bill of Rights is the Tenth, which provides: 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. The Tenth Amendment Center provides robust intellectual support for this position.

Because the federal government today disregards the clear language of the Tenth Amendment, many states have moved beyond simply requesting that federal agencies respect their rights into formal nullification of unconstitutional federal actions. Interestingly, the Commonwealth of Virginia itself instituted the practice of state nullification when it joined with Kentucky in 1798 in passing resolutions which nullified the Alien and Sedition Acts (federal laws which were clearly unconstitutional).

Since that time, state nullification has been used on several other occasions to rein in a tyrannical federal government. The Commonwealth of Massachusetts sought nullification of the federal Embargo Act of 1807, which limited the power of states to engage in commerce. The Massachusetts General Court (the states supreme court) rejected the right of the federal government to so limit the commerce of the states:

> A power to regulate commerce is abused, when employed to destroy it; and a manifest and voluntary abuse of power sanctions the right of resistance, as much as a direct and palpable usurpation. The sovereignty reserved to the states, was reserved to protect the citizens from acts of violence by the United States, as well as for purposes of domestic regulation. We spurn the idea that the free, sovereign and independent State of Massachusetts is reduced to a mere municipal corporation, without power to protect its people, and to defend them from oppression, from whatever quarter it comes.

The reduction of states to the status of mere instruments of the federal government is precisely what Virginia is attempting to thwart.

Idaho and other states have trod this path of nullification (in the case of these states, by legislative rather than state judicial action) to redress the states' grievances concerning the excesses of ObamaCare. Is such action allowed under the U.S. Constitution? That founding document of government was a compact which was ratified by states, not by popular vote and not by action of the existing national government under the Articles of Confederation. One of the assumed principles of law at the time the Constitution was adopted, and indeed before that, was that the traditions of English Common Law applied to government and to law as a reference of understanding and interpretation. Among those ideas in the English Common Law tradition is that parties to a contract have the right to

redress grievances through a disinterested tribunal (and federal courts could hardly be considered impartial when the respective rights of the federal government and states are the issue), and that contracting parties have the inherent right to rescind all or part of the provisions of a contract when other parties have failed to perform according to the terms of the agreement.

Many of this country's early victories for liberty, even during the colonial period, were based upon reference to these rules of construction and principles of honorable contracts. Might the Commonwealth of Virginia join other states in seeking more than simple petition to accept the rights of the states? Might the Commonwealth exercise the powers of any contracting party to void actions outside the contract?

Contrary to what some may say, this is not settled law and it is not wild radicalism. Nullification of specific extra-constitutional actions is, in fact, sober, clear, proper and constitutional.

Photo: Virginia States Capitol, Richmond