Written by **Selwyn Duke** on January 27, 2011

Nullifying Federal Nullification: Time for States to Stand Tall

Question: Are rules meant for only one side? Are civil laws meant for citizens but not the police? Are moral laws meant for laymen but not clergy? Okay, one more: Are constitutional limitations meant for states but not the feds?

Our federal government has long violated the Constitution. But blatantly unconstitutional ObamaCare may finally be the straw that breaks the camel's back, as lawmakers in nearly a dozen states have been talking about "nullification" — the Thomas Jefferson doctrine that recognizes states' right to reject unconstitutional federal law.

And now it's more than just talk. Republicans in the Idaho House introduced a nullification measure on Wednesday, and legislators in Alabama, Kansas, Maine, Missouri, Montana, Oregon, Nebraska, Texas, and Wyoming may follow suit.

Not surprisingly, the statists among us meet this proposal with disdain. The Associated Press is running the headline, "GOP invokes 1700s doctrine in health care fight" (funny, the Left loves 1700s Jeffersonian ideas when they happen to be cynicism about the clergy). And Idaho's Assistant Chief Deputy Attorney General Brian Kane criticized the effort, saying, "There is no right to pick and choose which federal laws a state will follow."

Really? Question: Does this hold true when the federal government is picking and choosing which constitutional restrictions it will follow?

Statists like to cite the Constitution's Supremacy Clause (Article VI, Clause 2) as stating that federal laws are "the supreme law of the land" — the AP article makes this claim. But this is untrue, the result of a selective reading. Here is the passage with the necessary context:

"This Constitution, and the Laws of the United States which shall be made in *pursuance* thereof … shall be the supreme law of the land…[emphasis added]."

"In pursuance thereof" is pretty important. The clause makes clear that only laws that follow the Constitution enjoy co-status with the document as supreme.

At this point the statists will say, "Okay, so we'll go to the Supreme Court; its job is to determine what's constitutional." This is the judicial supremacy that enables federal supremacy. But did you ever wonder where the idea of Supreme Court as ultimate arbiter, with the right to overrule the legislative and executive branches (judicial review), comes from?

Answer: The Supreme Court itself.

(And this opinion was rendered, the Associated Press et al. should note, in what was basically a 1700s-

era decision.)

In the famous (infamous?) *Marbury v. Madison* case in 1803, Chief Justice John Marshall wrote, "lt is emphatically the province and duty of the judicial department to say what the law is."

Wow, imagine that, an entity decides it wants more power and claims that power for itself. I bet that's never before happened in history … except with virtually every monarch, dictator, and tyrant who has ever lived.

Now, with monarchs, dictators, and tyrants people often take the claim seriously (or at least posture to that effect) because not doing so often means some kind of unpleasant death. But note that the courts have no power to enforce their whims or, as some would say, their rulings — all they can do essentially is talk. That power belongs to the executive branch. Yet its role is to enforce the *law* — not the rule of lawyers. So why do we take the Court's power grab seriously?

I suppose the answer is that people want some entity that can mediate disputes, and since judges are called "judges," people naturally look to them for judging. Yet since getting a law degree and donning a black robe don't magically bestow one with infallible discernment, why would we show unfailing obeisance to these lawyers-cum-oligarchs? And if we are to suddenly lend an entity's will to power credence, what about the ambitions of other small groups or individuals? Why look down on Hugo Chavez? He's just assuming power he tells us he deserves.

Oh, if you would dispute me on this, know that I am the ultimate arbiter of reality. How can you know?

I just told you so.

Of course, you don't have to believe me. Thomas Jefferson, who was president when the *Marbury v. Madison* decision came down, later warned that if the judiciary is to be considered the last word on constitutional matters, "then indeed is our Constitution a complete *felo de se*."

This means an *act of suicide*.

Jefferson continued:

> For intending to establish three departments, coordinate and independent, that they might check and balance one another, it has given, according to this opinion, to one of them alone the right to prescribe rules for the government of the others, and to that one, too, which is unelected by and independent of the nation.… The Constitution on this hypothesis is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please."

And he subsequently stated quite bluntly, "To consider the judges as the ultimate arbiters of all constitutional questions is a very dangerous doctrine indeed, and one which would place us under the *despotism of an oligarchy* [emphasis added]."

And this is precisely what we now have.

In all fairness to Chief Justice John Marshall, he would likely be appalled at how today's Court plays fast and loose with the Constitution. After all, he wrote in his decision, "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"

Yet today's government passes these limits at will. We have politicians who scoff at the Constitution, such as when Nancy Pelosi dismissed a constitutional question with, "Are you serious?! Are you serious?!" And we have justices who rubber-stamp such constitutional trespass with living-document

rationalizations, such as when Ruth Bader-Ginsburg said that our Constitution mustn't be "stuck in time." But it isn't; it's stuck in law, supreme law that can only lawfully be changed through the Amendment Process.

The federal government has a nice racket going: It legislates more and more power for itself and has its own likeminded judiciary approve it with a wink and a nod. It has given us a living document and a dying republic.

But we don't have to commit suicide by judge. If the feds can nullify the Constitution, the states can and must nullify their nullification. And when the Court "steps in," we should tell it to step off, as we paraphrase President Andrew Jackson and say, "The justices have made their decision. Now let them enforce it."