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The Constitution's Supremacy Clause Does Not Trump Nullification

A couple of legal experts in Lubbock, Texas, co-authored a recent "It's Debatable" column in which they argued whether the "[federal] government has the authority to invade sanctuary cities to enforce [federal] immigration laws."

Without wading into waters of that particular controversy (the undertow of the sanctuary city stream would drown the strongest swimmers in the constitutional currents), there is one thing that one of the Lone Star law professors got completely wrong and should not be controversial to constitutionalists, or to Americans who understand the timeless principles of liberty upon which our Constitution is founded.

In the professors' "It's Debatable" op-ed, published in the *Lubbock-Avalanche Journal* (online) on September 15, Arnold Loewy, the George Killiam Professor of Law at Texas Tech School of Law, responds to his co-author's — Charles Moster's — claim that states retain the authority to refuse to enforce unconstitutional federal edicts — that is, to nullify federal usurpations of power by calling nullification "fictitious."

Nullification, Loewy claims, is "fictitious because of the Supremacy Clause."

In an apparent begrudging acknowledgement of some vestigial state authority, Loewy adds, "Undoubtedly states should have some power, but the question is where and when."

Fortunately for us, the Founders — the people who wrote and ratified the Constitution — made it very clear what powers are possessed by the states and when they may be exercised.

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 closer 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. Any act of the federal government not permissible under any enumerated power given to Congress in the Constitution is not made in pursuance of the Constitution, therefore it is not the supreme law of the land and may be declared null and void by the states.

Alexander Hamilton reiterated this interpretation of this part of Article VI when he wrote in *The Federalist*, No. 33:

> If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be

> supreme over those societies, and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a goverment, which is only another word for POLITICAL POWER AND SUPREMACY. But it will not follow from this doctrine that acts of the large society which are NOT PURSUANT to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such. Hence we perceive that the clause which declares the supremacy of the laws of the Union, like the one we have just before considered, only declares a truth, which flows immediately and necessarily from the institution of a federal government. It will not, I presume, have escaped observation, that it EXPRESSLY confines this supremacy to laws made PURSUANT TO THE CONSTITUTION; which I mention merely as an instance of caution in the convention; since that limitation would have been to be understood, though it had not been expressed. [Emphasis in original.]

He restated that principle in a later letter, 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. 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.

Nullification, then, is obviously no "fictitious" attempt to promote a low-key establishment of anarchy. In fact, nullification is founded on the assertion that the sovereign states formed the union, and as creators of the compact, they hold ultimate authority as to the limits of the power of the federal government to enact laws that they expect the people to obey.

That is to say, the Constitution is an agency agreement between the states (the principals) and the federal government (the agent).

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 federal 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, finally, the principals (states) may revoke the agent's (the federal government's) authority at will. It would be unreasonable to force the principals to honor promises of

an agent that has acted outside the limits of its authority as set out in the document that created the agency in the first place — the Constitution.

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.

Well intentioned Americans may disagree on the constitutionality of state protection of "sanctuary cities," but the intentions are not so sincere when someone falsely claims the Constitution and the history of its creation deprives states of the authority to exercise power not granted to the federal government in the Constitution.

The final word will not go to a law professor but to an authority of slightly higher status: James Madison, who wrote in *The Federalist*, No. 45:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected.
>
> The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

What's fictitious? The claim that the federal government can enact and enforce any act regardless of the enumerated powers granted to it BY THE STATES in the Constitution.