Written by **Joe Wolverton, II, J.D.** on November 22, 2013

Nullification: "Terrifying" and "Stupid"?

A bill to refuse to enforce the unconstitutional mandates of ObamaCare will come before the South Carolina legislature when it reconvenes in January.

While such a reaction may seem reasonable in light of the train wreck that the Affordable Care Act has proven to be, there is one citizen of the Palmetto State who thinks it's time for South Carolina to get out of the shadow of its rebellious past.

Writing in the *Charleston City Paper*, Corey Hutchins hides behind scholars, historians, and partisan lawmakers to denounce the concept of nullification.

"Yet again, South Carolina reaches for the bottom," said Gwen Robinson, a Mt. Pleasant attorney, as quoted by Hutchins. "This is stupid," Robinson reportedly added.

Sliding a little farther down the legal ladder, Hutchins includes the learned opinion of a recent law school graduate, Andrew Patterson, in his diatribe, as well: "You can call this bill what you want," Patterson told the lawmakers at the hearing last night. "But essentially it is gutting [a federal law] … the idea of nullification is terrifying to me."

Stupid and terrifying.

Finally, Hutchins decides to quote an actual licensed attorney, Charleston law professor William Merkel. Merkel, as reported by Hutchins, claims, incorrectly,

> The purpose behind the Constitution — and [James] Madison, the reputed father of the Constitution spells this out in great detail in his notes he made leading into to the constitutional convention — the principle [sic] purpose was to strip the states of powers and provide the federal government with ample authority.

Try squaring that bald-faced mischaracterization of Madison with the following words from the man himself as written in *Federalist* 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.

Merkel then reminds readers that "the phrase nullification doesn't appear in the Constitution." Well, true enough, but perhaps Merkel has failed to read the *Federalist Papers*, or the Bill of Rights. The tenth of those fundamental amendments reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

This brief protection of the right of states to exercise their "numerous and indefinite" powers would seemingly qualify under the Merkel standard as the musings of "militant states' rights advocates."

From beginning to end, Hutchins tries to portray nullification as an embarrassing vestige of South Carolina's secessionist past and of the Nullification Crisis of the 1830s led by South Carolinian John Calhoun.

"Nearly 200 years later, [John] Calhoun's ideas are still alive in the S.C. General Assembly," Hutchins writes, speaking of the anti-ObamaCare legislation that will soon come before that body.

Hutchins isn't alone in his disdain for nullification — not even in South Carolina.

Earlier this year during debate on an ultimately unsuccessful attempt to nullify ObamaCare in South Carolina, several state newspapers published an article penned by Phil Noble.

In his piece, Noble synopsizes the 19th-century Nullification Crisis and thinks the battle is won. He explains:

> Now, some may say that Calhoun and company were nuts when they started all this nullification and secession stuff the first time. I'll leave it to others to characterize their mental condition. But this I do know: They put in motion a chain of events that led to the death of more than 650,000 of their fellow Americans, and untold suffering for the people of our state — suffering that we haven't fully overcome yet.

This article won't wade into the deep water of Civil War causation, for unlike Noble, I admit my lack of proper education when it comes to that complicated issue.

A field I am competent in, however, is the drafting of the Constitution, the federal government established by that document, and the process that led to ratification of the Constitution.

Despite the example set by Noble, there is no need to question the sanity of anyone advocating for the reaffirmation of the right of states to hold as null, void, and of no legal effect any federal act that exceeds the scope of powers granted to it by the states in the Constitution.

Noble believes that the Union victory in the Civil War settled the conflict between states' rights and federal "supremacy." Did it?

In a word: No. The Civil War made one thing clear: The federal government believes (and the Confederacy was forced to concede) that might makes right. The Union army defeated the army of the Confederacy; therefore, so the thinking goes, secession is no longer a constitutional remedy available to states. Might makes right.

Only it doesn't.

Think of it this way: Assume my neighbor and I disagree over the exact location of the boundary line between our properties. One day, while I'm out building a shed that my neighbor believes encroaches on his property, we start arguing and the argument escalates to a full-fledged fist fight, and I knock out my neighbor. Does that mean that the legally binding location of our mutual property line has been settled?

Does the pummeling of my neighbor make my opinion of the location of that line the rightful boundary? Of course not. Might, it seems, does not make right, neither in boundary disputes regarding land nor in similar disagreements over states' constitutional authority.

Those of us engaged in the struggle to force the federal beast back inside its constitutional cage are not nuts, and we are not feverish. Nullification is no fad and will not fade away.

A growing number of concerned citizens of this Republic are no longer willing to recur to Congress to repeal unconstitutional laws or to file legal complaints in the hope that the courts will strike down offensive measures. They understand that while perhaps commendable, these tactics are futile and offer no guarantee of the restoration of constitutionally ensured freedom. They refuse to wait on this or that president, this or that congressman, or this or that political party to acknowledge their pleas for relief from federal oppression. Instead, they unashamedly will assume their right and their duty to derail the "long train of abuses and usurpations" and "provide new Guards for their future security": the states and themselves.

Finally, in his nullification of nullification, Hutchins quotes Republican State Senator Ray Cleary, who thinks nullification is a waste of time. Speaking of the bill that would nullify ObamaCare, Cleary explains, as quoted by Hutchins:

> If I could nullify it I would — if it would be worthwhile — but, like I told somebody, my high school lost every football game my junior and senior year and on Mondays we had moral victories. I'm not necessarily a believer in moral victories.

Perhaps the victories would be more than "moral" if more state lawmakers would recognize their right and their obligation to hold as null, void, and of no legal effect any act of the federal government that exceeds the "few and defined" powers granted to it in the Constitution.

As Jefferson and Madison explained while reaffirming their "warm attachment to the Union of the States," state lawmakers' devotion to the Constitution and to the rule of law should compel them 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."

Perhaps the victories over federal overreach would multiply were enlightened state legislators and governors to stand up, tear up the federal welfare checks, and assume the "numerous and indefinite" powers they retained upon forming the federal government by way of the Constitution.

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