

Nullification: Answering the Objections

In January 2011 my book [*Nullification*](#) became notorious when it was linked to a bill that declared Barack Obama's health care law unconstitutional and therefore void and of no effect in the state of Idaho. (Other states have been introducing similar bills, but Idaho grabbed the media's attention.) Legislators had read it, the news media reported, and while Governor Butch Otter turned down a state senator's offer of a copy, that was only because he already had one. He had read it, too.

Naturally, the smear patrol went into overdrive. Why, this is crazy talk from a bunch of "neo-Confederates" who hate America! Anyone who has observed American political life for the past 20 years could have predicted the hysterical replies down to the last syllable.

"Nullification" dates back to 1798, when James Madison and Thomas Jefferson drafted the Virginia and Kentucky Resolutions, respectively. There we read that the states, which created the federal government in the first place, by the very logic of what they had done must possess some kind of defense mechanism should their creation break free of the restraints they had imposed on it. Jefferson himself introduced the word "nullification" into the American political lexicon, by which he meant the indispensable power of a state to refuse to allow an unconstitutional federal law to be enforced within its borders.

Today, political decentralization is gathering steam in all parts of the country, for all sorts of reasons. I fail to see the usefulness of the term "neo-Confederate" –

whatever this Orwellian neologism is supposed to mean – in describing a movement that includes California’s proposal to decriminalize marijuana, two dozen states’ refusal to abide by the REAL ID Act, and a growing laundry list of resistance movements to federal government intrusion. As states north and south, east and west, blue and red, large and small discuss the prospects for political decentralization, the Enforcers of Approved Opinion have leaped into action. Not to explain where we’re wrong, of course – we deviants are entitled at most to a few throwaway arguments that wouldn’t satisfy a third grader – but to smear and denounce anyone who strays from Allowable Opinion, which lies along that glorious continuum from Joe Biden to Mitt Romney.

Anyone who actually reads the book will discover, among many other things, that the Principles of ’98 – as these decentralist ideas came to be known – were in fact resorted to more often by northern states than by southern, and from 1798 through the second half of the nineteenth century were used in support of free speech and free trade, and against the fugitive-slave laws, unconstitutional searches and seizures, and the prospect of military conscription, among other examples. And nullification was employed not in support of slavery but against it.

When *Nullification* was released, here’s what I predicted would happen: “If the book’s arguments are addressed at all, they will be treated at a strictly second-grade level. (Official Left and Right agree on more than they care to admit, an unswerving commitment to nationalism being one of those things.) The rest of the so-called reply will run like this: Nullification is a secret plot to restore the southern Confederacy, and Woods himself is a sinister person with wicked intentions, before which all his fancy moral and constitutional arguments are

nothing but a devious smokescreen.” (I went on to make my [Interview With a Zombie](#) video to suggest how a typical media interview on the subject might run, and made [my first video blog](#) in response to the hysteria over Idaho.)

Since that is indeed what has happened, I’m following up with this point-by-point reply to the standard arguments I knew would be trotted out against the idea. (My replies to these claims are discussed in much greater detail in [the book](#).)

“Nullification violates the Constitution’s Supremacy Clause.”

This may be the most foolish, ill-informed argument against nullification of all. It is the reply we often hear from law school graduates and professors, who are taught only the nationalist version of American history and constitutionalism. It is yet another reason, as a colleague of mine says, never to confuse legal training with an education.

Thus we read in a recent AP article, “The efforts are completely unconstitutional in the eyes of most legal scholars because the U.S. Constitution deems federal laws ‘the supreme law of the land.’” (Note, by the way, the reporter’s use of the unnecessary word “completely,” betraying his bias.)

What the Supremacy Clause actually says is: “This Constitution, and the Laws of the United States which shall be made in pursuance thereof...shall be the supreme law of the land.”

In other words, the standard law-school response deletes the most significant words of the whole clause. Thomas Jefferson was not unaware of, and did not deny, the Supremacy Clause. His point was that only the Constitution and *laws which shall be made in pursuance thereof* shall be the supreme law of the land. Citing the Supremacy Clause merely begs the question. A nullifying state maintains that a given law is not “in pursuance thereof” and therefore that the Supremacy Clause does not apply in the first place.

Such critics are expecting us to believe that the states would have ratified a Constitution with a Supremacy Clause that said, in effect, “This Constitution, and the Laws of the United States which shall be made in pursuance thereof, plus any old laws we may choose to pass, whether constitutional or not, shall be the supreme law of the land.”

“Nullification is unconstitutional; it nowhere appears in the Constitution.”

This is an odd complaint, coming as it usually does from those who in any other circumstance do not seem especially concerned to find express constitutional sanction for particular government policies.

The mere fact that a state’s reserved right to obstruct the enforcement of an unconstitutional law is not expressly stated in the Constitution does not mean the right does not exist. The Constitution is supposed to establish a federal government of enumerated powers, with the remainder reserved to the states or the people. Essentially nothing the states do is authorized in the federal Constitution,

since enumerating the states' powers is not the purpose and is alien to the structure of that document.

James Madison urged that the true meaning of the Constitution was to be found in the state ratifying conventions, for it was there that the people, assembled in convention, were instructed with regard to what the new document meant.

Jefferson spoke likewise: should you wish to know the meaning of the Constitution, consult the words of its friends.

Federalist supporters of the Constitution at the Virginia ratifying convention of 1788 assured Virginians that they would be “exonerated” should the federal government attempt to impose “any supplementary condition” upon them – in other words, if it tried to exercise a power over and above the ones the states had delegated to it. Virginians were given this interpretation of the Constitution by members of the five-man commission that was to draft Virginia's ratification instrument. Patrick Henry, John Taylor, and later Jefferson himself elaborated on these safeguards that Virginians had been assured of at their ratifying convention.

Nullification derives from the (surely correct) “compact theory” of the Union, to which no full-fledged alternative appears to have been offered until as late as the 1830s. That compact theory, in turn, derives from and implies the following:

- 1) The states preceded the Union. The Declaration of Independence speaks of “free and independent states” that “have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do.” The British acknowledged the independence

not of a single blob, but of 13 states, which they proceeded to list one by one. Article II of the Articles of Confederation says the states “retain their sovereignty, freedom, and independence”; they must have enjoyed that sovereignty in the past in order for them to “retain” it in 1781 when the Articles were officially adopted. The ratification of the Constitution was accomplished not by a single, national vote, but by the individual ratifications of the various states, each assembled in convention.

2) In the American system no government is sovereign, not the federal government and not the states. The peoples of the states are the sovereigns. It is they who apportion powers between themselves, their state governments, and the federal government. In doing so they are not impairing their sovereignty in any way. To the contrary, they are exercising it.

3) Since the peoples of the states are the sovereigns, then when the federal government exercises a power of dubious constitutionality on a matter of great importance, it is they themselves who are the proper disputants, as they review whether their agent was intended to hold such a power. No other arrangement makes sense. No one asks his agent whether the agent has or should have such-and-such power. In other words, the very nature of sovereignty, and of the American system itself, is such that the sovereigns must retain the power to restrain the agent they themselves created. James Madison [explains this clearly](#) in the famous Virginia Report of 1800:

The resolution [of 1798] of the General Assembly [of Virginia] relates to those great and extraordinary cases, in which all the forms of the Constitution may prove

ineffectual against infractions dangerous to the essential right of the parties to it. The resolution supposes that dangerous powers not delegated, may not only be usurped and executed by the other departments, but that the Judicial Department also may exercise or sanction dangerous powers beyond the grant of the Constitution; and consequently that the ultimate right of the parties to the Constitution, to judge whether the compact has been dangerously violated, must extend to violations by one delegated authority, as well as by another, by the judiciary, as well as by the executive, or the legislature.

“The Supreme Court declared itself infallible in 1958.”

The obscure *obiter dicta* of *Cooper v. Aaron* (1958) is sometimes raised against nullification. Here the Supreme Court expressly declared its statements to have exactly the same status as the text of the Constitution itself. But no matter what absurd claims the Court makes for itself, Madison’s point above holds – the very structure of the system, and the very nature of the federal Union, logically require that the principals to the compact possess a power to examine the constitutionality of federal laws. Given that the whole argument involves who must decide such questions in the last resort, citing the Supreme Court against it begs the whole question – indeed, it should make us wonder if those who answer this way even understand the question.

“Nullification was the legal doctrine by which the Southern states defended slavery.”

This statement is as wrong as wrong can be. Nullification was never used on behalf of slavery. Why would it have been? What anti-slavery laws were there that the South would have needed to nullify?

To the contrary, nullification was used *against* slavery, as when northern states did everything in their power to obstruct the enforcement of the fugitive-slave laws, with the Supreme Court of Wisconsin going so far as to declare the Fugitive Slave Act of 1850 unconstitutional and void. In *Ableman v. Booth* (1859), the U.S. Supreme Court scolded it for doing so. In other words, modern anti-nullification jurisprudence has its roots in the Supreme Court's declarations in support of the Fugitive Slave Act. Who's defending slavery here?

“Andrew Jackson denounced nullification.”

True, though Jackson was presumably not infallible. (Had nullification really been all about slavery, then Jackson, a slaveholder himself, should have supported it.) His proclamation concerning nullification was in fact written by his secretary of state, Edward Livingston, and that proclamation was, in turn, [dismantled](#) mercilessly – *mercilessly* – by Littleton Waller Tazewell.

“You must be a ‘neo-Confederate.’”

I confess I have never understood what this Orwellian agitprop term is supposed to mean, but it is surely out of place here. Jefferson Davis, president of the Confederacy, actually denounced nullification in his farewell address to the U.S. Senate. South Carolina, in the document proclaiming its secession from the Union

in December 1860, cited the North's nullification of the fugitive-slave laws as one of the grievances justifying its decision.

Don't expect critics of nullification to know any of this, and you won't be disappointed.

One of the points of my book *Nullification*, in fact, is to demonstrate that the Principles of '98 were not some obscure southern doctrine, but at one time or another were embraced by all sections of the country. In 1820, the Ohio legislature even passed a resolution proclaiming that the Principles of '98 had been accepted by a majority of the American people. I do not believe there were any slaves in Ohio in 1820, or that Ohio was ever part of the Confederacy.

“James Madison spoke against the idea of nullification.”

More sophisticated opponents think they have a trump card in James Madison's statements in 1830 to the effect that he never intended, in the Virginia Resolutions or at any other time, to suggest that a state could resist the enforcement of an unconstitutional law. Anyone who holds that he did indeed call for such a thing has merely understood him. He was saying only that the states had the right to get together to protest unconstitutional laws.

This claim falls flat. In 1830 Madison did indeed say such a thing, and pretended he had never meant what everyone at the time had taken him to mean. Madison's claim was greeted with skepticism at the time. People rightly demanded to know: if that was all you meant, why even bother drafting such an inane and feckless

resolution in the first place? Why go to the trouble of passing solemn resolutions urging that the states had a right that absolutely no one denied? And for heaven's sake, when numerous states disputed your position, why in the Report of 1800 did you not only not clarify yourself, but you actually persisted in the very view you now deny and which everyone attributed to you at the time? Madison biographer Kevin Gutzman (see *James Madison and the Making of America*, St. Martin's, forthcoming 2011) dismantled this toothless interpretation of Madison's Virginia Resolutions in "A Troublesome Legacy: James Madison and 'The Principles of '98,'" *Journal of the Early Republic* 15 (1995): 569-89. Judge Abel Upshur likewise made quick work of this view in *An Exposition of the Virginia Resolutions of 1798*, excerpted in my book.

The elder Madison, in his zeal to separate nullification from Jefferson's legacy, tried denying that Jefferson had included the dreaded word in his draft of the Kentucky Resolutions. Madison had seen the draft himself, so he either knew this statement was false or was suffering from the effects of advanced age. When a copy of the original Kentucky Resolutions in Jefferson's own handwriting turned up, complete with the word "nullification," Madison was forced to retreat.

In summary, then, (1) the other state legislatures understood Madison in 1798 as saying precisely what Madison later tried to deny he had said; (2) Madison did not correct this alleged misunderstanding when he had the chance to in the Report of 1800 or at any other time during those years; and (3) the text of the Virginia Resolutions clearly indicates that each state was "duty bound" to maintain its constitutional liberties within its "respective" territory, and hence Madison did

indeed contemplate action by a single state (rather than by all the states jointly), as supporters and opponents alike took him to be saying at the time.

“Nullification has a ‘shameful history.’”

So we are instructed by the scholars who populate the Democratic Party of Idaho. Was it “shameful” for Jefferson and Madison to have employed the threat of nullification against the Alien and Sedition Acts of 1798? Was it “shameful” of the northern states to have employed the Principles of ’98 against the unconstitutional searches and seizures by which the federal embargo of 1807-1809 was enforced? Was it “shameful” for Daniel Webster, as well as the legislature of Connecticut, to have urged the states to protect their citizens from overreaching federal authority should Washington attempt military conscription during the War of 1812? Was it “shameful” for the northern states to do everything in their power to obstruct the enforcement of the fugitive-slave laws (whose odious provisions they did not believe were automatically justified merely on account of the fugitive-slave clause)? Was it “shameful” when the Supreme Court of Wisconsin declared the Fugitive Slave Act of 1850 unconstitutional and void, citing the Kentucky Resolutions of 1798 and 1799 in the process?

May I take a wild guess that no Democrat in the Idaho legislature knows any of this history?

The “shameful history” remark is surely a reference to southern resistance to the civil rights movement, in which the language of nullification was indeed employed. The implication is that Jeffersonian decentralism is forever discredited because

states have behaved in ways most Americans find grotesque. They *are* states, after all, so we should not be shocked when their behavior offends us. But this is apples and oranges. This outcome was possible only at a time when blacks had difficulty exercising voting rights, a situation that no longer obtains. Things have changed since Birmingham 1963 in other ways as well. The demographic trends of the past three decades make that clear enough, as blacks have moved in substantial numbers *to* the South, the only section of the country where a majority of blacks polled say they are treated fairly. It is an injustice to the people of the South, as well as an exercise in emotional hypochondria, to believe the states are on the verge of restoring segregation if only given the chance. I mean, really.

By exactly the same reasoning, incidentally, any crime by any national government anywhere would immediately justify a *world* government. Anyone living under that world government who then favored decentralization would be solemnly lectured about all the awful things that had happened under decentralism in the past.

Supporters of nullification do not hold that the federal government is bad but the state governments are infallible. The state governments are rotten, too (which is why we may as well put them to *some* good use by employing them on behalf of resistance to the federal government). We are asking under what conditions liberty is more likely to flourish: with a multiplicity of competing jurisdictions, or one giant jurisdiction? There is [a strong argument to be made](#) that it was precisely the *decentralization* of power in Europe that made possible the development of liberty there.

This objection – why, an institutional structure was once put to objectionable purposes, so it may never be appealed to again – never seems to be directed against centralized government itself, particularly the megastates of the nationalistic twentieth century. I rather doubt nullification critics would turn this argument against themselves – by saying, for instance, “Centralized governments gave us hundreds of millions of deaths, thanks to total war, genocide, and totalitarian revolutions. In the U.S. we can point to the incarceration of hundreds of thousands of Japanese and a horrendously murderous military-industrial-congressional complex, among other enormities. Our federal government is so remote from the people that it has managed to rack up debts (including unfunded liabilities) well in excess of \$100 trillion. In light of this record, what intellectual and moral pygmy would urge nationalism or the centralized modern state as the solution to our problems?”

“Nullification would be chaotic.”

It is far more likely that states will be too timid to employ nullification. But the more significant point is this: if the various states should have different policies, *so what?* That is precisely what the United States was supposed to look like. As usual, alleged supporters of “diversity” are the ones who most insist on national uniformity. It says quite a bit about what people are learning in school that they are terrified at the prospect that their country might actually be organized the way Americans were originally assured it would be. Local self-government was what the American Revolution was fought over, yet we’re told this very principle, and the defense mechanisms necessary to preserve it, are unthinkable.

Part of the reason the idea of nullification elicits such a visceral response from establishment opinion is that most people have unthinkingly absorbed the logic of the modern state, whereby a single, irresistible authority issuing infallible commands is the only way society can be organized. Most people do not subject their unstated assumptions to close scrutiny, particularly since the more deeply embedded the assumption, the less people are aware it exists. And it is this modern assumption, dating back to Thomas Hobbes, that – whether people realize it or not – lies at the root of nearly everyone’s political thought. Not only is this assumption false, but (as I discuss in the book) the modern state to which it gave rise has been the most irresponsible and even lethal institution in history, racking up debts and carrying out atrocities that the decentralized polities that preceded them could scarcely have imagined. Why it should be given the moral benefit of the doubt, to the point that all skeptics are to be viciously denounced, is unclear.

“The compact theory may apply to the first 13 states, but since all the other states were created by the federal government, we cannot describe these later states as building blocks of the Union in the same sense.”

The Idaho attorney general’s office tried making this argument against the Idaho health-care nullification bill. Superficially plausible, the argument amounts to a gross misunderstanding of the American system. Were the Idaho attorney general correct, American states would not be states at all but provinces.

The argument of the Idaho attorney general’s office, in fact, amounts to precisely the Old World view of the nature of the state and the people that Americans fled Europe to escape. The *American* position has always been that an American state is

created by the people, not the federal government. Jefferson himself amplified this point in the controversy over the admission of Missouri. The people of Missouri had drafted a constitution and were applying for admission to the Union. Were they not admitted, Jefferson told them, they would be an independent state. In other words, their statehood derived from their sovereign people and its drafting of a constitution, not the approval of the federal government.

“The Civil War settled this.”

The Civil War was not fought over nullification, and as I’ve said above, at the time of the war it was the northern states that had much more recently been engaged in nullification. The legitimacy of nullification involves a philosophical argument, and philosophical arguments are not – at least to reasonable people – decided one way or the other by violence. No one would say, when confronted with the plight of the Plains Indians, “Didn’t the U.S. Army settle that?” If the arguments for nullification make sense, and they do, that is what matters. Reality is what it is. The compact theory, from which nullification is derived, does describe U.S. history. There is no way to evade that brute fact.

My primary intention in writing *Nullification* was to resuscitate portions of American history which, having proven inconvenient to the regime in Washington, had slipped down the Orwellian memory hole. I wanted Americans to realize that illustrious figures from their country’s past posed questions about the most desirable form of political organization – questions that today one is written out of polite society for asking. I wanted to make a case, backed by overwhelming historical evidence, that the inhumane system whereby a single city hands down

infallible dictates to 309 million people is not a fated existence. Jefferson and others proposed an alternative, one we might wish to revisit in light of how obviously dysfunctional the present system has become. Before this information can be put to much immediate use there is a good deal of educational groundwork to be laid. I intended the book to be a first step along the road back to sanity.

Old-style, “small-is-beautiful” progressives would have sympathized with this view, as New Left historian William Appleman Williams did. The commissars of approved opinion who pass as “progressives” today cannot even take the trouble to understand it.

Afterword: The problem with Jefferson’s position is not that it was too “extreme,” but that if anything it was too timid. Should you want something more challenging still, read [Lysander Spooner](#).