

Correcting a Common Tenth Amendment Center Misunderstanding of "Nullification"

By Richard D. Fry, General Counsel, Patriot Coalition

In the below article by Tenth Amendment Center founder Michael Boldin, [Correcting a Common Libertarian Misunderstanding on Nullification](#) (i), Boldin says of the libertarian movement generally, and Dr. Edwin Vieira (ii) in particular,

"...nullification isn't their expertise. It's ours."

The Tenth Amendment Center's spin on "nullification" appears to promote what Dr. Vieira suggests is wrong with America in his July 20, 2009 article "[If Not Now, When?](#)"

"America is suffering the [transmogrification](#) of her legal system from the rule of law to the lawlessness of rulers. With the aid of puppet-politicians, media propagandists, and other front men, influential factions and special-interest groups are systematically seizing control of the apparatus of law so that they can use the law to break the law under color of the law—while treating everyone who justifiably opposes them as, if not actual lawbreakers, "extremists" only one short step removed from outlaws."

Dr. Edwin Vieira, Ph.D., J.D., [To The Point: "If Not Now, When?"](#)

Who is the Tenth Amendment Center?

I assure you that the Tenth Amendment Center (TAC) feels this way about everyone else as well. No one else can possibly know as much about "nullification" as TAC does. One might say TAC invented "state nullification" and one would be right to say so, TAC did *invent* it.

Michael Boldin is the founder and leader of the TAC, a national group. He is the primary spokesperson of TAC. Boldin believes he and TAC are the leading entity and spokesperson educating and promoting "state nullification."

I was told by one of his supporters that he (the supporter), Boldin and a small group of others revitalized "nullification." He was very adamant about it. It is as if they consider it "their thing."

As you might guess from the name of his organization, Tenth Amendment Center, Boldin believes, or at least he espouses the belief that "state nullification" is based in the Tenth Amendment of the Constitution, and it's a State action.

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The Legal Basis for Nullification

First, "nullification" as espoused by Jefferson in the *Kentucky Resolutions of 1798* is in fact constitutionally based. Jefferson said of it:

"...whenever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force..." (iii)

So in Jefferson's view nullification is predicated on an unconstitutional act, i.e., an act outside the general government's enumerated authority as delineated in the Constitution. Madison also had this belief. (iv)

Another way to say "unauthoritative, void, and of no force" is to say "null," which legally speaking means "having no legal validity."

Five years later, the U.S. Supreme Court recognized the same principle in a formal holding. Chief Justice John Marshall said for the Court:

"...a law repugnant to the Constitution is void...." (v)

Chief Justice Marshall made it clear that this was a general principle of constitutional law, not just of the U.S. Constitution. Marshall did rely upon specific language in the Constitution as part of the Court's support for this holding. Marshall noted:

*"It is also not entirely unworthy of observation that, in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned, and not the laws of the United States generally, but those **only which shall be made in pursuance of the Constitution**, have that rank." (Emphasis added.)*

Marshall was quoting Article VI clause 2 of the U.S. Constitution, also known as the Supremacy Clause. (vi) Subsequently, the Court in addressing unconstitutional enactments has stated:

"An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment."

- Ex parte Siebold, 100 U.S. 371,376-77 (1879)

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"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as inoperative as though it had never been passed."

- Norton v. Shelby County, 118 U.S. 425, 426 (1886)

These cases tell us that an unconstitutional enactment is *ipso facto* (by that fact itself) null and void, and not enforceable.

Automatic Constitutional Nullification

Article VI is a self-actuating (automatic) nullification provision. If a federal enactment is not in "Pursuance" of the Constitution, but Congress passes it, and the President signs it, it is null, period. Note again the trigger is the fact the enactment is unconstitutional.

Note also the Court does not say such enactments are "voidable;" it says they are "void" as in when passed and signed. The Court does not make them void, the Constitution does. Article VI, Clause 2 does.

So "constitutional," i.e., "Article VI," or "Jeffersonian" nullification, whatever you want to call it:

1. Only applies to unconstitutional enactments, and
2. Occurs automatically at the constitutional/federal level.

Tenth Amendment Center's "Nullification"

Michael Boldin does not accept these basic underlying principles of nullification, stating: (vii)

"So here's how we define nullification over at TAC: 'Any act or set of acts which has as its end result a particular law being rendered null and void, or unenforceable within a particular area.'"

But he explains further:

*"While I often refer to marijuana states and nullification, that's not the only thing happening. It's just the most effective so far. This really can and should be **applied to virtually anything the federal government does (a vast majority of which is unconstitutional in the first place)**." (Emphasis added.)*

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TAC believes "nullification" is an act, and that this "act" is what "nullifies" a law or enactment; but only if the "act" makes the law or enactment "null and void" or "unenforceable" within a "particular [geographical] area."

As I have shown, nullification is not an act; it is automatic. It applies to an enactment which is inconsistent with the Constitution and it makes such act null everywhere in the Republic. There is no such thing as an enactment which is constitutional in Kansas and unconstitutional in Florida.

There is no "State Nullification"

There is no such thing as "State nullification" because:

1. No pre-constitutional authority by the States to nullify an act of the general government existed.

The general government was created by the Constitution so no such authority could have existed before the general government itself existed. Such is simply a legal and physical impossibility.

2. Therefore, any authority for state nullification of laws by the general government must come from the Constitution. There is none.

The often-made argument that such state nullification power comes from the Tenth Amendment does not hold water because the Tenth Amendment only refers to sovereign powers of the States which existed before the Constitution. As we have shown, there were none related to the federal government. The *Coup de gras* for the "State nullification" argument is even more ironclad.

3. As an unconstitutional enactment is automatically nullified at the constitutional level, thus there is no "law" to be "nullified" by the States.

So when Boldin says;

"This [nullification] really can and should be applied to virtually anything the federal government does (a vast majority of which is unconstitutional in the first place)" (viii)

(Emphasis added.)

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What is he advocating? Well whatever it is, *it is not "nullification," or at least it is not constitutional, Article VI nullification.*

It sounds like he is advocating lawlessness and anarchy. It would appear Boldin's real problem is not with unconstitutional enactments *per se*, but rather federal law in general.

For whatever reason, TAC has twisted "nullification" into the myth of "State nullification," and then twisted that into not only nullification of unconstitutional enactments (a Constitutional/legal principle), but "nullification" of any constitutional laws that TAC does not like. These unfriendly laws appear to be mostly drug and marijuana laws.

There is no legal or constitutional principle of "nullification" of a constitutional law. Such as a construct is in the mind of TAC, yet it uses the term interchangeably to apply to both constitutional laws and unconstitutional enactments that never become law pursuant to Article VI Clause 2.

Federalist Principle of Voluntary Cooperation

TAC also confuses the principle of Article VI nullification (and perhaps its extra-constitutional "nullification") with *non-cooperation* under principles of federalism. Boldin stated:

"So, disagreeing with both Judge Napolitano and James Madison, libertarians of this particular stripe tend to tell us that such noncompliance doesn't work. "The feds will just come in and enforce anyway," is a common response. Or, as Edwin Vieira recently stated, "This is not nullification; rather, it is simply non-cooperation." And, "it is a stop-gap measure at best." (Emphasis added.)

It is well-settled law that under principles of federalism, the general government may not require the States to enact particular legislation (such as the militia law per the 1903 *Dick Act*, which all 50 States have enacted) and it cannot require the States to participate in or administrate any federal regulatory scheme or program. (ix) **States are not required to enforce federal law.**

This principle of non-cooperation or voluntary compliance is not constitutionally based, but based upon federalism, and relates only to constitutional laws. (In essence, State officers are

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prohibited under Article VI, Clause 3 from supporting or enforcing enactments which are unconstitutional under Article VI, Clause 2. or proposals for such.)

When a libertarian told Boldin the federal government could come in and enforce the law, even if the States did not comply, or when Dr. Vieira stated such action (non-compliance) was "*not nullification; rather, it is simply non-cooperation . . . it is a stop-gap measure*"; they were both 100% correct.

Boldin took offense because he lives in a different "reality." This drove Boldin to say:

"While I certainly respect the contributions made in the broader constitutional understanding and the libertarian movement by people like Vieira, nullification isn't their expertise.

It's ours."

Yes, Dr. Vieira, a world class scholar and practicing attorney for thirty years, and the rest who point out the legal reality of what TAC promotes, are wrong because no one has the "expertise" in "nullification" that TAC has. Boldin's vast level of inexperience has overshadowed Dr. Vieira's four Harvard degrees, his scholarship (authored five books related to our constitutional situation (2002-2014)), and his decades of experience and research.

This statement by Boldin is true in a twisted sort of way because no one else could understand that "nullification," as used by TAC, only exists in an alternate reality called *TAC world*. What this libertarian and Dr. Vieira did not understand is that TAC has its own private brand of "nullification" which is only partially related to constitutional nullification. How dare the libertarians confuse the issue with facts and legal principles.

Interposing is not Nullification

TAC also would have the States believe that they need not interpose to "nullify" a federal enactment, but rather that interposing is just one more tool the states have in their mystical "nullification" quiver from which to choose.

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Boldin says:

"The common version of this opposition [to nullification] is that nullification doesn't count unless there's some kind of physical stand off between state or local government officials and federal government officials." (x)

TAC does not even realize that "interposing" is not part of nullification at all. It has a different source for its authority. Interposing is an absolute **duty** under the ancient inherent sovereign principle of Allegiance and Protection.

Never heard of Allegiance and Protection? It is noted at least three times by the Apostle Paul, (xi) three times in the Declaration of Independence (xii) and it is the "allegiance" you refer to when you say " I pledge allegiance to the flag . . ." and has been recognized by the Supreme Court in many cases. (xiii)

The States have a **duty** to interpose any time anything or anyone threatens our rights, including our right to "Life, Liberty" and property. If a hostile band of Canadians unexpectedly sweep down from the north to conquer and pillage, the states have a **duty** to stop those wild-eyed Canadians.

They have a similar **duty** to stop the general government from "infringing" upon our right and duty to be armed, to stop it from regulating our personal property rights out of existence, or from indefinitely "detaining" us without a warrant based on probable cause issued by an independent judge.

James Madison referred to this duty in the *Virginia Resolution of 1798*. (xiv)

TAC does not know of or understand this principle. It believes interposing is optional.

Interposing means exactly what it says: for the State to get between its citizens and the interloper. If the interloper wants the citizens, it must go through the State to accomplish its objective.

If the interloper is the general government preparing to unlawfully confiscate a citizen's arms, or to indefinitely detain a citizen without benefit of a probable cause arrest warrant, there is really no other way to protect the citizen's rights but physically get in the way of the feral federal agents. **Interposing is a duty; it is not an option!**

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One of the main problems we have in the Republic now is that governments treat their duties as optional. How does TAC propose to restore the Republic by doing the same? The governments' duty is to "secure" the people's rights. Shouldn't we teach the people their rights and motivate them to demand the governments uphold the governments' duty? Can we restore the Republic any other way?

Recall interposing is necessarily a defensive posture. Think of the rattle snake coiled up ready to strike if bothered as in "Don't tread on me."

To allow agents of a feral federal government to effect a detention of someone for violating unconstitutional federal firearms enactments (all restrictive federal firearms enactments are unconstitutional) and only respond by sending a summons to the offending federal agent, if the State can find out who that is, is a violation of the duty of Protection and is not a vindication of the citizens' rights.

This is exactly what the Kansas Second Amendment Protection Act did. It also conceded the fact that the general government has authority to regulate (infringe) firearms that travel either commercially or privately in interstate commerce.

This act codified a violation of the state officers' duty under their oath to support the Constitution and the state's duty of Allegiance and Protection. We will not save the Republic by conceding such ground and further instilling in our public servants their blind belief in the supremacy of the general government.

Boldin quotes author Tom Woods as saying:

"The Tenth Amendment Center has done more than anyone in the world to promote the Jeffersonian idea of nullification." [Emphasis added] (xv)

I note TAC's "nullification" does include "Jeffersonian" nullification (Art. VI based on unconstitutionality), but it also includes federalism and anarchy. So Wood's statement is true in part, but it can also be said that 'TAC has done more to muddy the water as to what Jeffersonian nullification is than anyone else in the world.'

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TAC's bottom line is revealed with this statement from the subject article:

"More important than what qualifies as nullification is how well these efforts work."

This is just another way of saying the end justifies the means.

How does making a constitutional law "ineffective" restore the Constitution? It doesn't, but that does not really matter if your main objective is something other than restoring the Constitution. TAC does not understand constitutional "nullification," and what's more, does not want to understand it. It is merely interested in a technique, which it calls "nullification," that will give TAC what it wants, and that is to defy legitimate authority which restricts personal behavior in which some persons want to engage, and therefore want to end drug laws both federal (unconstitutional) and state which can be legitimate.

Isn't what TAC is advocating exactly what we are trying to stop the general government from doing, that is, acting in a lawless fashion in disregard for the rule of law?

TAC's Second Amendment Preservation Act (SAPA)

The Declaration of Independence, in Charge 23 against the King, states:

"He [the King] has abdicated government here, by declaring us out of his Protection and waging War against us."

When the **Second Amendment Preservation Act (SAPA)** does not criminalize and stop the general government's actions in unlawfully "arresting" citizens or seizing their firearms under bogus federal gun control "laws," it amounts to the State standing down or "declaring us out of [the State's] Protection."

The Kansas SAPA is even worse. Not only does it not interpose to Protect the rights of the citizen, as the state has a duty to do, the state, after requiring its law enforcement officers (who are under oath to the Constitution) to stand by and watch the unconstitutional seizures, then retains the option to send a summons to the offending federal agent.

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So, Kansas places more importance on vindicating its "sovereignty" than Protecting its citizens rights. The servant has put its interest ahead of its master's! Considering the citizens are sovereign in our Republic this would have been treasonous under the European concept of Allegiance and Protection.

How does this restore the Republic? How does this put us back in control of the Republic? How does this teach the State to uphold its solemn or constitutional duty, and not to "pimp us out" to the feds?

The TAC's **State Liberty Preservation Act** (anti-NDAA) only requires the state agents and employees not to assist the federal agents from applying the "law of war" against a U.S. citizen or other constitutionally protected person. This is once again the state "declaring [citizens] out of [the State's] Protection."

Think about this: the "laws of war" are rules prescribing conduct for the waging of war against some entity (generally a nation). Under the NDAA, war is being waged on "We the People!" Remember what Senators Graham and McCain said on the Senate floor: "America is the battlefield." So a state passing this bill is saying "although the federal government has declared war on you citizens, we will not protect you."

Outrageous!

How does TAC think that "We the People" supporting bills that exempt our State governments from their absolute duty to protect our lives and Liberty is going to restore the Republic or put us back in charge? The fundamental problem is that the governments, state and federal, are not upholding their duties to us and the Constitution (really the same thing). Doesn't this model bill simply re-enforce the problem?

TAC's Concept is Dangerous

TAC's brand of "nullification" is dangerous because it obscures the real problems we have with our "public servants" and perpetuates their failure to uphold their duty, including their duty to protect our rights.

TAC would have the States believe that they *may* "nullify" unconstitutional enactments and bad laws if they choose to do so. In reality the State officers have no power to nullify, but rather

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have **a duty** under their oath to support the Constitution to not comply with any unconstitutional enactment, and to in fact draw awareness to such. ***That is much more powerful!***

Hacking at the Root Evil

The root cause of the problems ailing the Republic is of course that "We the People" do not understand the Constitution and principles of federalism upon which our Republic is based. Therefore, we cannot hold our "public servants" accountable, even if we wanted to do so.

Those of us that realize it is "We the People's" ignorance and apathy that are killing the Republic should understand that TAC's twisted concept of "nullification" does not help get "We the People" back on track.

The primary symptoms of this root cause are that our public servants do not follow the Constitution or the will of the people within the bounds of the Constitution. As such, they no longer represent us but rather represent special interest groups including the GOP and Democrat parties.

Education is the Key

Our public servants need to be educated that under Article VI, Clause 3 (xvi) they have an obligation (duty) to have a working knowledge of the Constitution and they have a duty to apply that knowledge to every act they undertake. Their duty does not allow them to wait until someone else, including a federal court, decides if a law passes muster under Article VI Clause 2. That is their job.

They need to know that their duty to support the Constitution has no geographic or political boundaries and they are as obligated to resist an unconstitutional enactment of the Washington, D.C. government as any passed by the State government. That is the nature of federalism, which is part of the checks-and-balances on our government.

The oath to support the Constitution is as deep and wide as the Constitution and Republic it was intended to protect.

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Conclusion

Considering the root problem corrupting the Republic, we need to give Citizens the truth about their rights and their "public servants' " duties. Truth delayed is truth denied.

We can ill afford allowing the citizens to be misinformed about the reality of "nullification" and to be encouraged to support bills that allow the governments and the state and local officers under oath to support the Constitution to shirk their obligations.

The Constitution is not a smorgasbord that we or our public servants get to pick and choose from. The oath to support the Constitution requires the Constitution be followed in its entirety, every time in every situation.

The attitude that we can restore the Constitution and the Republic by supporting parts of it and conceding parts of it or ignoring parts of it is an immoral violation of one's oath to support the Constitution. It is like negotiating with cannibals on how much of you they are going to eat for dinner. You will always come out on the short end of that deal.

For the sake of Liberty,

Richard D. Fry
General Counsel
[Patriot Coalition](#)

Footnotes

[i] <http://tenthamentcenter.com/2013/08/23/correcting-a-common-libertarian-misunderstanding-on-nullification/#.UkJDAY0o6M8>

[ii] Dr. Vieira has earned four degrees from Harvard: A.B. (Harvard College), A.M. and Ph.D. (Harvard Graduate School of Arts and Sciences), and J.D. (Harvard Law School). He has practiced law more than thirty years, with emphasis on constitutional issues. In the U.S. Supreme Court he successfully argued or briefed the cases leading to the landmark decisions *Abood v. Detroit Board of Education*, *Chicago Teachers Union v. Hudson*, and *Communications Workers of America v. Beck*. He has written numerous books and articles in scholarly journals. His works include *Pieces of Eight*, *CRA\$HMAKER* (co-author) "How To Dethrone the Imperial Judiciary", Constitutional "Homeland Security," "The Sword and Sovereignty".

[iii] Kentucky Resolutions, Resolve One (1798) (Thomas Jefferson)

[iv] Virginia Resolution (1798) (James Madison) <http://billofrightsintstitute.org/founding-documents/primary-source-documents/virginia-and-kentucky-resolutions/>

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[v] *Marbury v. Madison*, 5 U.S. 137,180 (1803) " Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written Constitutions, that **a law repugnant to the Constitution is void**, and that courts, as well as other departments, are bound by that instrument."

[vi] " [This](#) Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[vii] <http://tenthamentcenter.com/2013/08/23/correcting-a-common-libertarian-misunderstanding-on-nullification/#.UkJDAY0o6M8>

[viii] <http://tenthamentcenter.com/2013/08/23/correcting-a-common-libertarian-misunderstanding-on-nullification/#.UkJDAY0o6M8>

[ix] *New York vs. Unities States*, 505 U.S. 114 (1992)(Plurality Opinion Justice O'Connor)
Printz v. United States - 521 U.S. 898 (1996)

[x] <http://tenthamentcenter.com/2013/08/23/correcting-a-common-libertarian-misunderstanding-on-nullification/#.UkJDAY0o6M8>

[xi] Acts 16;16-38 Acts 22: 22-29 Acts 23:12-32

[xii] Declaration of Independence,

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--**That to secure these rights, Governments are instituted among Men**, deriving their just powers from the consent of the governed... He has abdicated Government here, by declaring us out of his **Protection** and waging War against us...."

[xiii] *Minor v. Happersett*, 88 U.S. 162, 165, 21 Wall. 162 (1874), *Elk v Wilkins* 112 U..94 1884, *Luria v. United States*, 231 U.S. 9 (1913), *Reid v. Covert*, 354 U.S. 1,6 (1957)

[xiv] "That this assembly most solemnly declares a warm attachment to the Union of the States, to maintain which it pledges all its powers; and that for this end, it is their **duty to watch over and oppose every infraction of those principles which constitute the only basis of that Union**, because a faithful observance of them, can alone secure it's existence and the public happiness.

That this Assembly doth explicitly and peremptorily declare, that it views the powers of the federal government, as resulting from the compact, to which the states are parties; as limited by the plain sense and intention of the instrument constituting the compact; as no further valid that they are authorized by the grants enumerated in that compact; and that in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the states who are parties thereto, have the right, and are in **duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them.**"

[xv] <http://tenthamentcenter.com/2013/08/23/correcting-a-common-libertarian-misunderstanding-on-nullification/#.UkJDAY0o6M8>

[xvi] "[The](#) Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution;"