Written by **Joe Wolverton, II, J.D.** on July 29, 2014

The Daily Beast: Wrong on History, Wrong on Nullification

Add The Daily Beast to the roster of "news" organizations that don't understand the Constitution.

In an "Exclusive" story published on July 28, Ben Jacobs attacks Joni Ernst, the Republican nominee for U.S. Senate in Iowa, for believing in nullification. Here's Jacobs' smear in his own words:

> Ernst, a first-term state senator, has never explicitly supported pro-nullification legislation in her time in the Iowa state senate. However, she co-sponsored a resolution that says "the State of Iowa hereby claims sovereignty under the Tenth Amendment to the Constitution of the United States over all powers not otherwise enumerated and granted to the federal government by the Constitution of the United States." It was introduced in response to "many federal mandates [that] are directly in violation of the Tenth Amendment to the Constitution of the United States."

> States cannot nullify federal laws, of course.
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> In embracing the concept of nullification, Ernst harkens back to a discredited theory that the Constitution is a compact and states are free to void federal laws that they dislike. This view was widely promoted by John Calhoun, the great Southern advocate of slavery, prior to the Civil War and was touted by segregationists in the 1950s and 1960s. In recent years, the idea was purged of its most racist overtones and fringe elements of the right adopted it as an argument against Obamacare, gun control, and other federal regulations.

Where to begin?

First, Ernst never said she supported nullification. Here's Ernst's statement from a September 2013 appearance that Jacobs uses as a jumping-off point for his exposition of constitutional ignorance:

> You know we have talked about this at the state legislature before, nullification. But, bottom line is, as U.S. Senator why should we be passing laws that the states are considering nullifying? Bottom line: our legislators at the federal level should not be passing those laws. We're right … we've gone 200-plus years of federal legislators going against the Tenth Amendment's states' rights. We are way overstepping bounds as federal legislators. So, bottom line, no we should not be passing laws

> as federal legislators — as senators or congressmen — that the states would even consider nullifying. Bottom line.

That's not even close to the full-throated, Jeffersonian defense of nullification that Jacobs and The Daily Beast make it out to be.

Sadly, Ernst would probably get a lot farther among constitutionalists, libertarians, and other similarly dissatisfied members of the GOP were she to wholeheartedly commit herself to never voting for a bill that exceeds the constitutionally specified powers of the body of which she wants to be a member.

Rather than take Ben Jacobs' opinion as constitutional gospel, let's look at what other, perhaps weightier, writers had to say on the subject of nullification.

In *Federalist* No. 78, Alexander Hamilton explained the philosophy behind the principle:

> 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. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

James Madison, also writing in the *Federalist Papers*, recommended that state legislators, in order to prevent federal abridgment of fundamental liberties, should refuse "to co-operate with the officers of the Union."

Then, despite Jacobs' insistence that the Constitution was not the result of a compact among the states, in the Virginia Resolution of 1798 Madison wrote that any power residing in the federal government is derived

> from the compact, to which the states are parties; as limited by the plain sense and intention of the instrument constituting the compact; as no further valid that they are authorized by the grants enumerated in that compact; and that in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the states who are parties thereto, have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them.

Speaking during the War of 1812, Daniel Webster said,

> The operation of measures thus unconstitutional and illegal ought to be prevented by a resort to other measures which are both constitutional and legal. It will be the solemn duty of the State governments to protect their own authority over their own militia, and to interpose between their citizens and arbitrary power. These are among the objects for which the State governments exist.

In the Kentucky Resolution of 1798, Thomas Jefferson wrote,

> That the several States composing the United States of America, are not united on the principle of unlimited submission to their general government; but that, by a compact under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a general government for special purposes — delegated to that government certain definite powers, reserving, each State to itself, the residuary mass of right to their own self-government; and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force.

Undoubtedly, Jacobs would counter with the statement he made in his piece published by The Daily Beast that "the Supreme Court had dealt with this issue as recently as 1958, when in *Cooper v. Aaron*, a unanimous decision signed by every justice on the court, it was made clear that states could not nullify federal laws or Supreme Court decisions."

Jacobs' understanding of the current case law on the subject of states' authority to refuse to enforce unconstitutional demands of the federal government is incorrect. He completely ignores the concept of anti-commandeering.

Anti-commandeering prohibits the federal government from forcing states to participate in any federal program that does not concern "international and interstate matters."

While this expression of federalism ("dual sovereignty," as it was named by Justice Antonin Scalia) was first set forth in the case of *New York v. United States* (1992), most recently it was reaffirmed by the high court in the case of *Mack and Printz v. United States* (1997).

Writing for the majority in the *Mack/Printz* case, Justice Antonin Scalia explained:

> As Madison expressed it: "The local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." *The Federalist* No. 39, at 245. [n.11]
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> This separation of the two spheres is one of the Constitution's structural protections of liberty. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."

When the federal government assumes powers not explicitly granted to it in the Constitution, it puts the states on the road toward obliteration and citizens on the road to enslavement.

Finally, with regard to the statement by Erwin Chemerinsky, "a noted constitutional law scholar," that "nullification is expressly forbidden under Article VI of the Constitution," both Jacobs and Professor Chemerinsky should give that particular provision a closer read.

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 more careful reading reveals that it declares the "laws of the United States made in pursuance" of the Constitution are the supreme law of the land.

In pursuance thereof, not in violation thereof.

In fact, if an act of Congress exceeds the scope of the enumerated powers given to the federal government in the Constitution, that act was not made in pursuance of the Constitution and therefore it is not only *not* the supreme law of the land, but it is not law at all, but "merely [an act] of usurpation."

The Daily Beast is wrong on its history of the creation of the Constitution, wrong on the meaning of Article VI, wrong on the current state of Tenth Amendment case law, and wrong to impugn Joni Ernst for a statement she did not make.

Perhaps now she will, though.

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