

An Article V Application: The State's Tenth Amendment Rights In Action

By Bill Walker

There is a growing advocacy, primarily from the political right, based on perceived infringement by the federal government of state sovereignty of nullification of federal acts by the states. State sovereignty advocates say the federal government, through federal legislation, judicial rulings or federal bureaucracy, has usurped powers, they believe are the sole province of the states. [Many of these supporters](#) believe the states possess the inherent "right" to nullify these federal statutes, rulings or acts which they find repugnant either to state law or the state's interpretation of the Constitution by ignoring them outright or refusing to enforce them. This alleged "right" is called the doctrine of nullification or simply nullification.

In order to advocate their belief nullification or [Tenth Amendment advocates](#) ignore the specific language of the Constitution prohibiting such state power. This specific language is contained in clauses two and three of Article VI of the Constitution sometimes referred to as the [supremacy clause](#). Clause two mandates "the Constitution and laws of the United States which shall be made in Pursuance thereof...shall be the supreme law of the land the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding." Clause three requires all judges, executive officers and members of legislature, state and national, shall take an oath of support the Constitution. Thus, any action by any state official to act in contrary of the Constitution, including the supremacy clause, is clearly unconstitutional.

Naturally, nullification proponents attempt to exploit the constitutional phrase, "made in pursuance thereof" asserting the laws, acts and rulings in question are not made "in pursuance" of the Constitution. Therefore, they assert, the state has the right to nullify such laws, acts or rulings as they are not made "in pursuance" of the Constitution. The problem with this argument is the Constitution does not assign the states the authority to decide what is "made in pursuance" of the Constitution. Instead, the Constitution assigns this authority to the federal courts under of Article III ("all cases, in law and equity, arising under this Constitution...") or to the President of the United States under his Article II "preserve" power ("and will to the best of my ability, preserve ... the Constitution of the United States."). Thus, the Constitution delegates the power to decide if something is constitutional or not to branches of the federal government and denied to the states.

The Tenth Amendment which mandates "powers not delegates to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people" reinforces this interpretation. As specific language elsewhere in the Constitution delegates the power to determine whether something done by the federal

government is made “in pursuance” of the Constitution, the Tenth Amendment serves further to stop state nullification of federal acts. In answer, Tenth Amendment and nullification advocates simply ignore the language of the Tenth Amendment, which they say they support, but in fact, only support so long as it suits their political purposes. Why? Because all the Tenth Amendment does for their political position is reinforce the fact nullification is unconstitutional.

State nullification of federal actions dates back to 1832 when federally imposed tariffs on the states triggered the nullification debate. History credits this doctrine to being a contributing factor causing the Civil War. However, in 1832, the states responded differently than today. Instead of wasting time advocating the Tenth Amendment and sending useless, easily ignored memorials to Congress, (which is Congress is now doing to these memorials) the states turned to their most powerful state power granted them in the Constitution: an Article V Convention. Applications of those days ([South Carolina Application, page 1](#) and [South Carolina application, page 2](#)) clearly show the states felt a convention was the place to discuss whether or not the states had the right to nullify federal actions *and assuming assent by a convention and ratification by the states a means whereby nullification became a state power*. By obvious implication, the states requesting an Article V Convention clearly indicates they realized language for the power they asserted to exist required constitutional amendment. As nothing has changed in the Constitution regarding this fact since 1832, it is obvious for nullification to be a valid constitutional power it still requires an amendment to create it.

Of course, in 1832, there were not enough applications for an Article V Convention by the states. Today there are [750 applications from all 50 states](#). These applications have never been discharged by Congress obeying the Constitution and calling an Article V Convention and therefore remain as valid as they day they were submitted by the states. Therefore, just as with all other applications, a nullification amendment remains on the agenda for convention consideration. In short, the Constitution provides a solution to resolve the issue of nullification but it lies not within the Tenth Amendment but Article V.

Nullification proponents today however, do not bother advocating an amendment to the Constitution to permit nullification. Actually achieving a solution for their issue is, most likely, beyond their political conception. Indeed, most nullification advocates oppose obeying the Constitution and calling a convention when the Constitution demands it. Thus, they demand the constitutional obedience but only to those parts, they politically support. They are, in fact, constitutional hypocrites. Is it any wonder with such brilliant logic of urging something be simultaneously be obeyed and vetoed that these advocates are not taken seriously? After all, to defeat them intellectually requires only they be permitted to publicly speak their political position. The illogic of urging veto and obedience of the same thing defeats them.

What is missed by these Tenth Amendment advocates is an Article V Convention application is a power of the Tenth Amendment. The power to compel Congress to call a convention belongs expressly, solely and uniquely to the states and nothing else. To

oppose the states submitting applications by use of this power is to support Congress's so-called "right" to ignore them. In the ultimate analysis, opposing this issue is to oppose the very issue, the Tenth Amendment, they say they support. By denying the powers assigned the states in the Constitution, these advocates actually weaken not only these powers but the Tenth Amendment as well by permitting the government the right to interfere with those powers actually assigned to the states and not assigned to the federal government. Thus, the principle of federal government interference is established by those who say they oppose such interference but whose actions serve to advance that interference.

One cannot open the door to tyranny and not expect a tyrant to enter. By advocating scrapping the Constitution by permitting the government to ignore Article V, all that is achieved by Tenth Amendment advocates is destruction of their own advocacy. Once they have conceded government can veto the Constitution, it is up to the government alone to decide which parts of the Constitution it will choose to destroy. Is it any surprise a tyranny, having first taken away the power that can stop its actions by refusing to call a convention would then move against the only group (the states) strong enough to contain it by the obvious expedient of constitutional annexation of that group's powers?

The Constitution provides many means whereby the terms of the Tenth Amendment are enforced and without doubt, an Article V convention call application is the most powerful and effective means designed within the Constitution to effect the terms of the Tenth Amendment. Through this power, the states can hold the federal government accountable, which by all reports, is the objective of the Tenth Amendment movement. Clearly, the movement believes the states can be trusted more than the federal government to steer this country in the proper direction.

However, when it comes to the states using their most powerful tool to accomplish this task of setting direction for this nation, the Tenth Amendment movement opposition to an Article V Convention proves they really do not trust the states either. Remember we are discussing a STATE convention to propose amendments, which these advocates believe if called, will overthrow our Constitution, take away all our rights and impose a new Constitution by fiat. So much for believe Tenth Amendment advocates really support state sovereign rights. How else can it be explained why a movement demands action by the states but opposes the states taking real action? The Tenth Amendment may express the right of the states and their sovereignty but it is in an Article V Convention that the power to enforce that right exists. Before the Tenth Amendment movement demands the government obey the Constitution, it first needs to decide if it truly is serious about accomplishing the goals of achieving a balance between the states and federal government. Perhaps, in fact, all this movement wishes to do is waste Internet bandwidth supporting useless state resolutions, which neither have force of law nor are even binding on the state, which proposed them, or on the federal government to which they are aimed.

Perhaps, as some in the movement have expressed, amendments will not accomplish anything and therefore a convention will not work. The government will simply ignore any amendments made a convention. Yet these people believe the use of an amendment,

the Tenth Amendment, is the answer to confronting the government. Again, these Tenth Amendment advocates present a conflict in logic; if the government can ignore amendments because they have no authority over the government, then it follows any effort to use an amendment to effect change on the government must automatically fail. Thus, any attempt to use the Tenth Amendment to accomplish change will fail. However, they hold the Tenth Amendment cannot fail because it has the power to compel obedience by the government, which they concede can ignore amendments. To break this constitutional Gordian knot the Tenth Amendment movement will have to decide the Constitution (and its amendments) do have the power to control the government or they do not. It cannot be both ways. This in turn means they will either have to support all the Constitution, including an Article V Convention, or none of it.

If these advocates have any question as to the power of Article V and the effect on the government they should remind themselves of one pertinent fact. Article V created the Tenth Amendment. The Tenth Amendment, whose advocates believe has the power to change the course of the government through non-binding resolutions by the states, would not exist were it not from Article V. Thus, any power of the Tenth Amendment derives from Article V. If these advocates believe their amendment is so powerful then they have no choice but to admit the method by which created it is even more powerful and effective. As these non-binding resolutions obviously have no effect, the Tenth Amendment should take a logical position for once and support an Article V Convention call rather than wasting any more time with useless, illogical positions and meaningless, non-binding resolutions. That is, assuming they actually want to accomplish something rather than just waste Internet bandwidth complaining about it.