



Written by [Joe Wolverton, II, J.D.](#) on June 25, 2015

Is Nullification Racist?

As one state government after another decides to remove the so-called Confederate flag from state houses and other public buildings, the Establishment media is taking the controversy and converting into an opportunity to attack nullification.

On June 23, the Huffington Post made the incredible leap from 19th century Confederacy to support for slavery to nullification, painting the entire package as a “warped view of the Constitution.”



Not content to wade into waters too deep for his skill set, the author of the *HuffPo* piece dives in head first, calling the history of nullification “ignoble.” We will set the story straight, correcting all the author’s misstatements and baseless revision of the historical record of the Constitution.

First, the HuffPo poster defines nullification as “the belief that the states are the ultimate arbiters of what is or is not constitutional and that the states are thus always free to ignore federal law.”

That definition is a mangled mixture of truth and fiction. A more correct and constitutionally sound interpretation of the principle of nullification can come through an understanding of the creation of the Constitution.

The states created the federal government and reserve the right to resist the exercise by Congress of any powers not specifically granted to it by the states in the Constitution.

Thomas Jefferson, James Madison, and the rest of the Framers would encourage states to demand that the government of the United States cease the constant abuse of power and confine its activities to those boundaries drawn by state representatives in the Constitution and later agreed to by separate ratifying conventions in the states.

The documents sent by the states to Congress announcing their ratification of the Constitution provide additional evidence of the founding generation’s appreciation of the states’ and federal government’s respective roles as creator and creation. In nearly every one of these letters, the state legislature or ratifying convention delegation explicitly reminds Congress that the consent of the states formed the federal government.

Delaware, for example, declared:

We the Deputies of the People of the Delaware State, in Convention met, having taken into our serious consideration the Federal Constitution proposed and agreed upon by the Deputies of the United States in a General Convention held at the City of Philadelphia.

New Jersey expressed a similar understanding of the parties to the constitutional compact:

Whereas a convention of Delegates from the following States, vizt. New Hampshire, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, met at Philadelphia for the purpose of deliberating on, and forming a constitution for the United States of America.



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Georgia's ratification notice letter also recorded the states' role as creators of the new federal government:

Whereas the form of a Constitution for the Government of the United States of America, was, on the seventeenth day of September, one thousand seven hundred and eighty-seven, agreed upon and reported to Congress by the Deputies of the said United States convened in Philadelphia.

And on, and on, and on. The ratifying conventions called throughout the 13 states understood that the delegates sent to Philadelphia in the summer of 1787 created a general government of limited power, retaining for themselves nearly the full panoply of powers they had exercised successfully for over a century.

If nullification is to be successfully deployed and defended, states' lawmakers must remember that the Constitution is a creature of the states and that the federal government was given very few and very limited powers over objects of national importance. Any act of Congress, the courts, or the president that exceeds that small scope is null, void, and of no legal effect. No exceptions. James Madison said it best in *Federalist* 45: "The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite."

Next, the author of the Huffington Post article assumes — he believes correctly — that the courts, not the states, should be the "ultimate arbiter" of what does or does not pass constitutional muster. The Founders had something to say about that proposition, as well.

In 1804, Thomas Jefferson wrote that giving the Supreme Court power to declare unconstitutional acts of the legislature or executive "would make the judiciary a despotic branch." He noted that "nothing in the Constitution" gives the Supreme Court that right.

In this standoff of states, Supreme Court, and federal government, the last man standing is the people acting in their collective political capacity as states.

Abraham Lincoln also recognized the lack of constitutional authority for the Supreme Court's assumption of the role of ultimate arbiter of an act's conformity with the Constitution.

Lincoln said that if the Supreme Court were afforded the power to declare whether an act of the federal government was constitutional, "the people will have ceased to be their own masters, having to that extent resigned their government into the hands of that eminent tribunal."

Consider also the opinion of eminent constitutional scholar Von Holtz:

Moreover, violations of the Constitution may happen and the injured cannot, whether states or individuals, obtain justice through the court. Where the wrongs suffered are political in origin the remedies must be sought in a political way.

He continues, regarding this "aristocracy of the robe":

That our national government, in any branch of it, is beyond the reach of the people; or has any sort of "supremacy" except a limited measure of power granted by the supreme people is an error.

It seems that the Huffington Post piece is another example of a journalist jealous of the vast powers usurped by the federal government using the mainstream media to brand as a "racist" or "secessionist" anyone who dares mention the concept of nullification as an answer to the growth of government or the increase in its oversight.



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To those who have been labeled a member of the vast right-wing conspiracy and to their accusers, we respond: Read the Virginia and Kentucky Resolutions again. Nowhere in those documents do Madison and Jefferson express a desire to weaken the union or violate the Constitution. To the contrary, their express purpose is to “prevent unjust and unconstitutional assumptions of Congressional power.”

As a matter of fact, Jefferson argued that if states were to secede and form a new, separate confederation, “the same difficulties might occur in the smaller union; and finally each unit fall apart into its colonial condition.”

And remember, the Kentucky Resolutions were drafted by the author of the Declaration of Independence and the Virginia Resolution was written by the Father of the Constitution. These were no disloyal or seditious separatists. Their intent was to prevent the union they helped form from devolving into an oligarchy whose reign would be more oppressive and tyrannical than George III ever devised in his most power-addled fantasy.

When viewed under the clear, unbiased lens of logic, there is no way to support a claim of anti-union intent in either the Virginia and Kentucky Resolutions or in the present-day calls for nullification of any of the multitude of federal encroachments into the sovereign territory of the states.

In truth, the Constitution and the union are strengthened through the demand that the enumeration of powers listed in the first be applied in order to not fray the ties that bind them to the second. Should the general government continue pulling and pulling against the natural power of the states, then those ties will soon snap under the strain and the states will be flung centrifugally to their own devices.

This prediction is no wild premonition. This scenario is the hope of statist and centralists who hope to push those who advocate for states’ rights into a de facto banishment, pariahs separated economically and electorally from those of their former fellow citizens who were eager and willing to submit to the will of the (they believe) omnipotent federal government.

Calling those who understand the role of states in upholding the Constitution and the union “racists” and “neo-Confederates” is intellectually lazy and historically ignorant.



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