Written by **Joe Wolverton, II, J.D.** on December 24, 2013

Americans for Limited Government Calls Nullification "Unconstitutional"

Americans for Limited Government Foundation released a paper on December 19 claiming that state attempts to nullify ObamaCare are "unconstitutional and will do harm both to the people" of those states and to the overall effort to oppose the health care debacle known as the Affordable Care Act.

The eight-page attack on nullification was authored by Dr. Bradley Gitz, a political science professor at Lyon College in Batesville, Arkansas.

Regardless of Gitz's academic credentials, his denunciation of nullification as an effective tool against federal overreach is full of the same misunderstandings, misstatements, and outright mistakes that have plagued similar statements published recently by other "authorities."

Framing his discussion with the current attempt by the legislature of South Carolina to stop enforcement of ObamaCare at the borders of the Palmetto State, Gitz sets out to "count the ways" that nullification "is wrong."

In our response to Gitz's refutation, *The New American* will correct Gitz's errors in order to help constitutionalists understand the power and propriety of nullification in the ongoing battle to force the federal beast back inside its constitutional cage.

First, Gitz claims the "status of nullification" is "settled law" and that the Supreme Court has settled the matter once and for all. He cites three 19th-century decisions and one from 1958 in support of his thesis. Although he does not elaborate on just how the decisions he mentions nail the nullification coffin shut, even the mere insinuation that such is true (or even could be!) deserves some attention.

Where does the Supreme Court derive the power to declare the actions of the states unconstitutional? Despite mentioning Article III, Gitz is unable to point to that clause or provision of that article granting to the Supreme Court the authority to nullify nullification.

Simply put, such a conception of Supreme Court power was never contemplated by the Founders.

To begin with, Thomas Jefferson specifically addressed this assumption in the Kentucky Resolution of 1798.

> The principle and construction contended for that the general government is the exclusive judge of the extent of the powers delegated to it, stop nothing short of despotism since the discretion of those who administer the government, and not the constitution, would be the measure of their powers: That the several states who formed that instrument, being sovereign and independent, have the unquestionable right to judge of its infraction, and that a NULLIFICATION by those sovereignties, of all unauthorized acts done under color of that instrument, is the rightful remedy. [Emphasis in original.]

How did so many scholars, lawyers, and professors come to believe that the authority to nullify an unconstitutional act of the federal government is the exclusive prerogative of the Supreme Court? Along those same lines, how did so many otherwise intelligent people come to accede such absolute power to a small claque of black-robed oligarchs?

Two words: judicial review. From Marbury v. Madison to the *Cooper v. Aaron* case cited by Gitz, professors and students of law and government have been conditioned to accept that the Supreme Court is the final arbiter of all things constitutional. If that gaggle of justices decrees an act to be in conformity to the Constitution, then there is no appeal and the matter is settled for eternity.

There's are a couple of problems with this popular, easy, albeit sloppy, reasoning.

First, as Mary Babitz of the New Jersey Tenth Amendment Center explains:

> In fact, however, there is nothing in *Marbury v. Madison* to warrant such a supremacy, merely a statement that the Supreme Court, like any other branch of federal or state government, has the authority and duty of Constitutional review in determining whether another branch of its level, or the other level, of government has acted beyond the scope of its powers and infringed on the powers of the other.

Babitz is correct. The usurpation of exclusive authority to define the boundaries of the Constitution did not occur until the decision handed down in the *Cooper v. Aaron* case.

In that 1958 ruling, Chief Justice Earl Warren, without any right whatsoever, decreed that *Marbury v. Madison* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution," adding that judicial review "has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."

Well, that's decided then. Except it isn't.

Which of our founders — even among the most ardent nationalists — would a reader imagine would support as a core principle of federalism the endowment of a very small group of unelected, unaccountable, life-tenured lawyers with supreme, exclusive, and unassailable power over the Constitution?

How would anyone with even a passing appreciation for limited government and an elementary familiarity with the framing of our Constitution accept the idea of Supreme Court infallibility and concede to that robe-clad coterie power only dreamed of by King George III and every other tyrant throughout history?

Unfortunately, Gitz and Americans for Limited Government not only have fallen for this ruse, but have now repeated it, a much more deadly and unforgivable sin.

Next, why is it, if we accept Gitz's portrayal of Supreme Court power, that such immense power seems never have been wielded to save the people from the countless congressional acts that have not only exceeded that body's constitutionally established powers, but have robbed the people of the United States of their most cherished, fundamental liberties and burdened them with the almost unbearable financial obligation of funding these unconstitutional programs and policies?

If the Supreme Court is, as Gitz insists, the decider of all things constitutional, it is certainly doing a terrible job and have inexplicably fiddled while the Bill of Rights burned, leaving it all but unidentifiable. Surely, Gitz, the ALG, and other "conservative" organizations do not genuinely support such tyranny.

Next, Professor Gitz argues that the so-called Supremacy Clause of Article VI of the Constitution "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."

With all due respect, Dr. Gitz, the Supremacy Clause (as Gitz and others incorrectly label it) of Article VI does not declare that federal laws are the supreme law of the land. It states that the Constitution "and laws of the United States made in pursuance thereof" are the supreme law of the land.

The phrase that pays is "In pursuance thereof, not "in violation thereof." If an act of Congress is not permissible under any enumerated power, it is 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.

Alexander Hamilton put a fine point on the matter in *The Federalist*, No. 33:

> But it will not follow from this doctrine that acts of the larger 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. [Emphasis in original.]

Acts not authorized under the enumerated powers of the Constitution are "merely acts of usurpations" and deserve to be disregarded, ignored, and denied any legal effect.

Although Gitz would disagree, more state legislators need to learn this. Familiarity with this fact of constitutional construction is fundamental to a reclaiming of state authority and removing the threat to liberty posed by the centralization of power in the federal government.

Finally, we address Gitz's misleading claim that James Madison "denounced "nullification" in no uncertain terms." In support of this misrepresentation of Madison's position, Gitz relies on a statement by Madison that has become the (cracked) foundation upon which so much opposition to modern state attempts to nullify unconstitutional acts of the federal government have been built.

Although it's unclear from his paper whether Gitz intentionally or accidentally removes the quote from Madison from its context, putting it back will help readers reconcile Madison's allegedly contradictory statements.

In his "Notes on Nullification," Madison's disapproval of nullification was not with the principle, but with the practice, specifically as was being proposed by South Carolina and John Calhoun.

Anyone reading Madison's notes would notice that in several passages he refers to "her" doctrine of nullification, with South Carolina being the female in question. Furthermore, in other places in the notes, Madison says he is writing to resist South Carolina's "peculiar doctrine" of nullification.

Again, placing Madison's statements back within their proper context would go a long way toward disabusing anyone — including Dr. Gitz — of the notion that Madison "denounced 'nullification' in no uncertain terms."

Madison wrote his Notes on Nullification in response to inquiries being made to him specifically regarding South Carolina's efforts to invalidate a federal act and the assumption many were making that if one state nullified such an act then all states would be bound to do likewise unless a convention was called.

This equally erroneous attempted application of nullification is what prompted Madison to put pen to

paper. He rightly believed that one state can nullify a federal act without requiring other states to follow suit. Furthermore, in addressing South Carolina's tack, Madison wanted to be on record as opposing a bloody civil war.

For those interested in seeing the full picture of Madison's notion of nullification, consider this statement, also taken from Madison's notes:

"The right of nullification meant by Mr. Jefferson is the natural right, which all admit to be a remedy against insupportable oppression."

Notice: Madison says "all admit" that nullification is a "remedy against insupportable oppression."

To the point, if Gitz genuinely believes that Madison would not support South Carolina's attempt to hold ObamaCare as "null, void, and of no legal effect," then he must also believe that Madison would not consider the health care behemoth to be an "insupportable oppression."

If ObamaCare doesn't meet Madisonian muster of an "insupportable oppression," then one would be hard pressed to find any federal act that does.

Until "conservative" state legislators begin informing themselves of the rights retained by the states and begin ignoring the irrational and incorrect opinions of professors and judges, there will be no end of federal demands and they will get more and more difficult to comply with and will thereby justify increasing federal control over the apparatuses of state government.

The trajectory is easy to see and follow into the future. The federal government will soon grow into a central government after the model of the so-called European democracies, one "insupportable oppression" after another.

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