Normally, we would stay out of this and pursue our own methodology for fighting the exchange and Obamacare. But we have been asked our opinion of the nullification effort by a few Wisconsin Tea Party groups and particularly an opinion on the flyer being circulated espousing nullification.

We have seen and read this flyer. Unfortunately, it is rife with errors. In our opinion, it will do considerable damage to the Wisconsin Tea Party Movement and, by implied association, every group within it regardless of their respective stand for, against or neutral on the position advocated in the flyer. We wish to state at the outset here, that we once upon a time supported nullification in 2009 but we have been better educated by constitutional scholars, including those in the Nullification film cited in the flyer. We no longer see this as a reasonable and viable solution; rather, we now see it as a dangerous and destructive course of action.

First, let us start by being clear as to what nullification is (similarly to the flyer's first section) and how it is viewed by the legal community. It is a state's refusal to comply with a specific federal law, which that state considers to be unconstitutional, to the extent of breaking the federal compact (our federal Constitution, although not referred to here in the sense of legal "compact theory"), in the form specifically of the Supremacy Clause of our Constitution which states that the Constitution trumps all other laws, especially that of the individual states. It is based on a theory originally proposed in the Kentucky Resolutions of 1798 and 1799 authored by Thomas Jefferson and the Virginia Resolutions of 1798 authored by James Madison and later cited and advanced by John C. Calhoun. The Resolutions were published ANONYMOUSLY for good reason – namely the possibility of the Resolutions being called treasonous and due to the government positions of Jefferson and Madison at the time of writing. These Resolutions were rejected by every one of the other states. Every state immediately realized that these resolves were a rejection of the Constitution and threatened the integrity of the Constitution and the cohesion of the nation. At the time, political leaders stated that the damage of the Resolutions was "deep and lasting, and was a recipe for disunion". George Washington was so appalled by them that he told Patrick Henry that if "systematically and pertinaciously pursued", they would "dissolve the union or produce coercion". The Resolutions did not, as oft believed, advocate for nullification of the Alien and Sedition Acts of the time but rather for a repeal of those acts in the next Congress while still laying out a case for nullification as a legal doctrine.

At the time of the Resolutions' writing, there was no recognized "power of a state to reject unconstitutional federal law" and there is none now; contrary to the flyer's statement otherwise. The flyer claims that nullification is "implied in the Constitution" but does not say where the implication is written although we surmise that the author of the flyer will say that such power is to be found in the 10th Amendment. If one cannot undertake to lay a finger on that article of the Constitution that is the unquestionable source of such a "constitutional power" then one must conclude that it does not exist. The Kentucky Resolution of 1799 declared that Kentucky "will bow to the laws of the Union" but would continue "to oppose in a constitutional manner" the Alien and Sedition Acts. The Virginia Resolution did not use either the word or the concept of nullification. It used interposition which is an entirely different concept from nullification. Like nullification, interposition has also been repudiated by the Supreme Court of the United States (SCOTUS).

The flyer also claims that nullification is “a final and unequivocal ‘NO’ on the part of the state.” History does not support such an assertion as there is not a single incident in American history to which one can point and show that a state successfully nullified a federal law and that the federal government accepted such an outcome. To the contrary, there are numerous incidents where nullification has been attempted and the federal government prevailed through not only the rulings of the SCOTUS but also through political pressure, via Congressional action and public opinion. – And in the scenario of the South Carolina Nullification Crisis of 1832, military force was proposed and consequently the Force Act of 1833 was passed by Congress to facilitate using the US Army to bring South Carolina into compliance.

The Nullification Crisis came dangerously close to war when South Carolina raised an army to resist the federal government prompting congressional leaders to predict violence and disunion. Daniel Webster, in the Webster-Hayne debates, refuted nullification, quoting from Barton,

> “Webster, like the Founders before him, argued that if a state disapproved an action of the federal government, it had a right to seek redress in federal court or to amend the Constitution, but it had no constitutional right simply to nullify a federal law – that to do so would produce anarchy and eventually could result in a sectional or a civil war. In fact, he predicted that nullification would cause the Union to dissolve and that the American flag, “drenched…in fraternal blood,” would wave over “the broken and dishonored fragments of our once glorious empire.”

The flyer quotes Jefferson and Madison in support of the idea of nullification but uses earlier 1790s era citations rather than quotations from later in their lives when they recanted against the nullification concept. During the Nullification Crisis of 1832-33, Madison rejected South Carolina’s thesis stating that those who were leading the move to nullify and using his words from the Resolutions had misinterpreted his statements. He denounced nullification as a “colossal heresy”, a “specious doctrine”, “a more fatal inlet to anarchy cannot be imagined” and called it a “deadly poison”. Referencing from Gutzman on Madison,

> “His most extreme anti-Nullifier statement, the March 12, 1833 letter to Virginia's Senator William Cabell Rives, stated that the states had transferred their sovereignty to the federal government and that the transfer was permanent; the federal government was the final arbiter of its own powers. Assuming the inerrancy of Supreme Court (thus of federal) interpretation, he said, "As this is a simple question whether a State, more than an individual, has a right to violate its engagements, it would seem that it might be safely left to answer itself." Madison went to his grave insisting that Virginia's third resolution of 1798 had been misrepresented by the Nullifiers.”

All 6 U.S. presidents who preceded Andrew Jackson in office, at one time or another, publicly voiced opposition to nullification – once again including Jefferson and Madison, the authors of the concept.

Second, the flyer asks “Can’t the Supreme Court Stop Nullification?” and we beg to differ with the author’s conclusion of ‘no’, rather, YES it can – and it has repeatedly. As early as 1809 in *US v. Peters* the concept was tested in a SCOTUS case and rejected. Since then there have been numerous challenges and ALL have been rejected. The most notable cases being:

- *US v. Peters 1809*
- *Martin v. Hunter’s Lessee 1816*
- *Cohens v. Virginia 1821*
- *Osborn v. Bank of the US 1824*
- *Worcester v. Georgia 1832*
- *Prigg v. Pennsylvania 1842*
- *Ableman v. Booth 1859*
- *Texas v. White 1869*
- *Cooper v. Aaron 1959*
- *Bush v. Orleans Parish School Board 1960*

These cases involve either nullification, interposition or both. The Federalist Papers, perhaps the pre-eminent source of the intent of the Constitutional Framers, make clear in Numbers 33, 39, 44, 78, 80 and 82, that the federal courts, and the Supreme Court in particular, and not the states, hold the power to overrule state court decisions and to ascertain the constitutionality of laws. The SCOTUS has ruled extensively that the states are NOT the final arbiters of what is constitutional. We invite all to look up each case, but in particular the *Ableman v. Booth* ruling as this goes directly to the third point.

Third, the flyer laid out but a small part of the Joshua Glover story and thus presents it as Wisconsin leading the nullification drive over the Fugitive Slave Act of 1850. This hypothesis diverges from history significantly. As one can see from the aforementioned list of SCOTUS rulings, nullification was addressed long before Wisconsin became a state and many times at that. The Glover story found its way to the SCOTUS through *Ableman v. Booth* and was ruled on in 1859 prior to the Civil War. The Court, in a unanimous opinion written by Chief Justice Roger B. Taney, stated that the Wisconsin Supreme Court had effectively asserted the supremacy of state courts over federal courts in cases arising under the Constitution and laws of the United States. The Court noted that if the Wisconsin courts could annul the judgment of conviction by the federal district court in this case, then any state court could annul any conviction under federal law. The Court held that the states do not have that power.

The Court stated, that in adopting the Constitution, the people granted certain powers to the federal government:

> "It was felt by the statesmen who framed the Constitution and by the people who adopted it that it was necessary that many of the rights of sovereignty which the States then possessed should be ceded to the General Government, and that, in the sphere of action assigned to it, it should be supreme, and strong enough to execute its own laws by its own tribunals,

> without interruption from a State or from State authorities." Therefore, the Court concluded that the Constitution gives the federal courts the final authority in matters involving interpretation of the Constitution and laws of the United States. Because the Constitution grants this power to the federal courts, the state courts do not have the power to review or interfere with the judgments of federal courts in matters arising under the Constitution or laws of the United States. The Court therefore found that the power of the State of Wisconsin "is limited and restricted by the Constitution of the United States." Wisconsin did not have the power to nullify the judgment of the federal court or to hold the Fugitive Slave Act unconstitutional.

The fourth point in the flyer is the contention that nullification can stop Obamacare. This is also found to be erroneous. According to the SCOTUS, no state has, as the author of the flyer contends, the "authority to reject as unconstitutional federal legislation and curb federal power run amok." That is exactly why we have a SCOTUS – so that there is one consistent authority and not numerous and competing, conflicting authorities. There is some truth and useful information in this section; it states that the more states attempt to nullify the harder it becomes for the federal government to force Obamacare upon us. This is true; the recommended methodology is flawed but the strategy is correct. Also, it is now 13, not 11 states that have passed measures against Obamacare. Wisconsin was not, as stated, the only state to attempt to nullify the Fugitive Slave Act of 1850. The Wisconsin Supreme Court was the only state's high court to rule against the Fugitive Slave Act, but 6 other states did pass laws against compliance with the Act. "Authoring, advancing and passing nullification legislation" (sic) will serve only to make Wisconsin look ridiculous and draw the ire of the federal government. There are more productive measures available. Nullification is the political "n-word" and is treated as such. Those that use it are dismissed as kooks, crack-pots, malcontents and dismissed out of hand as radical extremists and constitutionally uneducated. The immediate result is that those in a position to make legal and legislative change STOP listening. It is simply not going to happen.

Finally we have been asked about our approach to the issue. We have learned the hard way that always coming at EVERY issue and problem with a hammer will solve few problems permanently. The failure of the Wisconsin Patriot Coalition is due, in large part, to the decision by the "leadership" to use a combative mentality from the outset of each issue. We see more productivity is gained when using a velvet glove approach from the beginning and reserve the boxing glove, for use very sparingly while trying hard to not damage relations with those equipped and empowered to create desired change. There are however indeed times when the boxing glove must be used. Over the last 2 years, the reputation of many groups (and that of the movement in the state overall) suffered from the antagonistic and hostile stance of those advocating such measures as a standard practice. It is very difficult to advance a piece of requested legislation when the legislature views a group with suspicion and a lack of credibility. We are all judged together since we are seen from without, however erroneously, as one organism.

The first approach is that of picking one of the federally proposed solutions. We concur with the writer of the e-mail message that was forwarded, containing the flyer, that choosing a state or partnership option is disastrous. Forcing the feds to do it all on their own is the best of the federally suggested options. There is another, fourth option, a more obstructionist strategy of simply refusing to make a choice and "just say 'no'" without stipulating what the state shall do in response to the federal government. Leave it open ended and "remove the consent of the governed" by reverting to citing the unconstitutionality of the PPACA through pointing to the error in the SCOTUS ruling – the SCOTUS has erred many times in the past so this is no surprise to anyone – think *Dred Scott v. Sanford*. We are advocating this precise stand. There are enough SCOTUS rulings that work in the states' favor to refuse assent and cooperation with the federal mandates. See *NY v. US* (1992) and *Printz v. US* (1997) for more detail.

In this approach, the federal government is forced into taking an action which will only reflect poorly on it and earn sympathy for Wisconsin's (and the other states') cause. The state's hands remain clean and untainted from assuming a reactionary and controversial stance which will be used to discredit the state and undermine its narrative. At present, the only thing keeping Wisconsin from looking most foolish are the recent on-line petitions for secession. The next step in this strategy is to document all of the problems that are going to come to light quickly with the implementation of Obamacare and use these examples to justify the repeal post-2016. The opportunity for repeal is <u>always</u> going to be present. Rectifying our dissatisfaction with the federal dominance, overreach and intrusion into the realm of the states lies within our Constitution and not without it.

Imagine the chaos if nullification was successful; everything would be contested by the states and the federal government would now be even less effective than it was under the Articles of Confederation. Imagine the southern states collectively deciding that the Civil Rights Act of 1964 was unconstitutional and, as a consequence, nullifying it and abrogating the rights of black Americans. What if the western states all decided that the Congress had unconstitutionally erred in passing the Indian Citizenship Act of 1924 (the Snyder Act) and chose to disenfranchise Native Americans through nullification? The 1993 Religious Freedom Restoration Act has been found unconstitutional in part; think of the possibilities for religious abuse if it were nullified in whole. On every issue and every piece of legislation, there will be states both for and against the act. It is predictable and inevitable that every act would have some state nullifying that specific act. 'Federal law' would be a meaningless expression.

We are pleased and encouraged that so many of the roughly 150 Patriot groups in the state of Wisconsin are working diligently to stop the imposition of Obamacare. We believe that the more ways that these groups try to stop the implementation the greater the likelihood that one way will indeed succeed. A single concerted method of resistance has a much lower probability of success. Groupthink is counterproductive.

We do however strongly agree with the second line of the flyer in that "Compliance is not the answer. Neither is the Supreme Court." Once again, this is our opinion only and we were asked.