

Nullification

Thomas R. Cuba

2021 0107

I first became aware of the concept of nullification in 2010. Shortly afterwards I found and read a book by the prominent historian, Tom Woods: Nullification. The underlying concept is good: Specifically to resist Federal actions in violation of the 10th Amendment. The guiding principle is that the State government has a responsibility to protect her citizens from overbearing and unwarranted Federal actions. The dynamics are wrong.

What is presented in the book is the idea that a state has the authority to enforce the provisions of the Tenth Amendment to the United States Constitution. Specifically, "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 Amendment is pretty straightforward. To paraphrase, it means that if the States didn't specifically give a power to the federal government, then the federal government can't take it. That is a valid point. The States created the Federal Government by a treaty that we now call the Constitution. It's the dynamics of the proposal that give me caution.

Work through it. Imagine that Congress adopts a law that all four-door cars must be painted blue. Of, course, I'm using an absurd law to avoid discussing the law itself and derailing the logic. Under nullification, any of the fifty states could then pass a law declaring that the Federal Blue Car law doesn't apply in that state. The state law exercises the reservation in the Tenth Amendment. The federal law is nullified. That seems simple enough, and it is.

The problem is the human dynamics and the political thrashing about that will occur. Nullification requires the state to take action in order to reject the Federal imposition, leaving the do-nothing option open, thereby accepting the imposition. To nullify, a bill or resolution would need to be drawn up, go through committee, and then to a vote in each house in order for the federal law to be nullified.

The process would be controversial and possibly jeopardize funding for whatever totally unrelated project that the federal government chooses to use as leverage. The do-nothing option avoids political controversy.

Not being one to reject a good idea without offering an improved mechanism to achieve it, I offer the substitute: "Ratification."

Under Ratification, every Federal Act which places a financial burden on a state would automatically be sent to a panel of state judges for a determination of whether the Federal Law is consistent with the 10th Amendment. The result would be put in front of the legislature which would vote to reject the Federal initiative or to ratify it. Ratification is philosophically aligned with the states having created the Federal Government and all the amendments through a ratification process. While the ratification suggestion may sound as if it's the same process as that for nullification, the dynamics are different. First, before the federal law is allowed to be in effect in the state, the determination must be made and voted on. The result is that the political pressures will be on the Legislature to reject bad acts. Second, the process would require an action by the state. Ratification requires affirmation. The opportunity for Nullification can be ignored.