Written by **Joe Wolverton, II, J.D.** on May 9, 2014

Wisconsin Republican Party Rejects "Rabbit Hole of Nullification"

Something is rotten in the state of Wisconsin and it's the Republican Party.

The state Republican Party held its annual convention last weekend and as reported by the (Milwaukee) *Journal Sentinel*:

> They [the Wisconsin GOP] snuffed out a proposal on secession, nullification and state sovereignty. The resolution that would have permitted lawmakers to nullify Obamacare, Common Core and drone usage in Wisconsin was approved earlier by a regional caucus and a state GOP committee.
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> "The Republican Party does not want to chase down the rabbit hole of nullification," said state Rep. Chris Kapenga of Delafield.

Rabbit hole, eh? Seems Kapenga has been caught in the Supremacy Clause snare and needs a lesson in constitutional history and federalism to free him.

Despite what many in state legislatures claim, the Supremacy Clause does not declare that federal laws automatically trump state laws without qualification. What it says is that the Constitution "and laws of the United States made in pursuance thereof" are the supreme law of the land.

The supremacy of federal law extends to only those acts made "in pursuance" of enumerated powers. There is no such deference afforded to those acts passed in violation of the federal government's constitutional authority.

If an act of Congress is not permissible under any enumerated power given to it in the Constitution, it was 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.

Constitutionally speaking, then, whenever the federal government passes any measure not provided for in the limited roster of its enumerated powers, those acts are not awarded any sort of supremacy. Instead, they are "merely acts of usurpation" and do not qualify as the supreme law of the land. In fact, acts of Congress are the supreme law of the land only if they are made in pursuance of its constitutional powers, not in defiance thereof.

As Alexander Hamilton wrote 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 the Constitution serving as the contract, the states granted to the federal government enumerated powers that were "few and defined," reserving to themselves the full panoply of sovereign privileges. Thus, the federal government became the agent of the states.

The law of agency applies when one party gives another party legal authority to act on the first party's behalf. The first party is called the principal and the second party is called the agent. The principal may grant the agent as much or as little authority as suits his purpose. That is to say, by simply giving an agent certain powers, that agent is not authorized to act outside of that defined sphere of authority.

Upon its ratification, the states, as principals, gave limited power to the central government to act as their agent in certain matters of common concern: defense, taxation, interstate commerce, etc.

The authority of the agent — in this case the federal government — is derived from the agreement that created the principal/agent relationship. Whether the agent is lawfully acting on behalf of the principal is a question of fact. The agent may legally bind the principal only insofar as its actions lie within the contractual boundaries of its power.

Should the agent exceed the scope of its authority, not only is the principal not held accountable for those acts, but the breaching agent is legally liable to the principal (and any affected third parties who acted in reliance on the agent's authority) for that breach.

Under the law of agency, the principal may revoke the agent's authority at will. It would be unreasonable to oblige the principals to honor promises of an agent acting outside the boundaries of its authority as set out in the document that created the agency in the first place.

Imagine the chaos that would be created if principals were legally bound by the acts of an agent that "went rogue" and acted prejudicially to the interests of the principals from whom he derived any power in the first place. It is a fundamental tenet of the law of agency that the agent may lawfully act only for the benefit of the principal.

Once state Representative Kapenga and his Republican colleagues understand this basic fact of federalism, it will be time to move to the next lesson: nullification.

Despite Kapenga's disparagement, the most effective weapon in the war against federal overreach is nullification.

Nullification occurs when a state, county, city, or other local entity holds as null, void, and of no legal effect any act of the federal government that exceeds the boundaries of its constitutional powers.

Nullification recognizes that states possess the right to invalidate any federal measure that exceeds the few and defined powers allowed the federal government as enumerated in the U.S. Constitution.

States (and their legal subdivisions) retain the right to act as arbiters of the constitutionality of federal acts because they formed the union, and as creators of the compact, they hold ultimate authority as to the limits of the power of the central government to enact laws that are applicable to the states and the citizens thereof.

Despite criticism by those who advocate for a more powerful federal government, nullification would not lead to anarchy, as it is only unconstitutional federal acts that will be subject to state invalidation.

Nullification is not the right of states to nullify any federal act. Rather, it is the right to choose to not enforce any federal act that fails to conform to the constitutionally established limits on its authority. Nullification presupposes that there are myriad (albeit limited) areas over which the Constitution has given purview to the federal government: defense, naturalization, foreign relations, interstate commerce, etc.

When Washington decides to go walkabout, however, and start legislating (or issuing edicts, in the case

of President Obama) in areas not within its constitutional boundaries (healthcare, education, gun ownership), the states reserve the right to check that usurpation by refusing to afford such acts the power of law. Conversely, it would be a usurpation on the part of the states should they attempt to disregard federal laws that are constitutionally sound.

In the Kentucky and Virginia Resolutions, Thomas Jefferson and James Madison reminded state lawmakers of the boundaries between states and the federal government established by the Constitution. In those seminal statements they also declared their "warm attachment to the Union of the States."

They believed, as do many of us involved in the struggle to force the federal beast back inside its constitutional cage, that devotion to the Constitution and to the rule of law compels one to "watch over and oppose every infraction of those principles which constitute the only basis of that Union, because a faithful observance of them, can alone secure its existence and the public happiness."

In the *Journal Sentinel* report, one delegate who opposed the nullification resolution is quoted as saying, "If we pass this, we'll be the laughingstock of America."

This unnamed legislator and those among his colleagues who share his lack of constitutional savvy should remember one very important point before they make statements denying state sovereignty and the 10th Amendment: State legislators have not only a duty, but an oath-bound obligation "to support this Constitution," (see Article VI of the Constitution) that includes requiring the federal government to restrain itself by the chains of the Constitution. If it refuses, then those lawmakers must be faithful to the oath they have sworn and refuse to enforce every unconstitutional act of the federal government, every time, without exception.

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