



Written by [Michael Tennant](#) on February 28, 2011

Montana Legislators Stick Up for the Constitution

The mainstream media can handle politicians who talk about cutting government on the campaign trail but abandon those views once in office. They cannot, however, deal with those who actually follow through on their promises, as witness an Associated Press story that is positively apoplectic about the “vision of the future” being presented to Montana residents by “newly elected lawmakers from the loose-knit, largely conservative anti-tax tea party coalition.”



“Their state,” writes Matt Gouras, “would be a place where officials can ignore U.S. laws, force FBI agents to get a sheriff’s OK before arresting anyone, ban abortions, limit sex education in schools and create armed citizen militias.”

In other words, the Montana legislature is taking seriously the Tenth Amendment, which states: “The powers not delegated to the United States by the Constitution, nor prohibited to it by the states, are reserved to the states respectively, or to the people.” Worse still, says Gouras, these “ideas are increasingly popping up in legislatures across the nation, as a wave of tea party-backed conservatives push their anti-spending, anti-federal government agenda.”

Such ideas are anathema to most politicians and to nearly all members of the press, who are highly biased in favor of an ever-larger, more intrusive federal government. Thus, Gouras quotes “veteran” state Rep. Walt McNutt (R) telling the conservative legislators to “stop scaring our constituents and stop letting us look like a bunch of buffoons.” (In sticking up for the federal government rather than the people he is supposed to represent, McNutt needs no help to resemble a buffoon.) House Minority Leader Jon Sesso (D), “exasperated” with a vote on a “declaration of sovereignty,” demanded to know “who decides if the federal government is acting unconstitutionally.” Gov. Brian Schweitzer (D), meanwhile, dredged up the old canard that “this talk of nullifying ... led to the Civil War.”

Ah, yes. Mr. Lincoln’s war: the last redoubt of the anti-nullification crowd. Never mind that state nullification, as Gouras points out, goes back almost to the beginning of the republic, as expressed in James Madison’s Virginia Resolution (1798) and Thomas Jefferson’s Kentucky Resolution (1799). These documents, drafted in response to the Federalist-dominated Congress’s overstepping its constitutional bounds by passing the Alien and Sedition Acts, declared that states, as the creators of the federal government, have every right to declare unconstitutional statutes null and void. Those who oppose nullification simply ignore this and declare that nullification brought on the Civil War, and immediately all nullification proponents are assumed to be pro-slavery.

Yet as Thomas E. Woods, author of perhaps the definitive book on the subject (coincidentally entitled *Nullification*), [explains](#), if nullification did cause the war, it was only because the North was nullifying



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such despicable things as the Fugitive Slave Act. The Wisconsin Supreme Court, he notes, even went so far as to declare the law unconstitutional in defiance of the U.S. Supreme Court. “Nullification was used throughout American history on behalf of free speech and free trade, and against unconstitutional searches and seizures, military conscription, and the fugitive slave acts,” Woods writes. One would think this would make nullification very popular on the Left; but since the Left is far more pro-Washington than it is pro-civil liberties, it continues to treat nullification as some far-Right, pro-Confederacy scheme rather than as a safeguard against an overweening federal government.

Schweitzer should know better than to label nullification “pretty toxic talk” likely to lead to war. He himself is a big player in a recent example of successful (at least for now) state nullification of federal law. Montana, along with 24 other states, passed legislation opposing the REAL ID Act, which mandates a *de facto* national identification card, effectively putting it “in limbo,” as Gouras puts it. Schweitzer boasted that his state had won the showdown with the Department of Homeland Security over REAL ID, thereby protecting Montanans’ privacy. What explains his reversal when it comes to, e.g., ObamaCare, which [at least 12 states](#) are considering nullifying? One obvious answer: REAL ID was a Bush administration scheme, while ObamaCare is the work of members of Schweitzer’s own party.

Gouras also reminds readers of the other standard anti-nullification argument: “legal scholars ... say the notion runs afoul of the clause in the U.S. Constitution that declares federal law ‘the supreme law of the land.’” This conveniently ignores the modifying clause that says that laws “which shall be made in pursuance” of the Constitution “shall be the supreme law of the land.” In other words, only laws that fall within the parameters of the Constitution have supremacy. States may quite properly ignore all others.

As to those other notions that Gouras finds so crazy, all are perfectly consistent with the Tenth Amendment and the desire of Montana legislators to protect their citizens from the excesses of the federal government. Abortion, after all, was a matter left to the states prior to *Roe v. Wade*. Likewise, education was strictly a state matter until the mid-twentieth century; Republicans in Congress were still vowing to abolish the Department of Education in the 1990s. “A well-regulated militia” is “necessary to the security of a free state,” according to the Second Amendment; and state militias were viewed by the Founders as bulwarks against both foreign and federal invasion. Certainly they were considered preferable to a standing federal army. Even the idea of having federal law enforcement subordinate to local law enforcement is to ensure that the feds do not trample on citizens’ rights.

Fortunately, Montana Republicans — at least those of the Tea Party persuasion — largely seem to be ignoring the caterwauling of the media and the establishment politicians. It helps that Republicans have a majority in the Senate and a supermajority in the House of Representatives — and that half of those representatives are first-timers, many of whom are Tea Party sympathizers. Of course, they’ll still have to deal with Schweitzer, who is obviously itching for a fight: He just got a new cattle brand that reads “VETO.” Given their numbers, Republicans may be able to override some of Schweitzer’s vetoes. Regardless, their mission to restore decentralized, constitutional government is worth the battle. Jefferson and Madison would agree.

Photo: The Montana state capitol.



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