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National Review: "Confederate Nullification" Could Cause Second Civil War

Once again, the neocons at *National Review* demonstrate their ignorance of historical and constitutional facts, replacing them with their own statist slant on the errors of federalism.

In an article published on July 26 entitled "Trump and the Politics of Moral Outrage," historian Victor Davis Hanson not only paints state nullification of unconstitutional acts of the federal government as potentially leading to a second Civil War, but he doubles down on the historical revision, dubbing this exercise of feudalism "confederate nullification."

Here's Hanson's harangue in his own words:

> Over 300 local and state jurisdictions have declared themselves immune from federal immigration laws — all without much consequence and without worry that a similar principle of nullification was the basis of the American Civil War or that other, more conservative cities could in theory follow their lead and declare themselves exempt from EPA jurisdiction or federal gun-registration laws. Confederate nullification is accepted as the new normal, and, strangely, its antithesis of border enforcement and adherence to settled law is deemed xenophobic, nativist, and racist.

Setting aside the name-calling, Hanson misunderstands the principle of federalism and its most potent application — nullification — assuming that a state could nullify *any* federal act with which it disagrees. That is not how Jefferson and Madison explained, it and it is not how the framers of the Constitution anticipated that the reserved power of the states would be exercised.

States, as the principals and the creators of its agent — the federal authority — retained to themselves the power to refuse to comply with any act of the agent that *exceeded* the limited authority granted to it in the document that set the boundaries of its legal prerogatives. In other words, if an act of Congress is made with clear constitutional legitimacy (border control or other "settled law," for example), nullification is neither constitutionally nor conceptually permissible.

Settled law? By settled law is Hanson referring to all federal acts, regulations, executive orders, etc.? It would certainly seem so in context. He is apparently invoking the Supremacy Clause as evidence of the lack of authority in the states to legislate in any area already occupied by any branch or bureau of the federal government.

While Hanson is a remarkable classicist and can read Latin and Greek texts that are, well, Greek to the rest of us, he is not quite as precise in his reading of the Constitution.

The fact is the Supremacy Clause does not declare that all laws passed by the federal government are

the supreme law of the land, period. A closer reading reveals that it declares the "laws of the United States made *"in pursuance"* of the Constitution are the supreme law of the land. (Emphasis added.)

In pursuance thereof, not in violation thereof. If an act of Congress, an order of the president, a decision of a federal court, or a regulation promulgated by any of the hundreds of executive branch bureaus is not permissible under any enumerated power granted by the states to the federal government in the Constitution; then that act was not made in pursuance of the Constitution, and therefore is not the supreme law of the land, much less the "settled law."

Alexander Hamilton reiterated this interpretation of this part of Article VI when he wrote in *The Federalist*, No. 33:

> 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.]

Supporters of the various state bills aimed at nullifying any number of unconstitutional acts of the federal government understand that the states retain numerous rights under the Constitution, including the right and obligation to refuse to cooperate with the central government's consolidation of all political power.

Next, with his pejorative and frankly jejune invocation of the word "confederate," Hanson intimates that any doubt about the location of boundaries between the federal and state governments was cleared up for good by the Union's victory in the War Between the States.

Not quite.

As I have explained elsewhere:

> 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.
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> 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. As noted historian Clyde Wilson wrote in his essay "From Union to Empire":

"States' rights had to be covered under a blanket of lies and usurpations by those who thought they could rule us better than we can rule ourselves. At the most critical time, the War Between the States, states' rights was suppressed by force, and the American idea of consent of the governed was replaced

by the European idea of obedience. But force can only settle questions of power, not right."

It is in that sense that Hanson is correct in his reading of history and his denigration of nullification. *National Review* is not known for working to restore what is right; it makes its money and enhances its prestige not by fighting for truth, but by serving as one of the mouthpieces of the court party. That is to say, whether the opinions of the neocons are right or wrong is immaterial; the only relevant consideration is whether those opinions consolidate the neocons' control of the sword of state.

So, while Victor Davis Hanson may fear the effect on law and order of states who presume to nullify "EPA jurisdiction or federal gun registration laws," I fear the effect on the preservation of liberty and the formerly unalienable rights of life, liberty, and the pursuit of happiness and the perpetuation of the Constitution in a country where states have succumbed to serving as nothing more than administrative subunits of an American empire and are no longer the last barricade between a federal government which has assumed all power over life and death and the people who once ruled as ultimate sovereigns.

In the words of James Madison, "The states … are duty-bound to interpose for the arresting of the progress of evil."

Correction: *As originally published, this article (including the title) misinterpreted Victor Davis Hanson's quote as saying that "Confederate nullification" is "xenophobic, nativist, and racist," when in fact, as at least one commenter below pointed out, he is clearly saying that Confederate nullification's "antithesis of border enforcement … is deemed xenophobic, nativist, and racist." We apologize for our misreading of Hanson's words and have corrected the article.*