NULLIFICATION:

SOUTH CAROLINA HEADS TO DISASTER

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The "nullification" movement is back, well intended but no more persuasive as a means of resisting the encroachment of federal power than before. The issue prompting its' resurrection this time around is "Obamacare;" officially known as the Affordable Care Act (ACA).

Alas, one of the original sponsors of the nullification doctrine, South Carolina, is now taking the lead in this latest turn down an all too familiar dead end - having passed the South Carolina House last spring, "The Freedom of Health Care Protection Act" (H3101), in essence a nullification bill that seeks to override Obamacare as federal law, now moves toward a vote next month in the South Carolina Senate.

The legitimacy of Obamacare is heavily debated in many states, yet none have followed through with a formidable piece of legislation that would deem the ACA null and void; none but South Carolina. While national media outlets continue to dispute the effects of such legislation all fingers are pointing at South Carolina, where some activists have taken pride in becoming the nullification poster child.

Last April, South Carolina passed The Freedom of Health Care Protection Act with a 65-34 vote in the House of Representatives. The bill has moved to the Senate where is scheduled for fast-track debate in January by the Republican controlled Senate. Judge Andrew Napolitano recently underscored during a Fox News interview, "If South Carolina successfully does this, Republican-led states will follow." "If enough states do this, it will gut Obamacare," he added. While these words may seem encouraging to some, make no mistake, it's a caveat for the devastating effects that nullification fever could cause throughout our nation.

So what is wrong with South Carolina and other like-minded states declaring Obamacare "null and void" in this fashion? Let us count the ways.

THE LEGAL PROBLEM

First and most obvious is that nullification is unconstitutional. Although there are few areas of constitutional interpretation that are truly "settled law" (given the "elastic language" of the document itself), the status of nullification is most certainly among them. It has been tested in the Supreme Court in a steady stream of cases for more than two hundred years and been overwhelmingly struck down each time, by liberal and conservative justices alike. Along these lines, we have *United States v. Peters* (1809), *Osborn v. Bank of the United States* (1819), *Ableman v. Booth* (1859), *Cooper v. Aaron* (1958) and others.

As anyone who has ever given a lecture on the concept of "Federalism" can readily attest, there are two constitutional provisions that come immediately into play here, neither of which can be finessed regardless of the fervor behind the effort. The first of these is Article VI, otherwise known as the

"Supremacy Clause," which specifies that federal laws "are the supreme law of the land" and therefore take precedence over state laws, meaning that in our constitutional framework Obamacare legally trumps any legislative acts from South Carolina's state government.

Second is Article III of the Constitution, which specifically grants the federal courts, the highest of which is the United States Supreme Court (SCOTUS), the power to determine that which is and isn't constitutional, a power generally referred to as "judicial review." Thus, the claim contained in "The Freedom of Health Care Protection Act" that the federal government has exceeded its authority by enacting Obamacare is irrelevant unless the Supreme Court agrees, and last summer it famously ruled otherwise in *National Federation of Independent Business v. Sebelius.* This doesn't mean the Court is always right (and in *Sebelius* there are good reasons to believe it wasn't), only that it has the final say.

Of course, sponsors of The Freedom of Health Care Protection Act don't always admit that what they are proposing constitutes outright "nullification," appearing to favor instead the presumably less radical language of "interposition" borrowed from James Madison's "Virginia Resolutions of 1798," issued in opposition to the Alien and Sedition Acts. But "interposition" as understood by Madison and others since emphasizes the initiation of debate within the public and among the states regarding a possible exceeding of federal authority and thus bears little resemblance to the substance of what the South Carolina Senate will be considering next month, with its payment of fines from the public treasury to encourage violations of federal law and the threatened criminalization of compliance therewith.

Nor should we forget that Madison himself, the "father" of our Constitution, later denounced "nullification" in no uncertain terms during the nullification crisis of the 1830s, noting that "A plainer contradiction in terms, or a more fatal inlet to anarchy, cannot be imagined." And that the Supreme Court back in 1960 swatted down even its "interposition" cousin by endorsing a lower federal court's ruling (in *Bush v Orleans Parish School Board)* that it represented "an illegal defiance of constitutional authority."

Defenders of the proposed law also claim that all they are ordering is "non-compliance" with Obamacare based upon various SCOTUS rulings (most recently in *New York v. United States* and *Printz v. United States*) which allow the states to resist the "commandeering" of their resources and offices for enforcement of federal law. But what House Bill 3101 compels goes much further than simply non-compliance or refusal to cooperate with federal authorities by essentially criminalizing compliance with Obamacare and encouraging non-compliance by private citizens through the use of financial payments (in the form of tax credits).

With respect to that first "over-reach," to criminalize compliance with federal statutes takes us several steps further than even an outright declaration of unconstitutionality would (the essence, until now, of "nullification" as a doctrine). And to use state revenue to "make whole" those penalized with fines for failing to conform to federal law amounts to something never before contemplated; more precisely, an effort to use public revenues to directly subvert federal law.

So let us not be confused by any terminological sleight of hand here, it is clearly the old and long

discredited concept of "nullification" that South Carolina is contemplating (and then some); and that is how it will most certainly be viewed and rejected on the basis of by those nine U.S. Supreme Court justices, all of whom are graduates of prestigious law schools and therefore presumably sufficiently conversant in established case law.

Not even the most conservative members of the Court, not Antonin Scalia or Clarence Thomas and most certainly not Chief Justice John Roberts (author of the Court's opinion in *Seblius*) will see it otherwise. There will be no choice on their part but to respect the established body of precedent on nullification; indeed, it is quite possible that they will refuse to even bother to hear any legal appeal on the issue after a lower federal court has firmly squashed what South Carolina will have wrought.

So there should be no doubt as to what the ultimate outcome will be here in a legal sense – even if the South Carolina Senate approves The Freedom of Health Care Protection Act and South Carolina Governor Nikki Haley signs it into law, it will be stuck down as unconstitutional, likely without dissenting opinion, at the first opportunity. And that will also be the fate of other, comparable measures currently being considered by like-minded states.

THE DAMAGE TO SOUTH CAROLINA AND ITS CITIZENS

Alas, the difficulties with the proposed "Freedom of Health Care Protection Act" go further than simply its lack of constitutionality, for any legal challenge to it (however ultimately successful) will take time to mount, and in the meantime the citizens of South Carolina will have to live with the less theoretical damage that it will likely inflict.

Perhaps the most certain consequence in terms of such damage will be that done to the status of health care in the state. Within this context, the negative consequences that even Obamacare might inflict will likely be dwarfed over time by those flowing from passage of House Bill 3101, as health insurance companies withdraw from the state for fear of running afoul of its ambiguous but potentially ominous criminal penalties. For if passed in its present form, any company that complies with the health insurance plan requirements of Obamacare (as existent federal law dictates) runs the risk of being prosecuted under South Carolina law. Whether this actually results or not remains to be seen, but many health care insurance providers are unlikely to remain in state until such determinations are made in largely arbitrary and subjective fashion by state officials. At the least, their capacity to operate efficiently within the state's borders and provide much needed services will be significantly complicated and impaired.

How the goal of providing access to affordable, quality health care is enhanced by criminalizing compliance with Obamacare provisions and thus chasing skittish health insurers out of the state health care market altogether is left unexplained by the Bill's supporters.

But the economic consequences of the misnamed "Freedom of Health Care Protection Act" will almost certainly go further than damaging South Carolina's already troubled health care situation (at

latest estimate 20% of South Carolinians lack health insurance), as ANY company that currently provides health insurance to its employees and falls under the provisions of Obamacare will also run the risk of being targeted by its implied criminalization of compliance with federal law. At the least, they will face tremendous uncertainty regarding their legal status and options; ambiguity which carries with it both potentially high litigation costs and an unstable investment climate. By threatening criminalization in such a fashion under the logic of "nullification," South Carolina will likely encourage the departure of increasingly mobile firms and much-needed investment, jobs, and economic growth. "Doing business" in Texas or Georgia will suddenly seem quite a bit more attractive and less risky than staying put or relocating to South Carolina.

In general, the more ambiguous and complicated the law becomes, the more difficult becomes the capacity of citizens (and companies) to safely comply with it and to predict the legal consequences of their decisions. Legal arbitrariness and capriciousness on the part of government becomes the enemy of stability, order, and thus prosperity, but this is precisely what passage of the Freedom of Health Care Protection Act portends. Indeed, by placing health insurance providers and even medium-size firms of all kinds between the rock of South Carolina law and the hard place of federal law, our elected representatives and governor will have succeeded only in providing gifts to trial lawyers in the form of an inevitable and debilitating explosion of litigation. It seems unlikely that this is what was intended, but throughout the debate over this effort at nullification, as is so often the case when political anger is aroused and indignant poses struck, consequences tend to be ignored until their costs hit home. At which point the self-congratulations for standing by principle ring increasingly hollow.

Finally, there arises, in terms of those unintended consequences, the question of whether there is any logic in arguing that South Carolina cannot afford to comply with the provisions of Obamacare but also proposing to cover the costs of Obamacare fines, as promised by the proposed legislation. At present the "fine" (which John Roberts managed to unpersuasively redefine as a "tax" in *Sibelius*) amounts to only $95 per person. But apart from the unconstitutionality of using public resources to subvert federal law noted earlier, the severity of those fines are scheduled to escalate on a yearly basis, to $325 per person in 2015 and to $695 per person in 2016, with the South Carolina taxpayer being obligated to cover those costs at certain detriment to the state's fiscal solvency.

How a relatively poor state that allegedly lacks the funds to comply with Obamacare can find the funds to make non-compliers financially "whole" again is another question left unanswered by supporters of the Freedom of Health Care Protection Act.

THE GREATEST DAMAGE OF ALL

Thus far we have enumerated only the more specific costs of passage of The Freedom of Health Care Protection Act to South Carolina: that it will make access to health insurance and quality health care more difficult to obtain and expensive by driving out health insurance companies caught between federal and state law, that it will discourage the flight of industry and therefore jobs and capital investment necessary for economic growth and prosperity to neighboring states, that its ambiguous

provisions criminalizing compliance with Obamacare will lead to a litigation explosion that benefits only the trial bar, and that it will eventually drain state revenue in pursuit of its infeasible promise to financially compensate those penalized for non-compliance with Obamacare.

And all on behalf of a quixotic nullification crusade that will end up being unanimously struck down as unconstitutional by the first federal court that addresses it.

Still, the biggest cost of all will reverberate well beyond the state of South Carolina to undermine the entire (and entirely justified) national campaign by conservatives and libertarians against Obamacare itself. By resurrecting a discredited concept ("nullification") historically associated with unsavory goals (including the preservation of slavery in the 19th century and segregated schools in the 20th), South Carolina conservatives run the risk of playing directly into the hands of the Obama Administration and liberals seeking to discredit opposition to the Administration's signature legislative achievement.

For months now, as implementation of Obamacare founders before our eyes due to its various inherent defects, the Administration and its supporters have sought to deflect blame by accusing Republicans of "sabotage" or "obstruction" of it; of being "extremists" and "radicals" that oppose government of all kinds. By raising the disreputable doctrine of nullification, conservatives and Tea Party supporters in South Carolina needlessly provide ammunition for such false charges.

In politics, tactics matter as much as goals, such that worthy ends must always take care to identify reasonable means. Defeating Obamacare is a worthy goal (perhaps THE most pressing goal) for conservatives and libertarians nationwide, but HOW this goal is pursued is crucial. Alas, at present there is no better way to raise Obamacare from its deathbed than to do what the South Carolina Senate is contemplating doing (and the South Carolina House has already done). Rather than having let Obamacare die from its many self-inflicted wounds, they will have unintentionally aided and abetted its recovery and entrenchment in our national life. The struggle against Obamacare is both important and necessary, and South Carolina appears poised to only make it more difficult.

Extremism has never been rewarded in American politics; and there are few doctrines more extreme in their implications than nullification. Andrew Jackson, no bleeding heart liberal or enemy of state's rights, considered nullification to be "incompatible with the existence of the Union, contradicted expressly by the letter of the Constitution, unauthorized by its spirit, inconsistent with every principle upon which it was founded, and destructive of the great object for which it was formed." Simple logic (as well as constitutionality) suggests that if states could pick and choose which federal laws they were to be held to, we would have not limited government but an incoherent jumble bordering on anarchy; none of our rights would be secure because the Constitution itself would have become meaningless with fifty different arbiters.

In our own time, Robert E. Levy, chairman of the nation's leading libertarian think tank, the Cato Institute, has noted in his opposition to nullification that we can't effectively defend our most basic rights "by flouting the very document that inspires that fight in the first place: the Constitution." Put differently, unconstitutional means can never be an effective way of safeguarding constitutional rights.

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In January The Freedom of Health Care Protection Act will resurface under special order and all eyes will be on the South Carolina General Assembly. The actions in South Carolina will play a critical role in the decision of other states as they consider moving forward with nullification doctrines.

In the end, what has been called “pitchfork populism” can generate great passion and mobilize grass-roots opposition to injurious policies and capricious governmental power, but our Founders also viewed the upper chambers of legislatures, in particular the more deliberative Senate, as mechanisms for diluting such passions and elevating reason, prudence, and deliberation. Next month, the South Carolina Senate should play that necessary role in the interest that cooler heads shall prevail. There are reasonable and effective and constitutional ways for conservatives to get rid of Obamacare; the doctrine of nullification is none of those things.

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