Revolutionists, Not Constitutionalists

by Tim Baldwin

I am convinced that most advocates of state nullification who oppose Article V (hereinafter referred to as "nullification purists") are effectively revolutionists, not constitutionalists. An article that demonstrates my point is entitled *Tool for Liberty: Nullifying for the Sake of Nullification*, which was written by Tate Fegley and posted by the Tenth Amendment Center.

In this article I will show how:

(1) nullification purists do not promote real nullification but give only lip service to the idea;

(2) nullification purists invoke Natural Law, not Constitutional law, as their authority, thus putting them into the category of revolutionists, not constitutionalists; and

(3) if States have reached the point of needing Natural Law to defend themselves against the federal government, then nullification is not the remedy they should be advocating.

1. **Nullification Purists Do Not Promote Real Nullification But Give Only Lip Service to the Idea**

Real Constitutionalists Do Not Have to Accept Nullification

Fegley's first sentence in this article immediately demonstrates the narrow-minded (and really, the ignorant) approach that nullification purists hold. Fegley says,

We should be skeptical of anyone who claims to love liberty and yet does not support state and local nullification of unconstitutional federal laws.

In truth, the supposed authors of nullification, Thomas Jefferson and James Madison (not to mention a host of Originalist constitutional scholars) denied that States have the power to unilaterally nullify a federal law, and I have written about this before. Right away, Fegley's statement seems foolish and discredits his position.

Real Nullification Is Nothing Without Force

That one should be skeptical about people who deny nullification depends on what "state and local nullification" means. If "nullification" means, a State not helping the federal government enforce its laws within that State, then yes, nullification is a constitutional right of the States as opined by the United States Supreme Court in *New York v. US* and *Printz v. US*. People who deny this deny the essential ingredient of Federalism, but this is hardly a point of contention among the legal and political community, and it is not what nullification purists mean by "nullification".

According to the Tenth Amendment Center, "nullification" means "any act or set of acts which renders a law null, void or just unenforceable."[1] But "rendering a law" null and void is an incomplete definition of law. Real nullification, to be enforceable, must be a law, and a law without force is no law at all. A State can nullify the entire federal code if it pleases—and why stop there? Why not nullify bureaucracies, offices, congressional decisions, etc.? Whatever, but what good does nullification do unless the State enforces it? Notice, the Tenth Amendment Center's definition of "nullification" does not include an enforcement component, which means the Tenth Amendment Center does not advance nullification as a law, but

nullification as an idea.

Looking deeper into the matter, what is the effect of a real nullification effort (i.e. the use of force) and what would be caused if States conflicted in which portions of federal law they chose to forcibly resist? Presumably, the liberal states would resist laws that protect conservative ideas, and conservative states would resist laws that protect liberal ideas.

I do not have the space in this article to demonstrate the result of this, but common sense should provide the answer: the effect of such widespread contentions results in the dissolution of the union. A house divided against itself cannot stand, as the Bible says. Nullification purists do not view nullification as reaching this point, however, and seem to ignore it altogether; neither have they articulated a plan for the union if the States, in fact, entered that realm of nullification.

Regardless, the recent “nullification movement” shows that States really do not intend to nullify anything because not one State has enforced nullification. Yes, they give lip service to nullification by passing a “law”, but when the federal government enforces the law nullified, no State uses force to stop that enforcement; and even if a State did use force, the matter is quickly brought to and decided in federal court, thereby estopping the State from using further force.

Does nullification, as defined by the Tenth Amendment Center, have political and social effect? Of course; because it reveals the current will of the people, which is always important; but it is not law because law requires force. Constitutional scholar, Ryan Card, observed this when speaking of the States nullifying Obamacare. He said

[D]espite being void of constitutional authority to nullify federal legislation,…nullification can be employed by states as a powerful political tool in opposing federal legislation. As the majority of states move to nullify federal health care reform, state legislatures signal to the federal government that implementing such reform will be a difficult task as states will be sluggish to give effect to national health care reform within their borders. Widespread state opposition to national health care reform also places intense political pressure in an election year on those congressional leaders who voted for such reform. (*Can States "Just Say No" to Federal Health Care Reform? The Constitutional and Political Implications of State Attempts to Nullify Federal Law*, 2010 B.Y.U.L. Rev. 1795, 1798.)

The question becomes, if nullification purists really believe nullification is the answer to the nation’s political situation, why do they not propose any plan to actually enforce nullification? Sure, they are happy to say what the “Supreme Law of the Land” is or is not, but they will do nothing to enforce the law. That they ignore the essential element of what makes law the law shows that they do not truly believe in nullification as a practical remedy to “restore the Constitution.”

But again, if the States were to actually “appeal to the sword” (see Madison, Federalist Paper 39, “[the federal judiciary] is clearly essential to prevent an appeal to the sword and a dissolution of the compact”), it would result in the dissolution of the union anyway (requiring a constitutional convention eventually). Hamilton said this well in Federalist Paper 15 when he addressed the issue of whether federal law and its enforcement should depend on State approval:

It is evident that there is no process of a court by which the observance of the laws can, in the last resort, be enforced. Sentences may be denounced against them for violations of their duty; but these sentences can only be carried into execution by the sword. In an association **where the general authority is confined to the collective bodies of the communities, that compose it, every breach of the laws must involve a state of war; and military execution must become the only instrument of civil obedience**. Such a state of things can certainly not deserve the name of government, nor would any prudent man choose to commit his happiness to it.

Simply put, when States begin using force to resist the federal government, government ceases to exist and the union is dissolved. Thus, a real nullification movement is, in reality, a revolution movement.

Montana Firearms Freedom Act Example

Interestingly, Fegley does not highlight or give any examples of the real definition of nullification; that is, a State **passing** AND **enforcing** nullification. Rather, Fegley merely points to the typical passive version of "nullification," using Montana's Firearms Freedom Act (MFFA) as this example. Let's look at MFFA to see how it does not fit within the definition of nullification, thus showing that even nullification purists do not advance a real nullification movement.

MFFA (which I helped defend in the District Court and United States Supreme Court, representing 30 Montana State Legislators), is not nullification. MFFA is a law that strictly defines what intrastate commerce is relative to the making, selling and buying of firearms within Montana and to define when that commercial activity is subject to Montana's exclusive police power. MFFA *worked within the current confines of federal law* and tried to (re)define the intrastate commerce in such a way that would exempt MFFA from federal jurisprudence relative to Congress' Commerce Power. Thus, MFFA never nullified a federal law.

In addition to not having a nullifying element to the law, MFFA did not have an enforcement element. Too, Montana did nothing to enforce the law contrary to any federal law. It did what all States do when they nullify a federal law: go to court and hope the judiciary redefines the Commerce Power.

After MFFA became law and suit was filed in federal court to uphold MFFA, Montanans who dealt with firearms acknowledged that federal government can and will enforce federal law regardless of MFFA. Consequently, they complied with federal law, not MFFA. Since MFFA has been declared unconstitutional by the federal District Court and Ninth Circuit Court of Appeals—with the United States Supreme Court denying petition for certiorari review—MFFA is a dead letter. Even the most active nullification proponents in Montana are not demanding that the Governor enforce MFFA (which is still Montana law) in spite of the federal courts' rulings. Therefore, MFFA lacked the moral compulsion necessary for law to work.

Pray tell, how is this kind of nullification changing federal law or "restoring the Constitution"? How can such a forceless tool overcome the monstrosity of long-standing federal power, practice, and precedent? Yet nullification purists insist that nullification is our only and best tool. Something is very wrong with this approach to "restoring liberty."

1. **Nullification Purists Invoke Natural Law, not Constitutional Law, as Their Authority**

Nullification purists claim that all government actions must be taken *under the authority of the Constitution* and any action taken outside of the Constitution's authority is *per se null and void*. In striking contradiction, however, they claim that as long as a State believes a federal law is unconstitutional, they have a NATURAL RIGHT to nullify (and presumably, forcibly resist) that federal law, regardless of whether nullification is constitutional.

Fegley demonstrates this saying,

the burden of proof should be on those who reject nullification to not simply present a rehashed argument…about why [nullification] isn't constitutional, but to show why, if one cares about liberty, she should be against nullification.

Wait! So, States should not be concerned about the constitutionality of nullification, as long as they are getting the results they want (as if the loosely defined word "liberty" is the standard of constitutional law—it is not!). Fegley continues his disregard for constitutional law, stating,

Perhaps they would retort that their goal isn't to show that nullification isn't good for liberty, but simply that it's not constitutional. If this is the case, then they disagree with Lord Acton when he said, "Liberty is not a means to a higher political end. It is the highest political end."

Yes, protecting liberty is the purpose of government's institution. However, to conclude that liberty does not exist in the current form of government only confirms that the constitutional system needs altering or abolishing, as the Declaration of Independence plainly teaches. Liberty, as defined by whomever, is not a rule of law; the Constitution is. Until the States or people dissolve their political connection to the Constitution, they are bound to follow it.

In addition, Fegley states that as long as a State believes it is accomplishing "liberty", then the Constitution need not stand in its way. Really!? Let's see—what would nullification purists say about federal officials who proclaimed this as the basis for their authority?

The Founders stated unequivocally, if the States do not like a constitutional provision, effect or even an abuse of the same, their duty is not to ignore the Constitution. Their job is to amend the Constitution under Article V of the Constitution—the method by which the States have authority to change the way the system operates. But Fegley rejects Article V as a useful remedy in the Constitution despite the Founders' plainly stated purpose of Article V. He claims that nullification is the ONLY means of protecting liberty, stating,

This is why we, as lovers of liberty, must support nullifying for the sake of nullification: **there really are no other realistic and reliable means for enforcing the limitations of the Constitution**.

This statement is, by the expressed language of the Constitution itself, WRONG! If you are going to claim to be a constitutionalist, you must accept Article V. Too, you cannot use Natural Law as the basis of political action as long as the Constitution is still in force and as long as you are still party to it.

The use of Natural Law is a blaring contradiction for self-identified constitutionalists, however, because you cannot have it both ways: the States cannot use Natural Law as the basis of power to act outside the Constitution (while trying to enforce the Constitution!) but limit the federal government's actions strictly by the Constitution. Whatever moral basis can be used by the States to pass and enforce laws can also be used by the federal government to pass and enforce laws because *both governments derive their power from the same source: the people* ("the people are the only legitimate fountain of power," Madison, Federalist Paper 49).

As a matter of observation, if the States have reached a point of invoking Natural Law as the higher authority to act in an extra- or unconstitutional manner, then why do they, in opposing Article V, insist that the States be bound by whatever the Constitution requires under Article V; or as they say, they would be forever bound by the most tyrannous amendments imaginable with no recourse? Why would the States not use Natural Law to declare their independence from the States that attempted to force such tyranny on them and take other actions sanctioned by Natural Law? Nullification purists ignore this, thus showing that they use Natural Law to advocate their agenda on one hand yet deny the use of Natural Law to oppose an agenda on the other.

After all, if "liberty" is the highest law, then what need is there for a Constitution as the "Supreme Law of the Land"? Why have a union with a central government? If States can nullify, ignore and oppose federal laws at whim, the States do not need a union and can do what they want, when they want and how they want. And what moral or constitutional authority would any other State or government have to stop them? Clearly such a union is no union at all.

1. **If States have reached the point of needing Natural Law to defend themselves against the federal government, then nullification is not the remedy they should be advocating.**

If States have reached the point of needing to invoke Natural Law as the higher authority of liberty, then under that scenario the American union is beyond the pale of salvation anyway and nullification is fruitless. Political philosophers that shaped Western politics, including the Founders, agreed, once a political body must invoke Natural Law as the basis of their authority to resist the government, then the social compact that formed that political society is dissolved or is on the brink of dissolution.

James Madison explained this well in his letter dated September 1829, relative to the issue of whether State nullification was a constitutional remedy; and if not, what remedies did the States and people have to correct or protect against a usurping federal government. Madison explained (source) the following.

A fundamental error lies in supposing the State Governments to be the parties to the Constitutional compact from which the Govt. of the U. S. results…**The real parties to the constl. compact of the U. S. are…the people** thereof respectively in their sovereign character, and they alone, so declared in the Resolutions of 98, and so explained in the Report of 99…

As these distinct portions of power were to be exercised by the General Govt. & by the State Govts; by each within limited spheres; and as of course **controversies concerning the boundaries of their power wd. happen, it was provided that they should be decided by the Supreme Court of the U. S**. so constituted as to be as impartial as it could be made by the mode of appointment & responsibility for the Judges.

Is there then no remedy for usurpations in which the Supreme Ct. of the U. S. concur? Yes: constitutional remedies such as have been found effectual…whilst the responsibility of the Genl. Govt to its constituents continues:--Remonstrances & instructions--recurring elections & impeachments; **amendt. of Const. as provided by itself & exemplified in the 11th article limiting the suability of the States**…

Finally should all the constitutional remedies fail, and the usurpations of the Genl. Govt. become so intolerable as absolutely to forbid a longer passive obedience & nonresistance, a resort to the original rights of the parties becomes justifiable; and redress may be sought by **shaking off the yoke, as of right, might be done by part of an individual State in a like case; or even by a single citizen, could he effect it, if deprived of rights absolutely essential to his safety & happiness**. In the defect of their ability to resist, the individual citizen may seek relief in **expatriation or voluntary exile** a resort not within the reach of large portions of the community.

Madison lists the following remedies that would *allow the union to remain intact*: (1) remonstrances and instructions, (2) recurring elections and impeachments, and (3) amending the Constitution. Notably, Madison never mentions state nullification in that list. The remedies Madison lists afterwards are those remedies that *lead to dissolution of the union*: (1) resort to original rights (i.e. Natural Law), (2) shaking off the yoke by individual States or even by a single citizen, and (3) absent the ability to resist, the individual citizen seeking expatriation or voluntary exile.

Looking at where nullification purists say the nation is on Madison's scale, it is clear they are invoking Natural Law; and according to Madison, such a remedy leads to the dissolution of the union. Fegley, in fact, states we have reached a point where "[f]ederal courts have proven that they are capable of making the most outlandish arguments in order to expand federal power." Or to put it as Madison did, the "usurpations of the general government [have] become so intolerable." But Fegley ignores what Madison says about the effect of invoking Natural Law and ignorantly declares that state nullification will save the union, not dissolve it.

Given the very plain understanding of what Madison explained, Fegley's following comment appears all the more absurd:

If we are to seriously accept the idea that the Framers of the Constitution constructed a system that would allow nine judges in black robes (or, more accurately, five who agree with one another) to have a monopoly in deciding the most minute details of the lives of over 300 million people, we have to say that the Framers created an oligarchy, not a constitutional republic

Fegley clearly does not like what the Constitution created in the federal judiciary and calls this an oligarchy (in fact, Patrick Henry called the Constitution an oligarchical and monarchical constitution—I suppose Fegley chooses to ignore Henry's assessment and believes the Constitution is something perhaps it never was). Yet the truth is, the Constitution DID establish a federal judiciary to determine controversies involving the Constitution and the State and federal governments. James Madison explained the federal judiciary's authority in Federalist Paper 39, stating,

It is true that in controversies relating to the boundary between the two jurisdictions [between state and federal], the **tribunal which is <u>ultimately</u> to decide, is to be established under the general government**…[S]uch tribunal is clearly essential **to prevent an appeal to the sword and a dissolution of the compact**.

Clearly implicated in the Constitution's principles is that when the United States Supreme Court no longer protects the boundaries of state and federal sovereignty, the States' remedies filter into the following fundamental actions, as Madison explained: 1) Article V Convention, 2) Constitutional Convention (presumably to dissolve the compact and form another), or 3) revolution.

The Founders all agreed that the States must use the convention remedies before dissolving the union and revolting—obviously to avoid violence. Yet, nullification purists completely ignore this and insist that nullification is the only remedy the States have (regardless of constitutionality), and claim that whoever denies nullification is suspect of being liberty's enemy. Nonsense!

In fact, to avoid needing Natural Law to defend against federal encroachment, the States' are duty-bound to first apply for an Article V convention. If that does not work, then they would be duty-bound to call a Constitutional Convention. If that does not work, then the following may be inevitable as Hamilton expressed:

[A]s to those mortal feuds which, in certain conjunctures, spread a conflagration through a whole nation, or through a very large proportion of it, proceeding either from weighty **causes of discontent given by the government or from the contagion of some violent popular paroxysm**, they do not fall within any ordinary rules of calculation. When they happen, they commonly amount to **revolutions and dismemberments of empire**. **No form of government can always either avoid or control them**. **It is in vain to hope to guard against events too mighty for human foresight or precaution, and it would be idle to object to a government because it could not perform impossibilities**. (Federalist Paper 16).

Simply stated, "If the plan of the convention, therefore, be found to depart from the republican character, its **advocates must abandon it as no longer defensible**." James Madison, Federalist Paper 39.

Conclusion

Nullification purists have revealed where they stand. They believe that the Constitution does not form the basis of the political action they desire. Rather, Natural Law does. Yet, they refuse to understand the political and historical significance of this supposition. If the necessity of invoking Natural Law is real, then they should change their titles from *constitutionalists* to *revolutionists* because every revolution in the history of mankind began by invoking, not the "written law of the land," but Natural Law. This is what nullification purists are doing now; yet they are supposedly trying to "restore" the very thing that is causing

the demise they decry, not realizing that nullification is the incorrect method of such restoration but is the means of dissolving the union.

Madison explained that the States would have three basic options to correct or protect against a usurping federal government once the Supreme Court no longer protects the boundaries of state sovereignty: 1) Article V Convention, 2) Constitutional Convention and 3) Revolution. Which of these destinations do nullification purists prefer? Which of these destinations is most prudent? And which of these remedies are nullification purists encouraging?

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[1] Compare nullification, however, to “interposition” where the States simply do not help or assist the federal government in the execution of federal law. States are doing this now and more are introducing legislation to this effect. But this “interposition” approach does not contest the power of the federal government to pass and enforce its own laws directly on the people. In other words, interposition does not attempt to act outside the scope of constitutional limits. This has been upheld by the Supreme Court as a valid constitutional authority of the States.