Written by **Joe Wolverton, II, J.D.** on March 17, 2016

Media Mangles Historical Record, Calls Nullification "Unconstitutional"

Now that the black-robed oligarchs sitting on the U.S. Supreme Court have declared that recognition of same-sex marriage is the "law of the land" and "constitutional," states have been forced to stand up and resist this edict, and consequently, the pro-"gay rights" crowd have come out to shout them down.

Here's a small sample of the attacks by the pink party on the authority of the states to nullify unconstitutional acts of the federal government — including the "final arbiter of all that is lawful," the Supreme Court.

From the pro-LGBT "equality" blog Slowly Boiling Frog, regarding a Tennessee state legislator's claim that the Volunteer State retains the authority to refuse to recognize same-sex "marriage," in defiance of the *Obergefell v. Hodges* decision: "A ruling of the Supreme Court of the United State is lawful per se."

And, there's more: "Nullification is unlawful and unconstitutional."

And, finally: "Over 200 years of precedence point to the fact that the Supreme Court is the final arbiter of the Constitution. States are obliged to accept and enforce federal laws that they do not like."

Tennessee's not the only state with a history deficiency.

In reporting on the details of the delegate count in the current presidential campaign, the *Chicago Tribune* published this analysis of the political climate in the state of Georgia:

> Georgia Republicans backed native son Gingrich in 2012 by a nearly 2-to-1 margin over Romney. The RCP average of polls conducted this year shows Trump leading Cruz by 11 percentage points. Trump won the primary in neighboring South Carolina decisively. Southern Baptists are the largest religious denomination, and the state Senate in 2009 passed a bill to nullify federal laws deemed unconstitutional, *even though the Supreme Court has ruled that states can't usurp that authority.* [Emphasis added.]

Finally, there's this revision of history from the *Twin Falls* (Idaho) *Times-News*, speaking of the claim made by a state legislator that Idaho has the authority to nullify a federal act that violates the Constitution: "That was the issue of nullification that was essentially decided by the Civil War."

In order to help our fellow citizens learn more about the history of this country, the history of the Constitution, and the powers of the Supreme Court, we offer the following response to all the foregoing attacks on nullification.

First, as to the assertion that the Civil War settled the question of a state's right to nullify a federal act.

The Civil War made one thing clear: The federal government believes (and the Confederacy was forced to concede) that might makes right. The Union army defeated the army of the Confederacy; therefore, so the thinking goes, secession is no longer a constitutional remedy available to states. Might makes

right.

Only it doesn't. Think of it this way. Assume my neighbor and I disagree over the exact location of the boundary line between our properties. One day, while I'm out building a shed that my neighbor believes encroaches on his property, we start arguing and the argument escalates to a full-fledged fist fight and I knock out my neighbor. Does that mean that the location of our mutual property line has been settled? Does the pummeling of my neighbor make my opinion of the location of that line the legal boundary?

Of course not. Might, it seems, does not make right, neither in boundary disputes regarding land nor in similar conflicts over state sovereignty.

Next, regarding the Supreme Court's supposed status as "arbiter of all that is lawful," we offer the following analysis.

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.

And, Abraham 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."

In his 1887 book *The Constitutional Law of the United States of America*, renowned German-American constitutional scholar Hermann Von Holst explained the error in accepting the Supreme Court as the ultimate arbiter of constitutional fidelity. "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 wrote.

He continued, 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."

Of course, that recitation of authority probably won't convince many nullification naysayers. Most of them, in fact, point to *Marbury v. Madison* as evidence that the Supreme Court definitely has, since the early days of the Republic, been accepted as the arbiter of all that is constitutional.

Consider this explanation of that ruse given by Mary Babitz of the New Jersey Tenth Amendment Center:

> In fact, however, there is nothing in *Marbury v. Madison* to warrant such a supremacy, merely a statement that the Supreme Court, like any other branch of federal or state government, has the authority and duty of Constitutional review in determining whether another branch of its level, or the other level, of government has acted beyond the scope of its powers and infringed on the powers of the other.

Babitz is correct. The usurpation of exclusive authority to define the boundaries of the Constitution did not occur until the decision handed down in the *Cooper v. Aaron* case.

In that 1958 ruling, Chief Justice Earl Warren, without any right whatsoever, decreed that *Marbury v. Madison* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution," adding that judicial review "has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."

Well, that's decided then. Except it isn't.

Which of our Founders — even among the most ardent nationalists — would a reader imagine would support as a core principle of federalism the endowment of a very small group of unelected, unaccountable, life-tenured lawyers with supreme, exclusive, and unassailable power over the Constitution?

How would anyone with even a passing appreciation for limited government and an elementary familiarity with the framing of our Constitution accept the idea of Supreme Court infallibility and concede to that robe-clad coterie power only dreamed of by King George III and every other tyrant throughout history?

In fact, in fairness, we'll give the last word on the issue of a state's authority to nullify unconstitutional acts of the federal government to the most nationalist of the delegates who attended the Constitutional Convention of 1787: Alexander Hamilton.

From *Federalist*, No. 33, written by Hamilton:

> If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted [sic] to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed.… But it will not follow from this doctrine that acts of the larger society which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such. [Emphasis in original.]