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March 24, 2010: The Legal Attack on Healthcare Reform

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Title: The Legal Attack on Healthcare Reform

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3/24/2010—Most of the Republican-inspired legal challenges to the recently enacted healthcare bill do not amount to much. In fact, the notion that states can exempt their citizens from the requirements of federal law is reminiscent of the Nullification Crisis of 1832, which was, as described on Wikipedia: “a sectional crisis during the presidency of Andrew Jackson created by South Carolina's 1832 Ordinance of Nullification. This ordinance declared, by the power of the State itself, that the federal Tariff of 1828 and the federal Tariff of 1832 were unconstitutional and therefore null and void within the sovereign boundaries of South Carolina.” The concept of nullification was rejected and that rejection was perfected at Gettysburg.

The one legal challenge people say might be serious is the substantive due process notion that the federal government, indeed no government, can require a citizen to purchase a product from a private entity, in this case the mandate that everyone must have healthcare. I don't think this is a serious legal argument either. It is similar to the argument the Supreme Court rejected in 1934, in *Nebbia v. NY*, that it was unconstitutional for a State government to tell a private business what price it could sell its product, milk in this case. The Court upheld price controls, saying

“The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. ...The Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.”

In the case of health insurance, the mandate is necessary because everyone else pays for the medical care of the uninsured. When you are in a traffic accident, the ambulance takes you to the emergency room whether you have insurance or not. You could even have a button that says, “let me die on the road, I don't want hospital care” and you will still end up with hospital care you will not be able to pay for.

In general, the question is, what happened to the conservative critique of the liberal distrust of democracy? Conservatives used to say that liberals run to the courts because they cannot win in the democratic forum of the legislature. That is what Republicans are doing now. Why are the Republicans not content to run against healthcare reform in November? If they win big, President Obama will serve only one term and they will be free to repeal all this. Their problem is, they are afraid they will not win at the voting booth. That is why they are turning to poor legal arguments instead.