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Written by **Joe Wolverton, II, J.D.** on July 9, 2015

Cruz, Huckabee Hedge on State Nullification of Same-sex Marriage Ruling

States, as creators of the federal government, are the arbiters of the limits of the latter's power, and forcing them to accept same-sex "marriage" certainly falls outside those limits.

The Supreme Court decision in the case of *Obergefell v. Hodges* purports to require states to permit homosexual couples to marry, despite the ofttimes overwhelming opposition to that policy expressed by the people.

One way that states can continue simultaneously supporting the Constitution and their own sovereignty is by nullifying the federal court's extra-constitutional edict. As may be imagined, not everyone supports the proposition of states taking this tack.

In an article published on July 1 in *The Atlantic*, David Graham informs readers that while "gay marriage is legal around the nation," nullification is not. What's more, Graham says that any attempt by states to nullify the *Obergefell* ruling or any other federal acts is pointless because "nullification is not constitutional."

This writer is not sure of Graham's grasp of constitutional law, constitutional history, or the Constitution in general, but he is out of his depth when it comes to this key concept of federalism.

The states created the federal government, set the boundaries of its power, and reserved to themselves all other rights not specifically delegated to the new national authority. The contract containing the rights and responsibilities of the parties to this contract that created the federal government is called the Constitution. This act of collective consenting is called a compact.

This element of the creation of the union is precisely where the states derive their power to negate acts of the federal government that exceed its constitutional authority. It is a thread woven inextricably in every strand of sovereignty. It was the sovereign states that ceded the territory of authority that the federal government occupies. And if the federal government wanders outside that territory, then states can stop the advance immediately.

Remarkably, as noted in the *Atlantic* article, there are a couple of current GOP presidential hopefuls who seem to understand on some level these historical facts about federalism and the powers retained by the states. Graham reports:

> Since the ruling, a handful of officials have suggested that states need not issue licenses for same-sex marriages. The two most notable voices are two Republican candidates for president, Mike Huckabee and Ted Cruz.

In truth, neither of these candidates came out completely in full-throated support of state nullification of the *Obergefell* decision.

Cruz (left), speaking on NPR, made an oblique reference to the power of states (and the people) to ignore the ruling:

> They cannot ignore a direct judicial order. The parties to a case cannot ignore a direct judicial order. But it does not mean that those who are not parties to case are bound by a judicial order.…
>
> The entire premise of the decision on marriage was that in 1868, when the people of the United States ratified the 14th Amendment, that we were somehow silently and unawares striking down every marriage law across the country. That's a preposterous notion. That is not law. That is not even dressed up as law.

That's hardly the courageous pro-nullification stance many constitutionalists would like to see in someone asking for their support next November.

For his part, Huckabee (right) took an even more milquetoast approach to the issue. "I'm not sure that every governor and every attorney general should just say, well, it's the law of the land because there's no enabling legislation," the former governor of Arkansas said, as quoted in *The Atlantic.*

Questioning the enactment of enabling legislation is not the constitutional horse to which Huckabee should hitch his campaign wagon, especially if he'd like the votes of constitutionalists.

The facts are simple enough for even politicians to understand.

Nullification, whether through active acts passed by the legislatures or the simple refusal to obey unconstitutional directives, is the "rightful remedy" for the ill of federal usurpation of authority. Americans committed to the Constitution must walk the fences separating the federal and state governments and they must keep the former from crossing into the territory of the latter.

The Virginia and Kentucky Resolutions plainly set forth James Madison's and Thomas Jefferson's understanding of the source of all federal power. Those landmark documents clearly demonstrate what these two agile-minded champions of liberty considered the constitutional delegation of power. Jefferson summed it up very economically in the Kentucky Resolutions:

> That the several states who formed that instrument, being sovereign and independent, have the unquestionable right to judge of its infraction; and that a nullification, by those sovereignties, of all unauthorized acts done under colour [sic] of that instrument, is the rightful remedy.

The plain declarations of Jefferson and Madison aren't enough, frankly, to convince those who would see the states reduced to mere administrative units of the federal leviathan. One of those statists is quoted in the *Atlantic* piece.

Regarding the legitimacy of state nullification of federal acts, Georgetown law professor David Vladeck said, "It's ridiculous. The Supreme Court says the Fourteenth Amendment requires states to issue licenses.… That is the law of the land. We have something in the Constitution called the Supremacy Clause," which, he believes, places state law subordinate to any and all federal fiats.

The Supremacy Clause (as he and others wrongly call it) of Article VI does not declare that all federal laws are unqualifiedly the supreme law of the land. Rather, it states that the Constitution "and laws of the United States made in pursuance thereof" are the supreme law of the land.

The phrase that pays is "in *pursuance* thereof, not "in *violation* thereof." If an act of Congress is not permissible under any enumerated power, it is not made in pursuance of the Constitution and therefore not only is *not* the supreme law of the land, it is not the law at all.

Or, as Alexander Hamilton wrote very plainly in *The Federalist*, No. 78: "There is no position which depends on clearer principles, than that every act of a delegated authority contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the constitution, can be valid."

With this in mind, the way forward for states that would rather not obey an unconstitutional edict of a branch of the federal government acting outside its enumerated authority is clear.

They, acting within the scope of their sovereign authority to enforce the terms of the contract we call the Constitution, must stop at the state borders the enforcement of the Supreme Court's legal decision masquerading as law. There are already some examples of states taking this approach.

The New American has reported on the efforts by Texas, Alabama, Mississippi, and Oklahoma to resist the ruling's legal effect by instructing local officials (including county clerks) to refuse to issue marriage licenses to same-sex couples.

So, while David Graham and *The Atlantic* may claim "there's no such thing as nullification," on several issues, several states are proving him wrong.

Photo of Mike Huckabee: Gage Skidmore

Photo of Ted Cruz: Michael Vadon