



Refuting Nullification, Part One

Frank Cocozzelli May 20, 2013

The emerging influence of Thomas J. Woods and other neo-Confederate ideologues within the Catholic Right was the focus of the first post in this series. They are advocating the failed concepts of secession and the nullification of federal statutes and court rulings. The second post in the series explored why nullification matters and how it can lead to localized tyranny and theocracy. To complete the quartet, we will discuss first how proponent's claims for historical justification are simply wrong, and then detail the Constitutional argument against nullification.

As I previously reported, among the Catholic Rightists beating the drum for nullification are Pat Buchanan, Thomas DiLorenzo, Thomas Fleming and Thomas E. Woods, Jr. All four advocate states' rights, a seething resentment of Abraham Lincoln, and as Rachel Tabachnick recently highlighted, Woods is a key member of the pro-secession League of the South, Traditional Catholicism (save possibly DiLorenzo) and Austrian-school, libertarian economics.

Known as "tenthers" they argue that individual states, citing the Tenth Amendment to the federal Constitution, have the right to nullify federal legislation or court rulings of which they disapprove -- on quite a range of subjects. Some have recently argued that states should and have the right to block federal health care reform; refuse to enforce federal firearms regulation and some cases, as a justification for imposing Christianity as an official state religion. Gov. Sam Brownback of Kansas - an Opus Dei convert to Catholicism -- has already signed several nullification bills into law, inviting a federal court challenge. U.S. Attorney General Eric Holder has written to Brownback to inform him that his legislation is unconstitutional. Indeed, nullification follows a pre-Fourteenth Amendment view of Constitutional law, before due process and equal protection were extended to cover the behavior of the several states.

As dubious as nullification may sound to liberals, let's note that even the conservative Heritage Foundation calls it "Unlawful and Unconstitutional." The libertarian Cato Institute is only slightly less absolute, citing a limited use for nullification, but cautions: "Can a state impede federal authorities from enforcing their own law if the state deems the law to be unconstitutional. The answer is "No," although more radical nullification proponents would disagree."

States Did Not Precede the Union

The claim by Woods and other latter-day John Calhouns that nullification is consistent with the original intent of the Constitution is rooted in bad history. They assert that the states constitute a higher authority than any of the branches of the federal government because the individual states existed before the national government was created. However, a fair reading of American history debunks that myth - and by extension, the foundation of the entire nullification argument.

When the notion of secession was at its height, Abraham Lincoln argued for a sturdy form of federalism. "Plainly," Lincoln declared, "the central idea of secession is the essence of anarchy." Lincoln was soon proved to be correct. In the closing days of the Civil War, Alabama and Georgia were so protective of their notion of state sovereignty that they threatened to secede from the Confederacy. Even Jefferson Davis, the president of the Confederacy admitted, his movement "died of a theory" -- and that theory was states rights.

The fallacy that "the states preceded the federal government" argument is exposed by simply considering the history of the thirteen colonies. At the time of the revolution each were Crown colonies, which is to say that the King of England appointed their governors. Royal charter founded indeed most of them. New York (then including whole swaths of territory that would become New Jersey) was wrestled from the Dutch by the British, and added to her American holdings. Little more than a century later, the British military might engaged in a war with France and her Native American allies to protect the colonies (in what we now call the French and Indian War.) The British victory enlarged the American colonies. Massachusetts gained control of what is now Maine while Virginia expanded into what is now West Virginia.

The political loyalty of what was to become our first thirteen states originally was to the King and Parliament, a binding central government. The common thread that ran through the complaints of each American colony in April 1775 was that they were being taxed and bullied by that central entity without any true representation in its decision-making. And when they initially revolted they did not do so advocating for their rights as Rhode Islanders or New Yorkers or as Georgians but as their rights as British subjects. They were simply demanding a say in the Parliament that was legislating without them being able to debate or vote on any law that adversely affected their general welfare.

When the Continental Army drove the British from Boston in March 1776, units from Maryland, Pennsylvania and Virginia while being commanded by a Virginian, George Washington, joined the Massachusetts Militia. They answered to a Continental Congress, not individual state governments. More importantly, when independence was declared it was done with purpose of severing their common

governing relationship with London and replacing it with our own central authority. This was the cause that transformed into the creation of a nation.

The argument that the states precede the federal government truly falls apart with the addition of the post-Revolution states. The states that were created out of the Louisiana Purchase were made possible with the common funds from the United States Treasury. Individual states were also carved out from United States' Territories. The same is true of Alaska. In the case of what are now our Southwestern states, those descended from territories seized from Mexico by a nationally organized war (a conflict opposed by then-Congressman Lincoln). Many of the upper western states were created from territories similarly seized from Native tribes such as the Sioux and Cheyenne.

Finally, it is worth noting that whatever our political outlooks, few of us see the founding of the Jamestown and Plymouth colonies as the origin of individual sections or states. Rather, we see them as the beginning of our identity, warts and all, as an American People (the longer history of Native Americans, notwithstanding). We celebrate Thanksgiving Day, for example, as a national tradition, not one unique to Massachusetts. Likewise, we celebrate July 4th as the beginning of the American Revolution, not the secession of the individual original thirteen colonies from the British Empire. Rather, we all revolted in unison and reliance upon each other to create a new nation.

Thomas Woods and his ilk are simply wrong about American history; the states did not precede either a central government or our common identity as a people.