

WHEN LIBERTY SUBVERTS FEDERALISM: IS NULLIFICATION OF FEDERAL LAW LEGITIMATE?

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A. INTRODUCTION

The United States is in the middle of a federal revolution. The idea of liberty, which animated the Declaration of Independence and created the basis of the nation, is now being used to subvert federalism. “Liberty” has become a synonym of state self-government, of freedom from big government’s encroachments. In the last decade, several states have maintained policies inconsistent with federal statutes and considered measures aimed at defying federal regulations in different areas: gun control, government-issued identification cards, marijuana legalization, the Common Core State Standards Initiative (that sets standards for K12 students in English and mathematics) and, most pertinently for this paper, healthcare.

The recent opposition to the reform of the private health insurance market is perhaps the most instructive example of this scepticism of federal authority; states are reluctant to accept federal funds and to cooperate for the implementation of core measures of the Affordable Care Act (ACA).¹ Not happy with the result of legal challenges,² a number of state legislatures are also considering bills aimed at nullifying federal intervention within their boundaries. Nullification, in this paper, is the term used to describe a formal declaration by a state legislature that a specified federal regulation is void within its borders. The main argument put forward by these measures is the defence of a founding fathers’ principle, the idea that vertical separation of powers would best suit American diversity and protect individual liberty. But what kind of liberty are these measures really invoking? Liberty from a “coercive” federal government that “exceeds the bounds of its limited powers and encroaches on the authorities reserved to the states under the Tenth Amendment”.³ It is therefore evident that the principle of individual liberty is being used to justify a revival of states’ rights. In this conception, ‘liberty’ is interpreted as freedom from the authority of the federal government, not from that of the state authority. Some states strongly believe that healthcare regulation should be their exclusive province and the most radical bills against the ACA recall Madison’s theory of interposition and Jefferson’s theory of nullification.

This work provides a portrait of the current nullification movement and sheds light on the constitutional controversies that surround it.

B. THE NOBLE ORIGINS OF NULLIFICATION: FOUNDING FATHERS

The term nullification was first used by founding father Thomas Jefferson in his Kentucky Resolution (1798) and the concept of states’ rights against the encroachment of the federal power was recalled by James Madison in his Virginia Resolution (1798).

Jefferson formally used the term nullification in his original draft of the Kentucky Resolution⁴ and defined it as “a natural right” on the part of a sovereign state to self-defence from the usurpation of

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¹ Patient Protection and Affordable Care Act of 2010, Pub L No 111-148, 124 Stat 119, amended by Health Care and Education Reconciliation Act of 2010, Pub L No 111-152, 124 Stat 1029.

² As soon as it was signed into law, the constitutionality of the ACA was challenged extensively in federal courts on the grounds that it exceeded the legitimate bounds of federal power mentioned in Art 1 section 8 of the US Constitution. The controversy was resolved by the Supreme Court’s decision upholding the reform as constitutional in the *Sebelius* case but pending lawsuits are still challenging various portions of the law, including a new pending case before the Supreme Court challenging the legality of IRS subsidies in federal exchanges: *King v Burwell*.

³ Georgia House Resolution 1045, introduced 13 Jan 2014.

⁴ Jefferson’s Draft, [before 4 Oct. 1798] in *The Papers of Thomas Jefferson, Volume 30: 1 January 1798 to 31 January 1799* (Princeton University Press, 2003) 536-43.

the federal government. He argued that “where powers are assumed which have not been delegated, a nullification of the act is the rightful remedy” and that the states “are not united on the principle of unlimited submission to their general government” but “they constituted a general government for special purposes” and “delegated to that government certain definite powers, reserving, each State to itself, the residuary mass of right to their own self-government”. Relevant literature⁵ tends to interpret Jefferson’s Resolution only as a plea for a joint nullification by the states but it seems to me that Jefferson was also in favour of nullification by a single state within its borders and was only calling for the cooperation of other states:

every State has a natural right in cases not within the compact, (*casus non fæderis*) to nullify of their own authority all assumptions of power by others within their limits (...) that nevertheless, this commonwealth, from motives of regard and respect for its co-States, has wished to communicate with them [the other states] on the subject.⁶

In his Virginia Resolution Madison did not use the word “nullification” but introduced the term “interposition”, conceived as a joined intervention of the states to stop the violation of the Constitution and invalidate the law:

in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the states who are parties thereto, have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them.⁷

The Virginia Resolution, rather than nullifying the law straight away, declares its unconstitutionality and invokes the concurrence of other states to take “the necessary and proper measures [...] for co-operating with this state, in maintaining the Authorities, Rights, and Liberties, referred to the States respectively, or to the people”. It is Madison’s formulation, I suggest, that has inspired a recent Virginia Senate Joint Resolution⁸ which does not openly declare opposition but makes application to Congress for calling an amendment convention pursuant to Article V of the United States Constitution aimed at restraining the power of the federal government. The convention would be “limited to proposing amendments to the United States Constitution that impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal government, and limit the terms of office for its officials and for members of Congress”.⁹ Prof. Levinson also described a new convention as an “opportunity for a thorough discussion about the genuine meaning of a federal system in the twenty-first century and what kinds of institutions are best designed to implement that meaning”.¹⁰

Also, there is a possibility that the Kentucky and Virginia Resolutions’ call for a joint effort by the states and for the protection of states’ rights has inspired recent bills establishing a union of states against the ACA. I am referring to the so-called Heath Care Compact, an agreement of a group of states joining together to establish broad healthcare programs that operate outside of the ACA.¹¹ To

⁵ See R Card, “Can states ‘just say no’ to federal healthcare reform? The constitutional and political implications of state attempts to nullify federal law” (2010) 2010 BYU LR 1795-1803 and A Johnston, “American political history 1763–1876” (1905) 197-198.

⁶ T Jefferson, *Kentucky resolutions* (Nov 10, 1798 & Nov 14, 1799), [hereinafter Jefferson, Kentucky Resolutions].

⁷ J Madison, “Virginia resolutions against the Alien and Sedition Acts” reprinted in *James Madison, writings* (J N Rakove (1999) 589–591 [hereinafter Madison, Virginia Resolutions].

⁸ 2015 Virginia Senate Joint Resolution n 269, Virginia 2015 Regular Session.

⁹ *Ibid.* 24-27

¹⁰ S Levinson, “The twenty-first century rediscovery of nullification and secession in American political rhetoric: frivolousness incarnate or serious arguments to be wrestled with?” (2014) 67 Ark LR 17.

¹¹ Defined by R Cauchi in “State laws and actions challenging certain health reforms” NCLS website (22.02.2015), available at <http://www.ncsl.org/research/health/state-laws-and-actions-challenging-ppaca.aspx>.

date, nine states have joined the Health Care Compact (Oklahoma, Alabama, Georgia, Indiana, Missouri, South Carolina, Texas, Utah and Kansas), and a total of 26 states have considered interstate compact legislation.¹² However, the Compact remains only a proposal for now; in order to come into effect it must be passed by both chambers of Congress.¹³

The current use/misuse of Jefferson and Madison's nullification and interposition language demonstrates that not only the seeds of such a controversial phenomenon can be found in the early days of the federation, but also that the debate about the meaning of the federation is still alive and reiterates the same arguments.

C. THE NULLIFICATION PHENOMENON

In my research of legislation in 50 states I have examined nullification bills proposed and enacted in 2014 against the ACA. From my data, collected using the NCSL Affordable Care Act Legislative Database powered by Lexis Nexis StateNet, it emerges that the legislatures of 26 states have considered at least 120 bills aimed at nullifying the ACA; 37 bills have been signed into law by 10 state legislatures. My analysis of these nullification measures not only reveals common "noble" ideological origins but also identifies a common argument, two common philosophical underpinnings and a common starting point:

- Common argument: healthcare regulation should be the exclusive province of the states as no police power is conferred to the Congress by Art. 1 sec. 8 of the US Constitution.
- Two philosophical underpinnings: the originalist interpretation of the Commerce Clause¹⁴ and the call for protection of state rights under the Tenth Amendment¹⁵.
- Starting point: alleged unconstitutionality of a federal bill/measure: the state legislature believes that a measure is unconstitutional and approves a bill to nullify its effects within its borders.

In spite of the above mentioned common grounds, the content and aims of the bills varies greatly and I would suggest a classification into three groups:

1. Bills declaring the ACA and its core provision "the individual mandate" unconstitutional and therefore inapplicable within the state;
2. Bills adopting measures to prohibit state agencies or employees from implementing the individual mandate within the state;
3. Bills establishing membership of the interstate health compact, a project that would transfer the authority and responsibility to make healthcare decisions from federal control to the member states.

An instructive example of bills of the first group is South Carolina Senate Bill n. 147/ 2014 which declares that the ACA "is not authorized by the Constitution of the United States and violates its true meaning and intent as given by the Founders and Ratifiers, and is invalid in this State, is not recognized by this State, is specifically rejected by this State, and is null and void and of no effect in this State."¹⁶

For the second group, the most recently approved nullification bill is Arizona's Proposition 122, approved on 4th November 2014 general election ballot. The proposition amended Article 2, Section 3 of the Arizona Constitution to declare the ability of the state to "exercise its sovereign authority to restrict the actions of its personnel and the use of its financial resources to purposes that are consistent with the Constitution" and that "this state and all political subdivisions of this state are prohibited from using any personnel or financial resources to enforce, administer or cooperate with the designated

¹² Ibid "26 States consider health compacts to challenge federal PPACA", available at <http://www.ncsl.org/research/health/states-pursue-health-compacts.aspx>.

¹³ Art I, Section 10 of the United States Constitution provides that "no state shall enter into an agreement or compact with another state" without the consent of Congress.

¹⁴ Art 1 section 8. "The Congress shall have Power (...)To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

¹⁵ "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".

¹⁶ Section 38-71-2120.

federal action or program.” The amendment enshrines the so called anti-commandeering doctrine, according to which the federal government cannot impose targeted, affirmative, coercive duties upon state legislators or executive officials.¹⁷

Finally, with regards to the third group of bills, intended to authorize joining the Interstate Compact, Louisiana House Bill 1909 reads:

The federal government has enacted many laws that have pre-empted state laws with respect to healthcare and placed increasing strain on state budgets, impairing other responsibilities such as education, infrastructure, and public safety. The member states seek to protect individual liberty and personal control over healthcare decisions and believe the best method to achieve these ends is by vesting regulatory authority over healthcare with the states. The Interstate Health Care Compact is hereby enacted into law and entered into by the state of Louisiana with any other states legally joining the compact in a form substantially similar to the form contained in this Part.

Most of the nullification bills have been proposed by Southern States, with Tennessee, Oklahoma and Georgia in the front line (respectively, 14, 12 and 10 bills). Significant absences are Texas and Florida. Five of the states proposing nullification bills used to be part of the Confederacy and all the states proposing nullification bills are red, i.e. Republican, states.

D. NULLIFICATION: CONSTITUTIONAL PROFANITY OR CONSTITUTIONAL LEGITIMACY?

Up until this point, my paper has provided a portrait of the nullification phenomenon and discussed its origins. In light of the current size of the phenomenon and its “noble” origins, it is now paramount to explore the constitutional controversies that surround the movement. Hence, the rest of this paper is an effort to answer the following question: is nullification a legitimate exercise of states’ rights?

My findings differ greatly depending on the type of nullification bill in question. For this reason, I will examine the constitutionality of three different types of nullification measures in turn.

Specifically, referring to my previous classification, bills of type 1 (declaring the ACA and its core provision “the individual mandate” unconstitutional and therefore inapplicable within the state) would not be a valid exercise of states’ rights according to the Supremacy Clause¹⁸ which clearly establishes the preeminence of federal law over state law. As UCLA professor Adam Winkler comments - “Any law that interferes with a valid federal law is unconstitutional. [...] The federal government can pass legislation in an area, and people who are citizens of the states have to obey that legislation.”¹⁹ At this point, supporters of nullification bills would object that they are only invalidating legislation that they deem unconstitutional and therefore not supreme; that sovereign states created and ratified the Constitution and therefore retain the prerogative to interpret the Constitution. Considering this objection, the key question turns out to be: do state legislatures have the authority to declare federal legislation unconstitutional? In the American constitutional tradition, judicial review²⁰ is a prerogative of the

¹⁷ M D Adler, “The Supreme Court’s federalism: real or imagined?” in Vol 574 *Annals of the American Academy of Political and Social Science*, (Mar 2001) 158.

The anti-commandeering doctrine found modern expression in *New York v United States*, 505 US 144 (1992) and *Printz v United States*, 521 US 898 (1997) which will be discussed below.

¹⁸ Article 6, Clause 2 of the United States Constitution. “This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.”

¹⁹ Quoted in K Mahnken, “Red states’ legally dubious strategy to destroy obamacare” (28 Jan 2014), *New Republic*, available at <http://www.newrepublic.com/article/116373/red-states-wage-legally-dubious-war-nullify-obamacare>.

²⁰ The power of the federal courts to review the constitutionality of laws.

Supreme Court (*Marbury v Madison*)²¹ and claiming that states can declare federal law unconstitutional would also ignore the unanimous *Cooper v Aaron*'s holding,²² according to which state attempts to nullify federal law are ineffective as the states are bound by US Supreme Court rulings. There are, as a consequence, two constitutional "obstacles" to the legitimacy of type 1 nullification bills: *judicial review* and *judicial supremacy* of the Supreme Court. Can these obstacles be overcome? What follows is a brief review of the literature dealing with those two principles.

With regard to *judicial review*, relevant conservative literature²³ seems to be sceptical of *Marbury* and has developed arguments against the attribution of this power to the Supreme Court itself. One of the main arguments is that the Constitution does not grant this power expressly. Article III reads: "The judicial Power of the United States, shall be vested in one Supreme Court, and in such Courts as Congress may from time to time ordain and establish" but never mentions judicial review. Also, originalists argue that the founders did not contemplate judicial nullification of legislation enacted by the states and by Congress. The distinguished historian Leonard Levy asserted: "The evidence seems to indicate that the Framers did not mean for the Supreme Court to have authority to void acts of Congress."²⁴ William Crosskey, one of the most provocative legal historians of recent times²⁵, reaches the same conclusion: "The rationally indicated conclusion is that judicial review of congressional acts was not intended, or provided, in the Constitution."²⁶ A more recent publication by Prof. William Nelson reads: "What makes [*Marbury*] even more important is the absence of any clear plan on the part of the Constitution's framers to provide the Court with this power".²⁷

On the other hand, modern scholarship²⁸ alleges that *Marbury* is a victim of contemporary revisionism and supports the legitimacy of judicial review in light of the assumption that there was a historical practice of judicial review in American courts before the decision in *Marbury*. Unexpectedly, even the originalist Randy Barnett supports this view: "Judicial nullification of unconstitutional laws is not only consistent with the frame provided by original meaning, it is expressly authorized by the text and is entirely justified on originalist grounds."²⁹ Who is right and who is wrong? Maybe the Supreme Court's judicial review power is a distortion; maybe it is the natural creature of the ideologies and legal philosophies that surrounded the formation of the US constitutional system;³⁰ what is certain is that it is a 200 years old legal tradition and factual reality in the US. Nullification is clearly hitting right at the top of the constitutional pantheon.

²¹ 5 US 137 (1803), the decision formally established the principle of judicial review. "It is emphatically the province and duty of the judicial department to say what the law is".

²² 358 US 1 (1958). Cooper announced that "the federal judiciary is supreme in the exposition of the law of the Constitution" and further that an "interpretation of [the Constitution] enunciated by th[e] Court . . . is the supreme law of the land." More importantly, the Supreme Court unanimously rejected the doctrines of nullification and interposition: "the Brown case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation..."

²³ C S Hyneman, *The Supreme Court on trial* (1963) 125; H L Boudin (1911) in 26 *Polit Sc Qtlly* 238-248; J B McDonough, "Usurpation of Power by Federal Courts" (1912) *AM. LR* 45; J Choper, *Judicial Review and the National Political Process* (1980) 62-63.

²⁴ L Levy, *Original intent and the Framers' Constitution* (1988) 100.

²⁵ So defined by A Krash in "The Legacy of William Crosskey" (1984) 93 *YALE LJ* 959.

²⁶ W Crosskey, *2 Politics and the constitution* (1953) 1000

²⁷ W Nelson, *Marbury v. Madison: The origins and legacy of Judicial Review* (2000) 1.

²⁸ See S Snowiss, *Judicial review and the law of the constitution* (1990) 89; James E Pfander, "Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers" (2001) 101 *Colum LR* 1515; W M Treanor "Judicial Review before Marbury" (2005) 58 *Stan LR* 455; C Sloan & D Mckean, *The great decision: Jefferson, Adams, Marshall, and the battle for the Supreme Court* (2009).

²⁹ R. Barnett, "The original meaning of the judicial power" (2004) 12 *Sup Ct Econ R* 115, 120.

³⁰ I am also referring to the influence in the United States of Coke's decision in *Dr. Bonham's Case* (8 *Co Rep* 107/ 77 *Eng Rep* 638) which, despite disputes and following development of UK law, is widely recognized as establishing judicial review.

With regard to *judicial supremacy*,³¹ academic criticism has strongly opposed the idea that the Supreme Court should serve as the final, highest arbiter of the Constitution, as expressed in *Marbury* and *Cooper v Aaron*. A provocative argument is put forward by Prof. Paulsen³² who contends that *Marbury* has created a myth and that a proper reading of Marshall's decision would actually suggest that judicial review is not an "exclusive" power of the judiciary but should be shared between the three institutional branches and the states' government. In his view, judicial *jurisdiction* does not imply judicial *supremacy* over the other branches of government:

none of the hypotheticals posed by Marshall remotely suggests judicial exclusivity or even judicial priority in constitutional interpretation. They all involve constitutional questions of a type that could (and should) be considered in the ordinary course of business of the legislative and executive branches. There is nothing uniquely judicial about them, so as to suggest in any way that constitutional interpretation is a uniquely judicial activity.³³

A more specific argument for judicial deference to the Congress finds corroboration in particular provisions of the Constitution, notably Section Five of the Fourteenth Amendment.³⁴ As Prof. Kermit Roosevelt³⁵ suggests, this assertion advances the argument that the Court should defer to the congressional interpretations upon which enforcement legislation is based. However, in my ACA nullification case study there is no inter-branch conflict within the federal government but a conflict between the federal judiciary and state legislatures representing the people. Hence, more pertinent to this paper, which depicts nullification as a movement aimed at protecting individual liberty and therefore empowering "The People", is another challenge to interpretive judicial supremacy which finds its ideological roots in the so called "popular constitutionalism", the idea that ordinary citizens, rather than the courts, are the most authoritative interpreters of the Constitution. A recent elaboration of this argument can be found in an acclaimed 2004 book by Larry Kramer³⁶ and in the work of Edward Hartnett: "With a Constitution made in the name of 'We the People,' all of us are legitimately interested in the meaning of the Constitution--all of us must be welcome participants in the conversation."³⁷

My findings are different with regard to type 2 bills (establishing measures to prohibit state agencies or employees from implementing the individual mandate within the state). Bills of this type³⁸ justify the refusal of the states to comply with federal law with a long-standing legal doctrine which would allow the states to decide whether or not it is appropriate to participate in a federal act: the anti-commandeering doctrine. The doctrine claims to find its legal foundation in three decisions of the Supreme Court which established that states cannot be required to help the federal government enforce federal acts or regulatory programs. Mike Maharrey,³⁹ Communications Director for the Tenth Amendment Center, cites to *Prigg v Pennsylvania*⁴⁰ (1842), an early decision in which Justice Joseph Story declared the preeminence of federal law but acknowledged that states could not be compelled to

³¹ See M Tushnet, *Taking the Constitution Away from the Courts* (1999) 8-9, 14-15, 22-23 and Edwin Meese III, "The Law of the Constitution" (1987) 61 Tul LR 979, 986. In support of judicial supremacy arguments see L Alexander & F Schauer, "On Extrajudicial Constitutional Interpretation" (1997) 110 Harv LR 1359, 1361.

³² M Paulsen, "The irrepressible myth of *Marbury*" (2003) 101 Mich LR 2706.

³³ *Ib* at 2721.

³⁴ "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

³⁵ "Judicial supremacy, judicial activism: *Cooper v. Aaron* and *Parents Involved*" (Summer 2008) 52 St Louis U LJ 1191, 1197.

³⁶ *The People Themselves: Popular Constitutionalism and Judicial Review* (2004) 221.

³⁷ E A Hartnett, "A Matter of Judgment, Not a Matter of Opinion" (1999) 74 NYU LR 123.

³⁸ Cfr. 2014 South Carolina House Bill No. 4979, 2014 South Carolina Senate Bill 1164, 2014 Tennessee Senate Bill No. 2450, 2014 Tennessee House Bill 2440, 2014 Tennessee Senate Bill 1680.

³⁹ M Maharrey, "Anti-commandeering: the legal basis for refusing to participate", Tenth Amendment Center, available at <http://tenthamendmentcenter.com/2015/02/03/anti-commandeering-the-legal-basis-for-refusing-to-participate/>. The Tenth Amendment has become the flag of an activist nullification think tank, the Tenth Amendment Center which provides model legislation and tips to state legislatures, and keeps track of nullification bills across 50 states via its website which publishes weekly updates, video, articles and book reviews.

⁴⁰ 41 US 539 (1842).

enforce federal slave rendition laws. However, the revival of the Tenth Amendment as a limit on the power of the federal government really dates from two cases, *New York v United States*⁴¹ (1992) in which Justice Sandra O'Connor affirmed that Congress could not require states to "take title" to radioactive waste and therefore to compel them to participate in the federal regulatory program: "Either type of federal action would 'commandeer' state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments"; and *Printz v United States*⁴² (1997) in which Justice Antonin Scalia confirmed that Congress does not have the power to direct the actions of State executive officials and therefore cannot require "local chief law enforcement officers" (CLEOs) to perform background-checks on prospective handgun purchasers. The anti-commandeering principle can also be found in the recent *National Federation of Independent Business v Sebelius*⁴³ (2012) decision. The main argument concerned the extent to which the single mandate provision of the ACA could be said to be authorized by the Commerce Clause power of the federal government. Roberts CJ, who thought that the single mandate was outside the scope of the Commerce clause power, sided with the liberal wing by upholding it as a valid exercise of the taxing power. A majority of the justices however agreed that another challenged provision of the ACA, a significant expansion of Medicaid, was not a valid exercise of Congress's spending power as it would coerce states to either accept the expansion or risk losing existing Medicaid funding. Justice Anthony Kennedy, found that compelling the states to participate in the ACA Medicaid expansion was coercive and unconstitutional under the Spending Clause⁴⁴ thus leaving the states with a "genuine choice whether to participate in the new ACA Medicaid expansion."⁴⁵

In light of the above, the question must be: does the anti-commandeering doctrine, as developed by the Supreme Court in *Sebelius*, solve the constitutionality of type 2 bills?

Yes, this class of bills would survive the scrutiny under the Supreme Court anti-commandeering doctrine because the doctrine provides that states (and state officials) are not compelled to enforce federal law and that a state can refuse to use its resources to attain federal goals. In other words: as long as the states engage in a passive resistance, their (in)actions will be constitutional; but they cannot impede the implementation of valid federal law by the federal government in their territory. *Sebelius* allowed the states to opt out of Medicaid expansion but states cannot avoid the implementation of the individual mandate and the creation of federal exchanges operating in their territory (fully administered by the federal government). Indeed, in case a state decides not to establish a state exchange (a marketplace where people can compare and purchase health coverage) the federal government will provide a "fall back" exchange for that state,⁴⁶ usually through the well-known platform Healthcare.gov.

With regards to type 3 bills (establishing membership of an interstate compact for multiple states opposing enforcement), they are certainly constitutional as state compacts are provided by Article I Section 10 of the United States Constitution: "no state shall enter into an agreement or compact with another state" without the consent of Congress. The matter here is not the constitutionality of interstate compact applications but the likelihood of congressional consent to a parallel and independent health care system. At first reading, the compact clause would seem to establish that any agreement within two or more states requires congressional consent. However, in *Virginia v Tennessee* the US Supreme Court concluded that not all interstate agreements require congressional consent and that such consent was required only with respect to those joint state agreements "which may tend to increase and build up the political influence of the contracting states so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their

⁴¹ 505 US 144.

⁴² 521 US 898 (1997).

⁴³ 567 US ____ (2012), 132 SCt 2566.

⁴⁴ See K S Swendiman and E P Baumrucker, "Selected issues related to the effect of NFIB v Sebelius on the medicaid expansion requirements in section 2001 of the Affordable Care Act." (16 July 2012) Congressional Research Service.

⁴⁵ *Sebelius*, Roberts, C J, slip opinion at 57.

⁴⁶ If a state fails to create an Exchange under Section 1311 of the ACA, the Act directs the federal Department of Health and Human Services to create an Exchange for that state. See Health Care and Education Reconciliation Act, Pub L N 111-152, §1204, 124 Stat 1029, 1321 (2010).

entire control.”⁴⁷ It would therefore appear that there are two kinds of compacts: those that require congressional consent because they affect federal interests and those that do not because no federal interests are affected.⁴⁸ The Health Care Compact would, in light of this premise, fall within the first category because it aims at transferring the authority on healthcare from federal control to the member states and to create an independent healthcare system. Would the Congress ever approve an interstate health compact? It is the opinion of the author that this is quite improbable. However, with the prospect of a Tea-party advancement in 2016 elections, supported by the candidature of Tea-Party Senator Ted Cruz as president⁴⁹, that improbability might be much more conceivable.

E. CONCLUSION

Much of the debate, both scholarly and political, considers nullification as buried in 1789,⁵⁰ a non-starter,⁵¹ an antebellum relic,⁵² a discredited theory risen from the grave,⁵³ one example of contemporary zombie (or dinosaur) constitutionalism.⁵⁴ Nonetheless, my research of legislation in 50 states demonstrates that nullification is very much a live issue that has even penetrated certain state legislatures. Beyond the nature of the phenomenon itself, this paper is concerned with the theory of nullification and, ultimately, with the controversies of such a radical assertion of states’ rights for American federalism. In particular, the revival of nullification raises deep vertical separation of powers questions: namely the adequacy of a growing regulatory role for the federal government and the desirability of federal intervention in matters of social policy in such a way as to materially interfere with the traditional powers of the states. On the other hand, it is also possible to recognize a veiled horizontal separation of powers issue⁵⁵: state legislatures are claiming for themselves the ability to pronounce upon the constitutionality of federal laws, effectively trying to usurp the judicial function.

In conclusion, a consideration, a conjecture and an admonition.

A consideration: *rebus sic stantibus*, the debate on radical states’ rights movement (i.e. nullification) has captured the attention of enthusiastic constitutional theorists and of states’ legislators but has not yet reached Washington. A conjecture: in the current highly polarized political climate, with a Republican Party agenda dominated by the increasingly influential libertarian Tea Party, this is arguably what Jason Frank⁵⁶ would call “a constituent moment” and therefore, a period of turbulence in federalism, American-style. I am referring to the same conjecture that I have introduced when discussing the possibility of a Congressional approval of the Interstate Health Care Compact. Given the rise of popular constitutionalism and originalism,⁵⁷ promoted mainly by the Tea- Party, there are reasons to speculate on the possibility that the dispute over the role of the federal government and its relationship to individual rights (culminated in the nullification discourse) could effectively evolve from mere constitutional argument to constitutional change. An admonition: the constitutional change would be successful and enduring as long the movement is able to solve the libertarian paradox that Prof. Rebecca E. Zietlow has delineated in her article “Popular originalism? The Tea Party movement

⁴⁷ 48 U.S. 503, 517-518 (1893).

⁴⁸ C N Broun, M H McCabe, M L Buenger and R L Masters, *The evolving use and the changing role of interstate compacts* (2007) 48.

⁴⁹ W Andrews, A Parlapiano and K Yourish, “Who is running for president (and who’s not)?” (23 March 2015) New York Times.

⁵⁰ M E Brandon, “Secession and nullification in the twenty-first century” (2014) 67 Ark L Rev 91-97.

⁵¹ J Dinan, “How states talk back to Washington and strengthen American federalism” (03 Dec 2013) n 744 Policy Analysis by Cato Institute.

⁵² J H Read and N Allen, “Living, dead, and undead: nullification past and present” (Fall 2012) American Political Thought, Vol 1, No 2, 263-297.

⁵³ R S Hunter, “Sound and fury, signifying nothing: nullification and the question of gubernatorial executive power in Idaho” (2013), 49 Idaho L Rev 659-692.

⁵⁴ S Levinson, (n 15) at 48.

⁵⁵ Cfr. Paulsen, *The irrepressible myth of Marbury*. He pleads for a shared judicial review power between the three branches of government and the state governments.

⁵⁶ *Constituent Moments: enacting the people in postrevolutionary America* (2010).

⁵⁷ The term popular originalism is used by J A Goldstein, “Can popular constitutionalism survive the Tea Party movement?” (2011) 105 N w U LR Colloquy 288, 298.

and constitutional theory.”⁵⁸ The paradox consists in the simultaneous embracing of two different doctrines: originalism (the doctrine according to which the interpretation of a written constitution should seek the original public meaning of the words of the text or be consistent with what was meant by those who drafted and ratified the original meaning of the provisions at the time that they were adopted) and popular constitutionalism (ie the idea that it is desirable for people other than judges to engage in constitutional interpretation⁵⁹). The advocates of nullification will have to make a choice: originalism or popular constitutionalism. This is to avoid a clash of the two holdings which would result in judicial activism. As Prof. Zietlow has commented, those two doctrines are indeed incompatible:

Originalists believe that a single fixed meaning exists and is discernible by examining the text and the intent of the Framers or the original public meaning of the text. By contrast, popular constitutionalists accept the possibility that the text has multiple meanings and that the meaning of the text may change through the process of construction by the political branches. To that extent, popular constitutionalism is premised on the existence of a living Constitution, a concept that is antithetical to most originalists.

The nullification controversy demonstrates a fundamental concern over the role of the federal government and the limits of congressional power. The ACA is not the only battlefield, constitutional conservatives have numerous issues of concern: drug control, Second Amendment rights,⁶⁰ Right to Try,⁶¹ Agenda 21,⁶² Common Core⁶³. This debate deserves academic attention as it is likely to affect lawmakers and the broad US political landscape in coming years with the potential to radically reshape our understanding of American federalism.

⁵⁸ 64 Fla LR 483 (2012).

⁵⁹ See L D Kramer, *Popular constitutionalism* (n 48).

⁶⁰ Nine states have passed laws “Firearms Freedom Acts (FFAs)” which render federal laws regarding firearms inapplicable to firearms and ammunition produced, sold, and used exclusively within state borders.

⁶¹ “Right to Try” bills allow extremely sick people to use treatments that are not currently allowed to them under federal regulations, effectively nullifying in practice some FDA restrictions. Source: Tenth Amendment Center website, <http://tracking.tenthamentendmentcenter.com/issues/right-to-try/>.

⁶² These bills would prohibit the state, as well as cities and counties, from adopting and developing environmental and developmental policies known as Agenda 21 (action plan of the United Nations with regard to sustainable development agreed in Rio de Janeiro, Brazil, in 199).

⁶³ Bills are aimed at delaying or banning implementation of the Common Core State Standards Initiative (set of learning goals for students K12 in mathematics and English language arts/literacy).