

Health care's new nullifiers

WASHINGTON — Virginia Attorney General Ken Cuccinelli seems determined to use an attack on health care reform to bring us back to the 1830s.

Cuccinelli, to cheers from the Tea Party crowd, went to court this week to overturn the new law, which he says conflicts with a Virginia statute "protecting its citizens from a government-imposed mandate to buy health insurance."

"Normally, such conflicts are decided in favor of the federal government," he said, "but because we believe the federal law is unconstitutional, Virginia's law should prevail."

The Republican attorney general's move reveals how far into the past America's New Nullifiers want to push the nation. They don't just want to abandon a more than seven-decade-long understanding of the Constitution's interstate commerce clause that has allowed the federal government to regulate a modern, national economy. They also want to resurrect states' rights doctrines discredited by President Andrew Jackson during the nullification crisis of the 1830s and buried by the Civil War.

There are two issues here. One is whether the federal government can require individuals to buy health insurance. The other is the states' rights question. In a suit separate from Cuccinelli's, 13 state attorneys general — 12 Republicans and a conservative Democrat from Louisiana — also challenged the mandate. But their main argument is that the federal government cannot force states to pay for an expanded Medicaid program and take other steps the law requires.

It would take a rashly activist court to find the individual mandate unconstitutional because it



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is structured as a tax. No one will go to jail for not buying insurance. Starting in 2014, people who refuse will have to pay a penalty to the federal government, administered by the IRS.

There are subsidies for those who cannot afford coverage on their own, as well as hardship exemptions.

The idea is simple: Most people without insurance currently receive at least some medical help, and the mandate is designed to get everyone paying into the system. One of the best defenses of a health insurance mandate came in a Wall Street Journal op-ed piece published in April 2006.

"By law, emergency care cannot be withheld," this commentator wrote. "Why pay for something you can get free? Of course, while it may be free for them, everyone else ends up paying the bill, either in higher insurance premiums or taxes."

He concluded: "Some of my libertarian friends balk at what looks like an individual mandate. But remember, someone has to pay for the health care that must, by law, be provided: Either the individual pays or the taxpayers pay. A free ride on government is not libertarian."

That would be Mitt Romney. The former Massachusetts governor is now trying to insist that the health plan with a mandate that he championed in his state — with the support of a legislator named Scott Brown — is

oh-so-different from the bill President Obama signed this week. But Romney can't take back his own words.

Still, at least the quarrel over the mandate is about something relatively new. The old states' rights argument, if successful, could upend years of federal legislation. Will we have a system where states can pick and choose among federal laws? We want our elderly to get Medicare, and give us more highway money, but forget this health care expansion.

That sounds like the logic of the nullifiers of the 1830s, fighting to resist a federal tariff they thought was too high. Gov. Robert Y. Hayne of South Carolina, their leader, sounded rather like today's Tea Partiers. His state, he declared in 1832, was "inflexibly determined never to surrender her reserved rights, nor to suffer the constitutional compact to be converted into an instrument for the oppression of her citizens."

Andrew Jackson's response to the nullifiers is classic. He denounced "the strange position that any one State may not only declare an act of Congress void, but prohibit its execution." He also wondered how a state could "retain its place in the Union, and yet be bound by no other of its laws than those it may choose to consider as constitutional."

OK, at least today the attorneys general are going to court before taking further action. But in the case of Cuccinelli, the very law he is relying on to justify his suit was passed by Virginia's Legislature in direct defiance of a federal bill they knew might be coming. Call it Nullification Light. It's no way to run a serious country, and it's a reckless approach to politics.

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