From Liberal States’ Rights Litigation to Liberal States’ Rights Discourse: A Study of State Oppositional Strategies to the ACA and Federal Immigration Laws

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1. Abstract

The battle for state rights under the Obama administration was fought mainly in the courts. This was particularly evident in the opposition carried out against the Affordable Care Act (ACA), which was challenged in the Supreme Court. The constitutional arguments used by the petitioners typified the usual positions of conservatives on major federal social programs; they challenged the power of Congress to legislate on healthcare and impose mandates. What is less known, however, is that the lawsuit was preceded by numerous legislative measures passed by state legislatures to avoid the implementation of the ACA within their borders. State legislatures passed so called “anti-commandeering resolutions” in the hope of influencing upcoming litigation. Their claim was that Congress could not commandeer the states or state officials to implement a federal program.

This paper compares the strategies used by red state legislatures to oppose the Affordable Care Act with the strategies presently used by blue state legislatures and local jurisdictions to push back on Trump’s immigration policy and recent executive order directing that federal funds be withheld from so called “sanctuary cities.” It also argues that blue states are now replicating the same push back strategies used by red states against Obama’s healthcare reform.

For instance, on October 5, 2017, the California state governor signed Senate Bill 54 that prohibits state and local law enforcement agencies, including school police and security departments, from using money or personnel to investigate, interrogate, detain, detect, or arrest persons for immigration enforcement purposes.[[1]](#footnote-1) The California legislature enacted the bill claiming that the federal government cannot “commandeer” state officials to enforce federal law, just like red states did between 2010–2016 to avoid the implementation of the ACA. As a consequence, sanctuary cities like San Francisco began and continue to block their jails from turning over criminal aliens to federal authorities for deportation.

The similarity of the strategies is also reflected in the legal challenges. In response to the Trump’s executive order, a number of sanctuary cities brought actions against the President, challenging the constitutionality of the provision on anti-commandeering grounds. On November 20, 2017, Circuit Judge William Orrick permanently blocked the provision, ruling it was “unduly coercive” and violated the separation of powers, the Tenth Amendment’s prohibition against commandeering local jurisdictions, and the Fifth Amendment’s procedural due process requirements. Another battle for federalism has just started in the United States and the merits of the litigation could soon be with the Supreme Court. The constitutional dynamics are very similar to those of the battle against the ACA. This article examines the numerous legislative measures that prepared that lawsuit.

1. Introduction

On January 25, 2017, President Donald J. Trump issued Executive Order 13768, “Enhancing Public Safety in the Interior of the United States.”[[2]](#footnote-2) The order declares the policies and priorities concerning the enforcement of federal immigration laws, with particular reference to federal-state agreements. Specifically, Section 8 requests state and local law enforcement agencies across the country “to perform the functions of an immigration officer” and cooperate with the federal government in the identification of illegal aliens.[[3]](#footnote-3) If a local authority does not cooperate with the federal government in this effort, the Executive Order establishes that the local authority is not eligible for federal grants. The order specifically targeted so-called sanctuary jurisdictions, cities and counties that limit cooperation with immigration detainers and refuse to carry out immigration checks. Jasmine C. Lee and others of the New York Times have argued that the phenomenon is very diverse and that “there is no universal definition for a sanctuary city.”[[4]](#footnote-4) For the purpose of this paper, a sanctuary city is defined as a local jurisdiction that refuses to cooperate with the federal government’s requests to carry out specified immigration checks.

The refusal to cooperate with the federal government and the increasing call for states’ rights is nothing new. Research has broadly investigated the way in which states ought to protect their policy interests by refusing to provide assistance to the federal government. Professors Jessica Bulman-Pozen and Heather K. Gerken have defined this peculiar relationship between local jurisdictions and Washington D.C. as “uncooperative federalism”—a situation arising when “states use regulatory power conferred by the federal government to tweak, challenge, and even dissent from federal law.”[[5]](#footnote-5) States have been “uncooperative” with the federal government on numerous occasions, not least with the refusal to implement specific provisions of the ACA. As explained below, the enactment of uncooperative bills prepared the ground for subsequent lawsuits[[6]](#footnote-6) and the undermining of the reform.

This article interprets the sanctuary cities movement as a manifestation of contemporary uncooperative federalism. It argues that liberal states and local jurisdictions have put in place sanctuary legislation against Executive Order 13768 that paradoxically replicates the type of uncooperative legislation used by red states against Obama’s healthcare reform. Likewise, this article draws a parallel between the two oppositional phenomena and argues that the opposition’s constitutional debate, one on the right balance between state and federal power, is unresolved and is currently exacerbated by polarized politics.

In this article, I first discuss the legislative strategies used by red states to oppose the ACA and speculate on the role played by state legislation in preparing the grounds for the *Sebelius* lawsuits. I then examine the sanctuary legislation and focus on California Senate Bill 54 as a case study on the link between state sanctuary legislation and sanctuary lawsuits. I conclude with the view that the use of states’ rights rhetoric by liberal voices in court together with the oppositional tactics of sanctuary jurisdictions has created a new “liberal states-rights’ discourse.” This expression defines the opposition to Trump’s Executive Order as a heterogenous phenomenon that, as noted, has involved courts and local jurisdictions alike.

1. Strategies Used by Red State Legislatures to Oppose the ACA and Their Link to Sebelius

Between 2010–2012, legislators in thirty-nine states opposed the implementation of the individual mandate to buy health insurance and the Medicaid expansion provisions of the ACA. The reasons for the opposition were mainly political, ideological, and economical in nature but, as is common in the United States, the political battle ended up in court. The constitutionality of the ACA was challenged in federal courts and reached the Supreme Court, which, by a vote of 5 to 4, upheld the individual mandate as a constitutional exercise of Congress’s taxing power and struck down the Medicaid expansion as coercive under the Spending Clause.[[7]](#footnote-7) Scholars have extensively discussed the *Sebelius* decision and the legal challenges that state attorneys mounted against the ACA but have largely disregarded the role performed by state legislatures in creating roadblocks to the reform and preparing the ground for lawsuits.

This section examines those measures put forward by state legislatures to push back on the ACA. In particular, legal challenges were preceded and followed by numerous sovereignty bills aimed at pushing back on the ACA from within the states and creating “sovereignty injury grounds” to use in court.[[8]](#footnote-8) The National Conference of State Legislatures maintains three databases of legislation filed in response to the ACA (one for 2011–2013, one for 2014, and another for 2015–2016). This work considers year 2011 as it was the most prolific. The measures used by the states were very diverse, ranging from anti‑commandeering resolutions to fully fledged legislation, but the most significant unifying characteristic is their tendency to phrase objections to federal policy, or assertions of state authority, in terms of states’ rights. The actions taken by the states can be grouped into three categories: nullification bills, anti-commandeering resolutions, and healthcare freedom acts.

1. Nullification Bills

At least thirty-nine legislatures considered nullification bills. These states introduced statutes and resolutions that, in virtue of sovereignty rights, declared specified provisions of the ACA unconstitutional and consequently considered the individual mandate provision null and of no effect within their borders. The allegation at the heart of these bills was that healthcare regulation should be the exclusive province of the states; no police power is conferred to the Congress by Art. 1 Sec. 8 of the U.S. Constitution, and states have the power to invalidate the individual mandate within their borders. A typical example is the text of the Alabama House Bill 60 (2011):

(a) In order to preserve the freedom of all residents of Alabama to

provide for their own health care, a law or rule shall not compel,

directly or indirectly, any person, employer, or health care provider to

participate in any health care system.

(b) A person or employer may pay directly for health care services and

shall not be required to pay penalties or fines for paying directly for

lawful health care services.[[9]](#footnote-9)

Another example is the text of Indiana Act No. 461 (2011). According to the Act, “a resident of Indiana may not be required to purchase coverage under a health plan. A resident may delegate to the resident’s employer the resident’s authority to purchase or decline to purchase coverage under a health plan.”[[10]](#footnote-10) Texas state legislature was considered to pass the highest number of nullification bills (10) in 2011, followed by South Carolina (6) and Illinois (6).

Even though many states have considered nullification bills, it is worth noting that they have not been tested in court because they would certainly be considered to be at best meaningless and at worst unconstitutional.[[11]](#footnote-11) However, as Doctors Read and Allen have suggested, success in court is not always the aim and perhaps nullification bills also played a role in raising the voices of state legislatures: “whether nullification theory is upheld in federal court is not the only question. States in the past have sometimes successfully obstructed federal laws and rulings for years despite consistently losing in court.”[[12]](#footnote-12) On the other hand, Professor John Dinan sees recent state measures as “contribut[ing] to restraining federal power and preserving state autonomy in several ways.”[[13]](#footnote-13) In this sense, today’s nullification is to be interpreted as one of many strategies that state legislatures put in place to push back on unwanted federal policies. Their efficacy is not related to the strength of their legal claims but to the political turbulence that they trigger.

1. Anti-commandeering Resolutions

Between 2010–2011, five state legislatures—Alabama, Utah, Arizona, Virginia, and Wyoming—passed resolutions claiming Tenth Amendment sovereignty, and declaring the rejection of any federal legislation that would impose mandates on the states. The states grounded their claims by asserting that Congress could not commandeer the states.

The first legislature to pass an anti-commandeering resolution was Alabama on January 22, 2010. The resolution is a declaration of sovereignty under the Tenth Amendment and, by recalling the Founding Fathers’ statements on the vertical separation of powers as a double security for the people, it relies on the anti-commandeering doctrine as elaborated in *Printz*:

WHEREAS, the United States Supreme Court has ruled in *New York v. United States*, 112 S. Ct. 2408 (1992), that Congress may not simply commandeer the legislative and regulatory processes of the states.”[[14]](#footnote-14) The resolution continues with a call for the prohibition or repeal of “compulsory federal legislation that directs states to comply under threat of civil or criminal penalties or sanctions or requires states to pass legislation or lose federal funding.[[15]](#footnote-15)

It also demanded “the federal government, as our agent, to cease and desist, effective immediately, mandates that are beyond the scope of these constitutionally delegated powers.”[[16]](#footnote-16) In Utah, the governor signed a House Joint Resolution that was very similar to the Alabama resolution on March 23, 2010, the same day as the passage of the ACA. The language of the preamble is in fact identical,[[17]](#footnote-17) suggesting a joint action of the states or a common drafting hand. In April 2010, the Arizona legislature adopted House Concurrent Resolution 2001 and Senate Concurrent Memorial 1001, urging Congress to introduce and enact legislation that repealed the ACA because it contravened the anti-commandeering doctrine. House Concurrent Resolution 2001[[18]](#footnote-18) was intended to be a declaration of sovereignty[[19]](#footnote-19) and called for the prohibition or repeal of “all compulsory federal legislation that directs states to comply under threat of civil or criminal penalties or sanctions or requires states to pass legislation or lose federal funding.”[[20]](#footnote-20) The resolution called for Tenth Amendment rights and made express reference to the anti-commandeering doctrine, citing *New York v. United States*[[21]](#footnote-21)as principal authority:

Whereas, the United States Supreme Court has ruled in *New York v. United States*, 505 U.S. 144 (1992), that Congress may not simply commandeer the legislative and regulatory processes of the states; and

Whereas, a number of proposals from previous administrations and some now pending from the present administration and from Congress may further violate the Constitution of the United States.[[22]](#footnote-22)

Alabama, Utah, and Arizona were joined by Virginia’s House on January 31, 2011 with the adoption of Virginia House Resolution 46 (2011). The resolution quickly moved from the House Committee on Rules to the floor of the General Assembly and passed with 65 “Yes” and 33 “No” votes. The content of House Resolution 46 is similar to the resolutions examined above. It refers to the text of the Tenth Amendment, the compact theory, and the anti-commandeering doctrine as elaborated in *New York*: “the scope of power defined by the Tenth Amendment means that the federal government was created by the states specifically to be an agent of the states.” [[23]](#footnote-23) The purpose, as specified in the resolution, is specifically to serve notice to the federal government to “cease and desist, effective immediately, mandates that are beyond the scope of these constitutionally delegated powers.”[[24]](#footnote-24) Further, just as in the other resolutions, there is a request to prohibit or repeal “all compulsory federal legislation that directs states to comply under threat of civil or criminal penalties or sanctions or requires states to pass legislation or lose federal funding.”[[25]](#footnote-25) The Virginia resolution, however, is different to the other resolutions because of its timing.

If the Tenth Amendment resolutions in Alabama, Utah, and Arizona were meant to shape the constitutional discourse around the ACA and prepare the ground for legal challenges, then the Virginia resolution had a different purpose. The Virginia resolution was different because it was passed after Attorney General Cuccinelli had already started the challenge to the ACA in the case *Virginia ex rel. Cuccinelli v. Sebelius*[[26]](#footnote-26) and U.S. District Judge Henry E. Hudson had ruled that the individual mandate provision exceeded Congressional authority under the Commerce Clause and the Tax Clause.[[27]](#footnote-27) At the time of the passage of the resolution, the case was pending in the United States Court of Appeals for the Fourth Circuit. The main intent of the legislators, as it appears on the video of the House discussion, was to send a message to Congress and to chase a repeal of specified federal legislation. However, the video of the house floor debates also shows that legislators were very keen on influencing the constitutional debate taking place in court. In particular, the sponsor, Delegate Chris Peace, repeatedly pointed to the anti-commandeering doctrine as elaborated in *New York*. When Delegate Peace was asked whether the resolution promoted a narrow interpretation of the Tenth Amendment—specifically, that if a power is not enumerated in the Constitution is it a power on which Congress cannot act—he responded, “Generally speaking yes, but the resolution also contemplates expressions of constitutional law, as referenced again by the New York case.”[[28]](#footnote-28) Delegate Peace used the term “expressions of constitutional law” to refer to the *New York* case and to explain that the case had been included in the resolution to legitimize the claim of state sovereignty.

It might be argued that the house passed the resolution to shed light on the anti‑commandeering doctrine as a potential legal expedient to push back against the implementation of the ACA and make the voice of the states heard in court. But, the strategy was unsuccessful in the Court of Appeals. Circuit Judge Diana Gribbon Motz held that Virginia could not challenge the “individual mandate” provision in the ACA for lack of Article III standing.[[29]](#footnote-29) However, this lawsuit should be considered as part of a wider multi‑state legal strategy that culminated in the Florida lawsuit.[[30]](#footnote-30)

In Wyoming, the legislature adopted two Tenth Amendment resolutions in 2010, HJR 2 and HJR 9. The first is a pure Tenth Amendment resolution with a demand on U.S. Congress to prohibit or repeal “all compulsory federal legislation that directs states to comply under threat of civil or criminal penalties or sanctions”[[31]](#footnote-31) and a reiteration of the states’ right under Article IV, Section 4 of the U.S. Constitution, the Guarantee Clause; the Ninth Amendment, non-enumerated rights retained by people; and the anti-commandeering doctrine. HJR 9, on the other hand, is a request to the Wyoming Congressional delegation and U.S. Congress to take action to initiate the amendment process provided by Article V of the U.S. Constitution to amend the Tenth Amendment and Article I, Section 8 (the Interstate Commerce Clause) of the U.S. Constitution.[[32]](#footnote-32) The requested amendments are aimed at reducing the extent to which federal courts can extend Congressional power and initiate a new direction for Supreme Court jurisprudence that would limit Congress’ powers. In particular, the Wyoming legislature proposed to include the word “expressly” in the Tenth Amendment to read: “The powers not *expressly* 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” and to further add that the “*amendment shall be considered by all courts as a rule of interpretation and construction in any case involving an interpretation of any constitutional power claimed by the Congress*.”[[33]](#footnote-33) With this request, the House manifested its commitment to promote a narrow interpretation of the Tenth Amendment and to influence the constitutional debate around states’ rights.

The amendment to the Commerce Clause in Wyoming was instead aimed at restricting Congress’ power to regulate interstate commerce in relation to “*matters that are primarily intrastate with only an insignificant or collateral effect upon interstate commerce*.”[[34]](#footnote-34) The proposed amendment is an open criticism to the Supreme Court’s jurisprudence that has expanded the scope of the Congressional Commerce Clause power and represents an attempt to respond to the volume of federal legislation and regulations enacted on the basis on the Commerce Clause. The timing of the resolutions and the similarity of content to the other resolutions would suggest that the legislature of Wyoming intended to join the other states in the sovereignty movement that led to the multi-state action that came to the U.S. Supreme Court under the name of *NFIB v. Sebelius*.

The analysis of the history and related filing pertaining to the *Sebelius* case reveals that the anti-commandeering challenge was launched by the Attorneys General and/or Governors of twenty-six states party to *Florida v. HHS.*[[35]](#footnote-35) The case startedin the United States District Court, N.D. Florida, Pensacola Division and was finally heard by the Supreme Court as *NFIB v.* *Sebelius*. The challenge was set up on March 23, 2010. In the pleading, the states complained that the ACA violated the Spending Clause and principles of federalism protected under the Tenth Amendment:

56. The Act exceeds Congress’s powers under Article I of the Constitution of the United States, and cannot be upheld under the Commerce Clause, Const. art. I, §8; the Taxing and Spending Clause, id.; or any other provision of the Constitution.

\* \* \*

58. The Act violates the Tenth Amendment of the Constitution of the United States, and runs afoul of the Constitution’s principle of federalism, by commandeering the Plaintiffs and their employees as agents of the federal government’s regulatory scheme at the states’ own cost.[[36]](#footnote-36)

The claim was reiterated on August 6, 2010, in a Motion filed by the plaintiffs, assisted by Baker & Hostetler LLP’s lawyers David B. Rivkin and Lee A. Casey. The motion relied on a “coercion and commandeering” theory and asserted that the ACA compelled states to administer and enforce federal insurance-related programs:

The ACA shifts billions of dollars in costs, mandates, and responsibilities to the States, coerces and commandeers their resources, and renders them arms of the federal government, in violation of Congress’s Article I powers, the Ninth and Tenth Amendments, and the Constitution’s federalist structure.[[37]](#footnote-37)

However, the refined claim that the threat to lose the federal matching funds amounted to commandeering was further developed in a Motion filed on November 4, 2010, where the plaintiffs used the *South Dakota v. Dole*[[38]](#footnote-38) test to argue that Medicaid passed the “point at which pressure turns into coercion” and therefore was unconstitutional:

The “choice” offered by the ACA is just as illusory. As shown, States cannot opt out of Medicaid, because they are subject to unconstitutionally coercive consequences. This clearly was Congress’s purpose and intent. However, remaining in the ACA Medicaid program will encumber the Plaintiff States with such massive new expenses and responsibilities that their viability as sovereigns will be severely threatened.[[39]](#footnote-39)

Paul Clement, a former United States Solicitor General under George W. Bush, further refined the challenge by authoring the plaintiffs’ argument in the United States Court of Appeals for the Eleventh Circuit. The anti-commandeering doctrine ultimately reached the U.S. Supreme Court in the *Reply* *Brief of State Petitioners on Medicaid*,[[40]](#footnote-40) in which 24 states presented the Supreme Court with the argument that the ACA was unconstitutionally coercive because it forced states to implement federal policy. The petitioners, in reply to the federal government’s argument that the spending power has no anti-coercion limit and encompasses the power to commandeer the states through coercion, argued that if the federal government can coerce states to administer federal programs, by threatening to withhold billions of dollars extracted from in-state taxpayers, then very little is left of the anti-commandeering doctrine.[[41]](#footnote-41) This argument was received in the *Sebelius* plurality decisionby Chief Justice John Roberts, who wrote that the “financial ‘inducement’ Congress has chosen is much more than ‘relatively mild encouragement,’” but instead “a gun to the head” [[42]](#footnote-42) and that “[t]he threatened loss of over 10 percent of a State’s overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.”[[43]](#footnote-43) In declaring the Medicaid expansion coercive, Chief Justice Roberts believed that the Act commandeered the states or, in his words, “require[d] the States to govern according to Congress’ instructions,”[[44]](#footnote-44) hence re-conceptualising, according to Professor Bradley W. Joondeph, “what qualifies as federal compulsion, and thus extended the reach of the anti-commandeering doctrine.”[[45]](#footnote-45)

The analysis of the filings pertaining to *Sebelius* suggests that the anti-commandeering doctrine came to the attention of the courts because the states, in first instance, challenged the Medicaid expansion on Tenth Amendment grounds. This alone would demonstrate the effectiveness of state challenges to federal policies and, above all, would confirm the initial assumption that states play an important role in shaping the constitutional discourse. However, there is more. State legislatures expressed their constitutional concerns before the actual legal challenge to the ACA. Tenth Amendment resolutions were adopted in four states: Alabama,[[46]](#footnote-46) Utah,[[47]](#footnote-47) Arizona,[[48]](#footnote-48) and Wyoming.[[49]](#footnote-49) Those resolutions may have inspired the legal challenges. This consideration would reinforce the argument that state legislatures play a crucial role in shaping the constitutional discourse and that the analysis of state legislative activity is key to understanding legal challenges.

1. Health Care Freedom Acts[[50]](#footnote-50)

The last group of strategies used by red legislatures in opposition to the ACA is fully fledged legislation. Sixteen state legislatures passed “Health Care Freedom of Choice Acts,” statutes aimed at blocking the operation of the individual mandate within their borders. The measures sought to guarantee that residents would not be compelled to participate in any healthcare system and would be free from the threat of penalty if they chose not to participate. None of these acts had legal validity, but, as argued by Professor Dinan and others, the Health Care Freedom Acts were meant to trigger a conflict between state and federal law that would have provided support in lawsuits against the government.[[51]](#footnote-51) In other words, in passing anti‑ACA legislation, state legislatures were preparing the ground for the subsequent *Sebelius* lawsuit. This is evident, for instance, upon examination of the anti‑ACA statutes passed by the Virginia legislature in 2010.

The Virginia General Assembly considered a total of six statutes and amendments to the state constitution that would have created direct conflict with the individual mandate provision.[[52]](#footnote-52) Three identical bills were filed by different sponsors in the Senate: SB 283,[[53]](#footnote-53) 311,[[54]](#footnote-54) 417.[[55]](#footnote-55)

The bills filed in the Senate read:

No resident of this Commonwealth, regardless of whether he has or is eligible for health insurance coverage under any policy or program provided by or through his employer, or a plan sponsored by the Commonwealth or the federal government, shall be required to obtain or maintain a policy of individual insurance coverage. No provision of this title shall render a resident of this Commonwealth liable for any penalty, assessment, fee, or fine as a result of his failure to procure or obtain health insurance coverage.[[56]](#footnote-56)

The House considered two constitutional amendments: HB 722,[[57]](#footnote-57) and HB 10.[[58]](#footnote-58) The text of HB 10 contained a reference to liberty that was then deleted to reflect the language of the senate bills:

No law shall restrict a person’s natural right and power of contract to secure the blessings of liberty to choose private health care systems or private plans. No law shall interfere with the right of a person or entity to pay for lawful medical services to preserve life or health, nor shall any law impose a penalty, tax, fee, or fine, of any type, to decline or to contract for health care coverage or to participate in any particular health care system or plan, except as required by a court where an individual or entity is a named party in a judicial dispute. Nothing herein shall be construed to expand, limit or otherwise modify any determination of law regarding what constitutes lawful medical services within the Commonwealth.[[59]](#footnote-59)

Perhaps a confirmation of the fact that the bills were intended to trigger a court challenge is that another measure, House Joint Resolution 7, a proposed amendment to Article I of the Virginia Constitution that would have prohibited penalties for individuals that do not purchase health insurance, was due for reconsideration in 2012. The resolution failed in the House Privileges and Elections committee in mid-February and was never taken up again because the lawsuit was already in advanced stage.[[60]](#footnote-60)

The first bill to pass in the Senate was SB 417, the Virginia Health Care Freedom Act. Senate Bill 417 was introduced on January 13, 2010, by Senator Jill Holtzman Vogel,[[61]](#footnote-61) an affirmed attorney with national reputation and native Virginian who also served as Deputy General Counsel at the Department of Energy.[[62]](#footnote-62) The fact that the sponsor was an attorney would corroborate the argument that the legislators were aware of the insubstantial legal value of the provisions of such a bill for Virginia residents and the intent of the bill was purely to support the state standing in a potential lawsuit. Senate Bill 417 was approved by the Committee on Commerce and Labor and passed the Senate on February 1, 2010, with a vote of 23 “Yes” and 17 “No”.[[63]](#footnote-63) The discussion around the bill in the Senate was minimal because it followed a broad discussion of the other identical bill—SB 283.

Senate Bill 283 was sponsored by Senator Frederick M. Quayle. During the discussion about SB 283 the sponsor commented, “This is not a bill that deals with healthcare but it is a bill that attempts to reinforce the U.S. Constitution: never, the Congress has mandated that all citizens should purchase anything . . . .[[64]](#footnote-64) The bill was criticized by Democratic senators—such as Senator Petersen and Senator Saslaw. Senator Petersen expressed concerns that the measure “would create problems in situations when—as part of a divorce settlement—a Court requires to provide health insurance for minor children or when an organization such an athletic club that requires its members to carry health insurance.”[[65]](#footnote-65) Senator Saslaw, pointing to the U.S. Constitution Supremacy Clause, belittled the bill as “not worth the paper it is written on” and “absolutely meaningless.”[[66]](#footnote-66) Once passed by the Senate, SB 283, 311, and 417 were then sent to the House of Delegates for review, and passed the House on February 12, 2010.[[67]](#footnote-67) The three bills again received harsh comments from some Democratic Representatives such as Joseph D. Morrissey, who commented, “What we do here has merit, has meaning and it is purposeful but these bills devalue what we do; as legislation it is an embarrassment simply because it is not legislation. It is mere poetry with no legislative value.”[[68]](#footnote-68)

Governor Bob McDonnell subsequently made recommendations to this bill, including the exemptions that the democratic senators pointed to during the senate discussion.[[69]](#footnote-69) This event is fundamental to determining the date of enactment of the bill. Attorney General Ken Cuccinelli and others would later argue before the court that because Senate Bill 417 had been previously amended by the Governor, it became law without his signature when the House of Delegates adopted the Governor’s amendment on March 10, 2010.[[70]](#footnote-70)

Of particular significance, at the signing ceremony of Senate Bills 283, 311, 417 and House Bill 10, was the presence of Attorney General Ken Cuccinelli. Attorney General Cuccinelli commented, “Virginians spoke loudly and clearly in rallies, in town halls, and at the ballot box about their opposition to the new federal health care law. The governor and both Democrats and Republicans in the General Assembly heard them, and as a result, the Virginia Health Care Freedom Act is being signed today.”[[71]](#footnote-71) The fact that Attorney General Ken Cuccinelli was present during the ceremony is a clear demonstration that the objective of the legislation was mainly to support a legal action.

The legislation was eventually codified under Virginia Code Section 38.2–3430.1:1 (2010) and was effective on July 1, 2010.[[72]](#footnote-72) The final text of the provision is reported below, with the final amendments (exceptions to the exemption) requested by the Governor in italics:

No resident of this Commonwealth, regardless of whether he has or is eligible for health insurance coverage under any policy or program provided by or through his employer, or a plan sponsored by the Commonwealth or the federal government, shall be required to obtain or maintain a policy of individual insurance coverage *except as required by a court or the Department of Social Services where an individual is named a party in a judicial or administrative proceeding*. No provision of this title shall render a resident of this Commonwealth liable for any penalty, assessment, fee, or fine as a result of his failure to procure or obtain health insurance coverage. *This section shall not apply to individuals voluntarily applying for coverage under a state‑administered program pursuant to Title XIX or Title XXI of the Social Security Act. This section shall not apply to students being required by an institution of higher education to obtain and maintain health insurance as a condition of enrollment. Nothing herein shall impair the rights of persons to privately contract for health insurance for family members or former family members*.”[[73]](#footnote-73)

This provision is directly and purposely in conflict with the individual mandate, Section 1501 of the ACA. The evident conflict between state and federal law was used by Attorney General Ken Cuccinelli to support a legal action against the implementation of the individual mandate requirement in Virginia. His argument was that the Commonwealth of Virginia had a right to challenge the individual mandate because the state had suffered a “sovereign injury” and that the individual mandate conflicted with its “exercise of sovereign power over individuals and entities within the relevant jurisdiction,” which “involves the power to create and enforce a legal code.”[[74]](#footnote-74) He emphasized that Virginia had standing “solely because of the asserted conflict between that federal statute and the VHCFA.”[[75]](#footnote-75)

The lawsuit started in the United States District Court for the Eastern District of Virginia on March 23, 2010. A similar multi-state lawsuit was filed on the same day in Florida, but Cuccinelli’s rationale for filing apart from McCollum and the other attorneys general was to take advantage of the Eastern District of Virginia’s “Rocket Docket,” the renowned speedy resolution of civil litigation.[[76]](#footnote-76) The complaint requested declaratory and injunctive relief from the individual mandate and asked the Court “to declare that § 1501 . . . [was] unconstitutional because the individual mandate exceeds the enumerated powers conferred upon Congress.”[[77]](#footnote-77) The main issue was whether Virginia could claim standing on its own and not on behalf of any individual.[[78]](#footnote-78)

Cuccinelli’s case was heard by District Judge Henry E. Hudson, who held that the VHCFA provided Virginia with standing.[[79]](#footnote-79) “The mere existence of the lawfully-enacted statute is sufficient to trigger the duty of the Attorney General of Virginia to defend the law and the associated sovereign power to enact it,”[[80]](#footnote-80) and that the individual mandate was unconstitutional. The decision was a victory for Attorney General Ken Cuccinelli’s strategy and it provided hopes across the 50 states for a repeal of the ACA. However, the case was appealed. On September 8, 2011, Circuit Judge Diana Gribbon Motz held that Virginia could not challenge the “individual mandate” provision for lack of Article III standing[[81]](#footnote-81) and dismissed the case “[b]ecause the individual mandate applies only to individual persons, not states, the Secretary moved to dismiss the suit for that Virginia had not and could not allege any cognizable injury and so was without standing to bring this action.”[[82]](#footnote-82) Circuit Judge Motz expressly avoided ruling on the constitutionality of the individual mandate, “Because we hold that Virginia lacks standing, we cannot reach the question of whether the Constitution authorizes Congress to enact the individual mandate,”[[83]](#footnote-83) and defined the VHCFA as “a smokescreen for Virginia’s attempted vindication of its *citizens’* interests.”[[84]](#footnote-84) Virginia failed in its attempt to strike down the individual mandate[[85]](#footnote-85) provision, but it is arguable that the Virginia lawsuit contributed to raise the profile of the other lawsuits mounted across the country, especially the Florida lawsuit that reached the U.S. Supreme Court.

As I have argued, anti-ACA sovereignty measures may have also contributed to strengthening the case for the plaintiffs in *Sebelius*. It is not a coincidence, as I suggest, that in the plurality opinion, Chief Justice Roberts stated that the threat to withhold federal funding from the states that did not expand Medicaid constituted “a gun to the head” and did so explicitly recalling the anti-commandeering doctrine elaborated in *Printz* and *New York*:

Congress may use its spending power to create incentives for States to act in accordance with federal policies. But when “pressure turns into compulsion,” ibid., the legislation runs contrary to our system of federalism. “[T]he Constitution simply does not give Congress the authority to require the States to regulate.” New York, 505 U.S., at 178, 112 S.Ct. 2408. That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own.[[86]](#footnote-86)

It has been argued that *Sebelius* expanded the anti-commandeering doctrine: “[u]nder the new conceptualization of the anti-commandeering doctrine, even when Congress does not compel states to act, a law can be struck on anti-commandeering grounds if the practical impact of the law is one that coerces another sovereign’s power.”[[87]](#footnote-87) If this is correct, then there are valid reasons to believe that the legislation and state legislative measures that preceded the lawsuit played a role in bringing the doctrine to the attention of the court and, more importantly, in shaping the final outcome of the lawsuit that exempted state legislatures from the compulsory expansion of Medicaid.

1. Strategies Used by Blue State Legislatures and Local Jurisdictions to Push Back on Trump Immigration Policy and Recent Executive Order 13768

As discussed above, the anti-ACA movement was mainly orchestrated by state legislatures that refused to implement federal policies related to healthcare. The sanctuary city movement is instead a very diverse phenomenon that involves different levels of government, from small local jurisdictions (counties, boroughs, and parishes) to state legislatures. Sanctuary policies can take the shape of local ordinances, executive orders, resolutions, etc., that declare non-cooperation with the federal government. Between January and February 2017, DHS released three reports that list non-cooperative local jurisdictions or, in the language of the report, non-cooperative “law enforcement agencies” (LEAs).[[88]](#footnote-88) The reports show that the sanctuary cities phenomenon was widespread. Between January 28, 2017 and February 3, 2017, LEAs refused 206 detainer requests; between February 4, and February 10, 2017, the refusals were 47; and between February 11, and February 17, 2017, the figure increased to 65. The same reports also list about 140 jurisdictions that, since 2011, are known to have policies that restrict cooperation with ICE.[[89]](#footnote-89)

In addition to local laws, as anticipated, the sanctuary phenomenon involves state legislatures. A research conducted by the National Conference of State Legislatures (NCSL) shows that between January 2017 and July 2018, at least 15 states and the District of Columbia considered legislation supporting noncompliance with immigration detainers.[[90]](#footnote-90) Of these 15 states, California[[91]](#footnote-91), District of Columbia,[[92]](#footnote-92) and Vermont[[93]](#footnote-93) enacted sanctuary-related bills and resolutions.[[94]](#footnote-94) The controversy revolves around 8 U.S.C. § 1373, which provides that a state “may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”[[95]](#footnote-95)

California has been leading the sanctuary movement with Senate Bill 54, which was introduced on December 5, 2016, and signed into law on October 5, 2017. The bill prohibited state and local law enforcement agencies “from using money or personnel to investigate, interrogate, detain, detect, or arrest persons for immigration enforcement purposes,”[[96]](#footnote-96) and required, by October 1, 2018, the Attorney General “to publish model policies limiting assistance with immigration enforcement” that would then be implemented by public schools, health facilities and courthouses in the state.

On examination of the text and related committee debates, it is paradoxically arguable that SB 54 shares traits with the anti-ACA bills enacted between 2010-2011. This is evident from two points of view. First, it is an “uncooperative bill,” a bill that claims state sovereignty and freedom from federal commandeering. The wording of the bill emphasizes separation of powers and condemns impositions from the federal government, just like the anti-ACA bills. The bill reads, “Entangling state and local agencies with federal immigration enforcement programs diverts already limited resources and blurs the lines of accountability between local, state, and federal governments.”[[97]](#footnote-97) The state of California is justifying the refusal to cooperate with federal requests with constitutional concern over the use of state resources for federal purposes, an issue at the core of the previous anti-commandeering decisions. Furthermore, in line with the research conducted on the anti-ACA bills where the intentions of legislators were investigated via the analysis of the legislative history of the bills, I have reviewed the committee reports in search of insight into the motivations that led to the enactment of the California “uncooperative bills.” The anti-commandeering rhetoric is apparent in the presentation of the bill to the Senate Committee on Public Safety. Bill sponsor, Senator DeLeon stated, “As we know the Trump administration has been attempting to commandeer local law enforcement to be an extension of the Trump deportation machine . . . .”[[98]](#footnote-98) It is arguable that Senator DeLeon intended to use the anti-commandeering doctrine as constitutional basis for the bill. Second, the similarity of SB 54 to anti-ACA bills relies on the nature of the bill as preparatory for a legal challenge. The bill attempts to influence the constitutional debate by expressly declaring that the federal immigration enforcement programs raises “constitutional concerns, including the prospect that California residents could be detained in violation of the Fourth Amendment to the United States Constitution, targeted on the basis of race or ethnicity in violation of the Equal Protection Clause.”[[99]](#footnote-99) Senate Bill 54 is, no doubt, a prefatory bill to a constitutional challenge.

As stated above, the sanctuary movement has involved mainly local authorities. It is therefore helpful to consider California local sanctuary legislation. For example, take the wording of Chapters 12H and 12I of the San Francisco Administrative Code:

Chapter 12H: prohibits San Francisco departments, agencies, commissions, officers, and employees from using San Francisco funds or resources to assist in enforcing federal immigration law or gathering or disseminating information regarding an individual’s release status.

Chapter 12I: prohibits San Francisco law enforcement from detaining an individual, otherwise eligible for release from custody, solely on the basis of a civil immigration detainer request. It also prohibits local law enforcement from providing ICE with advanced notice that an individual will be released from custody, unless the individual meets certain criteria.[[100]](#footnote-100)

Chapter 12H is a general prohibition to assist the federal government with the share of information, while Chapter 12I prohibits San Francisco law enforcement from detaining an individual on the basis of a civil immigration detainer request. By refusing to cooperate with the federal government, some local legislatures are stating their sovereignty and freedom from federal commandeering in order to push back on the unwanted healthcare reform, in a way that mirrors the tactics of some red states during the Obama era.

The parallel with anti-ACA bills is even more convincing if we consider the evident link between the constitutional arguments of the bills and the legal grounds of the multiple sanctuary lawsuits that took place in California,[[101]](#footnote-101) Illinois,[[102]](#footnote-102) Massachusetts,[[103]](#footnote-103) Pennsylvania,[[104]](#footnote-104) and Washington.[[105]](#footnote-105) The plaintiffs of these lawsuits challenged the constitutionality of the enforcement provision of Trump’s Executive Order on several grounds, including violation of the Tenth Amendment’s prohibition against commandeering local jurisdictions, anti-commandeering grounds, and the Fifth Amendment’s Due Process Clause.

Remarkably, on January 31, 2017, the City of San Francisco filed a lawsuit in the U.S. District Court for the Northern District of California[[106]](#footnote-106) that is specular to the California SB 54 and the San Francisco Administrative code articles examined above. The City of San Francisco argued that Section 9(a) of Trump’s Executive Order 13768 violates the separation of powers doctrine “because it improperly seeks to wield congressional spending powers,”[[107]](#footnote-107) and, even if the President had the spending power, the order would violate the Tenth Amendment’s prohibition against commandeering local jurisdictions and the Fifth Amendment’s Due Process Clause because “it seeks to deprive local jurisdictions of congressionally allocated funds without any notice or opportunity to be heard.”[[108]](#footnote-108)

By confronting the wording of the legislation and the grounds for the lawsuit, it could be argued that California SB 54 and the San Francisco code provisions anticipated the debate in court and prepared the ground for the constitutional challenge which, as of August 2018, has been successful both at the district and appellate court levels. In particular, the counties obtained a nationwide enjoinder of Section 9(a) of the Executive Order in the district court and maintained the enjoinder of the provision in California at appellate court level. As of August 2018, the Court of Appeals has held that the Executive Order violated constitutional separation of powers but has remanded the issue of nationwide scope for permanent injunction to the district court “for a more searching inquiry into whether this case justifies the breadth of the injunction imposed.”[[109]](#footnote-109) It would therefore seem that the counties have successfully avoided the withdrawal of vital federal funding. It is certainly difficult to assess the role that legislation has played in shaping the lawsuit and the possible “gravitational effect” it has had on the decisions but this article has sought, at the very least, to highlight the connection between the two and draw a parallel with the same tactics deployed in relation to the ACA.

1. Conclusion: From Liberal States’ Rights Litigation to Liberal States’ Rights Discourse

The aim of this article has been to highlight the similarity of strategies used by red and blue states respectively to challenge Obama’s ACA and President Trump’s Executive Order 13768. I have attempted to draw a parallel between the states’ right discourse used by red legislatures between 2010–2011 to avoid the budgetary consequence of Medicaid expansion and the “liberal state rights discourse” used by blue legislatures to preserve their federal funding. It would appear that it is all about money. However, as in many other cases concerning state-central government controversies, the roots of the controversy lie in much deeper territory, which is the constitutional debate on the proper allocation of power between local jurisdictions and federal government, i.e. the federalist debate. It has been noted that, in claiming freedom from federal impositions, blue jurisdictions borrowed Tenth Amendment and separation of powers rhetoric from the conservative doctrinal tradition and in particular from the anti-commandeering doctrine as elaborated in *New York*,[[110]](#footnote-110) *Printz,*[[111]](#footnote-111) and more recently in *Sebelius.*[[112]](#footnote-112) This is no coincidence and reflects the deep concerns of states, red or blue, over the interference of Washington D.C. in social policies. The use of states’ rights rhetoric by liberal voices in court has been meaningfully termed the new “liberal states-rights’ litigation.”[[113]](#footnote-113) This article proposes a further elaboration of the concept that includes measures passed by sanctuary jurisdictions and proposes the term “liberal states-rights’ discourse” instead. This expression defines the opposition to Trump Executive Order 13768 as a heterogeneous phenomenon that, as noted, has involved courts and local jurisdictions alike.

1. . S.B. 54, 2017 Legis., Reg. Sess. (Cal. 2017). [↑](#footnote-ref-1)
2. . Exec. Order No. 13,768, 82 Fed. Reg. 8675, 8799 (Jan. 25, 2017). [↑](#footnote-ref-2)
3. *. Id.* at 8800. [↑](#footnote-ref-3)
4. . Jasmine C. Lee, Rudy Omri & Julia Preston, *What Are Sanctuary Cities?*, N.Y. Times (Feb. 6, 2017), https://www.nytimes.com/interactive/2016/09/02/us/sanctuary-cities.html. [↑](#footnote-ref-4)
5. . Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 Yale L.J. 1256, 1259 (2009). [↑](#footnote-ref-5)
6. *. See, e.g.,* Florida *ex rel.* Bondi v. U.S. Dep’t of Health & Human Servs., 780 F. Supp. 2d 1256 (N.D. Fla.), *order clarified*, 780 F. Supp. 2d 1307 (N.D. Fla. Mar. 3, 2011), *aff’d in part, rev’d in part sub nom*. Florida *ex rel.* Att’y. Gen. v. U.S. Dep’t of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011), *aff’d in part, rev’d in part sub nom.* Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012). [↑](#footnote-ref-6)
7. . Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 584 (2012) [hereinafter *NFIB*]. [↑](#footnote-ref-7)
8. *. See generally* Austin Raynor, *The New State Sovereignty Movement*, 90 Ind. L.J. 613 (2015). [↑](#footnote-ref-8)
9. . H.R. 60, 2011 Legis., Reg. Sess. (Ala. 2011). If the Governor fails to return a bill to the house in which it is originated within six days after it was presented to him (Sundays excepted), it becomes a law without his signature. [↑](#footnote-ref-9)
10. . S.B. 461, 117th Gen. Assemb., Reg. Sess. (Ind. 2011). [↑](#footnote-ref-10)
11. *. See* Cooper v. Aaron, 358 U.S. 1, 18–19 (1958) (highlighting state attempts to nullify the Supreme Court’s decision in Brown v. Board are ineffective). [↑](#footnote-ref-11)
12. . James H. Read & Neal Allen, *Living, Dead, and Undead: Nullification Past and Present*, 1 Am. Pol. Thought 263, 267 (2012). [↑](#footnote-ref-12)
13. . John Dinan, *Contemporary Assertions of State Sovereignty and the Safeguards of American Federalism*, 74 Alb. L. Rev. 1637, 1640 (2011). [↑](#footnote-ref-13)
14. . S.J. Res. 27, 2010 Legis., Reg. Sess. (Ala. 2010). [↑](#footnote-ref-14)
15. *. Id.* [↑](#footnote-ref-15)
16. *. Id.* [↑](#footnote-ref-16)
17. *. Id.* The preamble reads:

    WHEREAS, the Tenth Amendment to the United States Constitution reads as follows: ‘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’; and

    WHEREAS, the Tenth Amendment defines the total scope of federal power as being that specifically granted by the United States Constitution and no more. *Id.* [↑](#footnote-ref-17)
18. . H.R. Con. Res. 2001, 49th Legis., 2d Reg. Sess. (Ariz. 2010). [↑](#footnote-ref-18)
19. *. Id.* at 2405. The title of the Resolution is titled: “Resolving Intent to Claim Sovereignty Under the Tenth Amendment to the Constitution of the United States over Certain Powers, Serving Notice to the Federal Government to Cease and Desist Certain Mandates and Providing That Certain Federal Legislation Be Prohibited Or Repealed.” [↑](#footnote-ref-19)
20. . Ariz. H.R. Con. Res. 2001. [↑](#footnote-ref-20)
21. *. See, e.g*, New York v. United States, 505 U.S. 144 (1992). [↑](#footnote-ref-21)
22. . Ariz. H.R. Con. Res. 2001. [↑](#footnote-ref-22)
23. . H.R. Res. 46, 2011 Legis., Reg. Sess. (Va. 2011). [↑](#footnote-ref-23)
24. *. Id.* [↑](#footnote-ref-24)
25. *. Id.* [↑](#footnote-ref-25)
26. *. See generally* Virginia *ex rel*. Cuccinelli v. Sebelius, 656 F.3d 253 (4th Cir. 2011). [↑](#footnote-ref-26)
27. *. See* Virginia *ex rel*. Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 787–88 (E.D. Va. Dec. 13, 2010). [↑](#footnote-ref-27)
28. *. Virginia House of Delegates*, RICHMOND SUNLIGHT (Jan. 31, 2011), https://www.richmondsunlight.com/bill/2011/hr46/ at 1:57:20-1:58:40. [↑](#footnote-ref-28)
29. *. See* Cuccinelli, 656 F.3d at 253. [↑](#footnote-ref-29)
30. *. See* *Bondi*, 780 F. Supp. 2d at 1307. [↑](#footnote-ref-30)
31. . H.R.J. Res. 2, 60th Legis., Budget Sess. (Wyo. 2010). [↑](#footnote-ref-31)
32. . H.R.J. Res. 9, 60th Legis., Budget Sess. (Wyo. 2010). [↑](#footnote-ref-32)
33. . Wyo. H.R.J. Res. 9. The full amendment to Tenth Amendment reads as follows:

    The powers not *expressly* 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 amendment shall be considered by all courts as a rule of interpretation and construction in any case involving an interpretation of any constitutional power claimed by the Congress.* [↑](#footnote-ref-33)
34. *. Id.* [↑](#footnote-ref-34)
35. *. See* *Bondi*, 780 F. Supp. 2d at 1307. [↑](#footnote-ref-35)
36. . Complaint at \*16, Florida v. HHS, 780 F. Supp. 2d 1256 (N.D. Fla. 2011) (No. 3:10-cv-91), 2010 WL 1038209. [↑](#footnote-ref-36)
37. . Plaintiffs’ Memorandum in Opposition to Defendants’ Motion to Dismiss at \*45–\*46IV, Florida v. HHS, 780 F. Supp. 2d 1256 (N.D. Fla. 2011) (No. 3:10-cv-91-RV/EMT), 2010 WL 3163990 (N.D. Fla.). [↑](#footnote-ref-37)
38. . South Dakota v. Dole, 483 U.S. 203, 210–11 (1987). [↑](#footnote-ref-38)
39. . Memorandum in Support of Plaintiffs’ Motion for Summary Judgement at \*39, Florida v. HHS, 780 F. Supp. 2d 1256 (N.D. Fla. 2011) (No. 3:10-cv-91-RV/EMT), 2010 WL 4564355 (N.D. Fla.). [↑](#footnote-ref-39)
40. . Reply Brief of State Petitioners on Medicaid at \*10–\*11, Florida *ex rel*. Att’y. Gen. v. U.S. Dep’t of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011) (No. 11-400), 2012 WL 864598. [↑](#footnote-ref-40)
41. *. Id.* at \*9–\*10. [↑](#footnote-ref-41)
42. *. NFIB*, 567 U.S. at 580–81. Chief Justice Roberts explained that Congress could condition the receipt of funds on the States’ complying with restrictions on the use of those funds, because that is the means by which Congress ensures that the funds are spent according to its view of the ‘general Welfare.’ However, he argued that the threat to withhold federal funds for states that did not expand Medicaid was coercive and Congress could not penalize States that choose not to participate by taking away their existing Medicaid funding. [↑](#footnote-ref-42)
43. *. Id*. at 582. [↑](#footnote-ref-43)
44. *. Id*. at 677. [↑](#footnote-ref-44)
45. . Bradley W. Joondeph, *The Health Care Cases and the New Meaning of Commandeering*, 91 N.C. L. Rev. 811, 832–33 (2013). [↑](#footnote-ref-45)
46. *. See* Ala. S.J. Res. 27. [↑](#footnote-ref-46)
47. *. See* H.C. Res. 2, 58th Legis., 2010 Gen. Sess. (Utah 2010). [↑](#footnote-ref-47)
48. *. See* Ariz. H.R. Con. Res. 2001. [↑](#footnote-ref-48)
49. *. See* Wyo. H.J. Res. 2; Wyo. H.J. Res. 9. [↑](#footnote-ref-49)
50. . For similar arguments in this section, see generally Ilaria Di Gioia, *The Battle for a Constitutional Movement: State Legislative Opposition to the ACA*, Political Sci. Ass’n (2017), https://www.psa.ac.uk/sites/default/files/conference/papers/2017/Ilaria%20Di%20Gioia-%20The%20battle%20for%20a%20constitutional%20moment.pdf (conference paper). [↑](#footnote-ref-50)
51. . Dinan, *supra* note 1, at 1641, 1669; *see also* Raynor, *supra* note 8, at 638 (“Sovereignty laws can also have a significant effect on constitutional adjudication, at all stages of the judicial process; they may catalyze private lawsuits, trigger standing for purposes of federal jurisdiction, and even influence the content of substantive doctrine.”). [↑](#footnote-ref-51)
52. *. See generally* S.B. 283, 2010 Gen. Assemb., Reg. Sess. (Va. 2010); S.B. 311, 2010 Gen. Assemb., Reg. Sess. (Va. 2010); S.B. 417, 2010 Gen. Assemb., Reg. Sess. (Va. 2010). The Senate bills are identical but sponsored by three different senators. *See also* H.B. 10, 2010 Gen. Assemb., Reg. Sess. (Va. 2010); H.B. 722, 2010 Gen. Assemb., Reg. Sess. (Va. 2010). The House bills contain a slightly stronger language and invoked “a person’s natural right and power of contract to secure the blessings of liberty”). After their passage in the House, the bills were revised by the Senate to be identical to S.B. 283, S.B. 311, and S.B. 417, while H.J.R. Res. 7, an amendment to art. 1 of the Virginia Constitution, failed in the House Privileges and Elections committee. *Compare* Va. S.B. 283, Va. S.B. 311, Va. S.B. 417, *with* H.J.R. Res. 7, 2010 Gen. Assemb., Reg. Sess. (Va. 2010). For a report of the texts and circumstances of the passages of these billsseeMatthew R. Farley, *Challenging Supremacy: Virginia’s Response to the Patient Protection and Affordable Care Act*, 45 U. Rich. L. Rev. 37, 53–55 (2010). [↑](#footnote-ref-52)
53. . Va. S.B. 283. [↑](#footnote-ref-53)
54. . Va. S.B. 311. [↑](#footnote-ref-54)
55. . Va. S.B. 417. [↑](#footnote-ref-55)
56. *. Id.* [↑](#footnote-ref-56)
57. . Va. H.B. 722. [↑](#footnote-ref-57)
58. . Va. H.B. 10. [↑](#footnote-ref-58)
59. *. Id.* [↑](#footnote-ref-59)
60. *. See* Farley, *supra* note 52, at 56–57. [↑](#footnote-ref-60)
61. . Va. S.B. 417. [↑](#footnote-ref-61)
62. *. See* Sen. Jill Holtzman Vogel, About Links, http://www.senatorjillvogel.com/about/ (last visited Sept. 15, 2018). [↑](#footnote-ref-62)
63. *. See* *SB 417 Individual Health Insurance Coverage; Resident of State Shall Not Be Required to Obtain a Policy: Senate: Read Third Time and Passed Senate (23-Y 17-N)*, Va.’s Legislative Info. Sys. (Feb. 1, 2010), http://lis.virginia.gov/cgi-bin/legp604.exe?ses=101&typ=bil&val=sb417. [↑](#footnote-ref-63)
64. *. 02/01/2010 Senate Proceedings*, Richmond Sunlight (Feb. 1, 2010) at 00:24., https://www.richmondsunlight.com/minutes/senate/2010/02/01/. [↑](#footnote-ref-64)
65. *. Id.* at 00:28. [↑](#footnote-ref-65)
66. *. Id.* at 00:33. [↑](#footnote-ref-66)
67. . SB 283 passed with a vote of 67-Y and 29-N, SB 311 passed with 67-Y and 28-N, and SB 417 passed with 66‑Y and 29‑N. *See generally id.* [↑](#footnote-ref-67)
68. *. 02/12/2010 House Proceedings*, Richmond Sunlight (Feb. 12, 2010) at 00:28, https://www.richmondsunlight.com/minutes/house/2010/02/12/. [↑](#footnote-ref-68)
69. . The Governor recommended adding that the provision did not exempt from the requirement to carry health insurance in two circumstances:

    1. Line 12, enrolled, after coverage

    insert

    except as required by a court or the Department of Social Services where an individual is named a party in a judicial or administrative proceeding

    2. Line 15, enrolled, after *Act*.

    insert

    This section shall not apply to students being required by an institution of higher education to obtain and maintain health insurance as a condition of enrollment. Nothing herein shall impair the rights of persons to privately contract for health insurance for family members or former family members.

    *(SB417) Governor’s Recommendation*, Va.’s Legislative Info. Sys. (2010), https://lis.virginia.gov/cgi-bin/legp604.exe?101+amd+SB417AG. [↑](#footnote-ref-69)
70. . Kenneth T. Cuccinelli, II et. al., *State Sovereign Standing: Often Overlooked, but Not Forgotten*, 64 Stan. L. Rev. 89, 92 (2012). [↑](#footnote-ref-70)
71. *. Governor Northam Statement on Biennial Budget That Expands Health Care and Invests in a Stronger Economy*, WHSV3 (May 31, 2018, 10:27 AM), http://www.whsv.com/content/news/Virginia-lawmakers-vote-to-expand-Medicaid-484085081.html [hereinafter “*Governor’s Statement*”]. [↑](#footnote-ref-71)
72. . The history of passage of SB 417 is also commented by Farley, *supra* note 52. [↑](#footnote-ref-72)
73. . Va. Code Ann. § 38.2-3430.1:1 (2010). [↑](#footnote-ref-73)
74. *. Cuccinelli*, 656 F.3d at 268 (citing Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 601 (1982); Wyoming v. United States*,* 539 F.3d 1236, 1242 (10th Cir. 2008); Diamond v. Charles*,* 476 U.S. 54, 62 (1986)). [↑](#footnote-ref-74)
75. *. Id.* [↑](#footnote-ref-75)
76. . The U.S. District Court for the Eastern District of Virginia is known as the “Rocket Docket” for its speedy disposition of cases and controversies. *See* Sean F. Murphy, *President’s Column*, The Rocket Docket News: The Newsletter of the N. Va. Chapter of the Fed. Bar (2012), http://www.fedbar.org/image-library/chapters/northern-virginia-chapter/Winter-2012-Newsletter.pdf. [↑](#footnote-ref-76)
77. . Complaint for Declaratory and Injunctive Relief, Virginia *ex rel.* Kenneth T. Cuccinelli v. Sebelius, 2010 WL 3875236 (E.D.Va. 2010) (No. 3:10‑CV‑188). [↑](#footnote-ref-77)
78. *. See also* Timothy Sandefur, *State Standing to Challenge Ultra Vires Federal Action: The Health Care Cases and Beyond*, 23 U. Fla. J.L. & Pub. Pol’y 311, 312 (2012). [↑](#footnote-ref-78)
79. . For an account of the standing issues at stake see Raynor, *supra* note 8, at 640. [↑](#footnote-ref-79)
80. *. Cuccinelli*, 702 F. Supp. 2d at 605–06. [↑](#footnote-ref-80)
81. *. Cuccinelli*, 656 F.3d at 270. [↑](#footnote-ref-81)
82. *. Id.* at 267. [↑](#footnote-ref-82)
83. *. Id.* [↑](#footnote-ref-83)
84. *. Id.* at 269. [↑](#footnote-ref-84)
85. . Liberty Univ., Inc. v. Geithner, 671 F.3d 391, 397–98 (4th Cir. 2011), *cert. granted*, *judgment vacated sub nom.* Liberty Univ. v. Geithner, 568 U.S. 1022 (2012) (mem.), *abrogated by* *NFIB*, 567 U.S. at 519 (challenging, unsuccessfully, the individual mandate as unconstitutional in Virginia). [↑](#footnote-ref-85)
86. *. NFIB*, 567 U.S. at 577–78. [↑](#footnote-ref-86)
87. . Margaret Hu, *Reverse-Commandeering*, 46 U.C. Davis L. Rev. 535, 554 (2012). [↑](#footnote-ref-87)
88. *. Enforcement and Removal Operations: Weekly Declined Detainer Outcome Report for Recorded Declined Detainers Jan. 28 – Feb. 3, 2017*, U.S. Immigration and Customs Enf’t (2017), https://www.ice.gov/doclib/ddor/ddor2017\_01-28to02-03.pdf. [↑](#footnote-ref-88)
89. . Immigration and Customs Enforcement (“ICE”) states that the list is based upon public announcements, news report statements, and publicly disclosed policies. Jurisdictions include counties, boroughs, and parishes. *Id.* [↑](#footnote-ref-89)
90. . Ann Morse, Lydia Deatherage, & Veronica Ibarra, *What Bills Are States Introducing Regarding Sanctuary Policies?*, NCSL (July 23, 2018), <http://www.ncsl.org/research/immigration/sanctuary-policy-faq635991795.aspx#bills>. [↑](#footnote-ref-90)
91. . S. Res. 22, 2017 Legis., Reg. Sess. (Cal. 2017). [↑](#footnote-ref-91)
92. *. See* Morse, Deatherage, & Ibarra, *supra* note 89. [↑](#footnote-ref-92)
93. . S. Res. 79, 2017 Gen. Assemb., Reg. Sess. (Vt. 2017). [↑](#footnote-ref-93)
94. . On the other hand, six state legislatures considered legislation that prohibits sanctuary policies and therefore pre-empt local jurisdictions from becoming sanctuary. [↑](#footnote-ref-94)
95. . 8 U.S.C. § 1373(a) (1996). [↑](#footnote-ref-95)
96. . Cal. S.B. 54. [↑](#footnote-ref-96)
97. *. Id.* [↑](#footnote-ref-97)
98. . Michel Martin, *California State Senator Speaks On Recently-Approved Sanctuary State Bill*, All Things Considered (Sept. 17, 2017); *see also* *ICE Arrests 600 in Naitonwide Raids After Trump Order Expands Criminalization of Immigrants,* Democracy Now! (Sept. 13, 2017), https://www.democracynow.org/2017/2/13/ice\_arrests\_600\_in\_nationwide\_raids. [↑](#footnote-ref-98)
99. . Cal. Gov’t Code § 7284.2(e) (2018). [↑](#footnote-ref-99)
100. . S.F., Cal., Admin. Code § 12H.2 (2018); S.F., Cal., Admin. Code § 12I.2 (2018). [↑](#footnote-ref-100)
101. *. See, e.g.*, Cty. of Santa Clara v. Trump, 250 F. Supp. 3d 497 (N.D. Cal.), *reconsideration denied*, 267 F. Supp. 3d 1201 (N.D. Cal. Jul. 20, 2017), *appeal dismissed as moot sub nom.,* City & Cty. of San Francisco v. Trump, No. 17-16886, 2018 WL 1401847 (9th Cir. 2018). [↑](#footnote-ref-101)
102. *. See, e.g.*, City of Chicago v. Sessions, 264 F. Supp. 3d 933 (N.D. Ill. 2017), *reconsideration denied*, No. 17 C 5720, 2017 WL 5499167 (N.D. Ill. Nov. 16, 2017); *aff’d*, 888 F.3d 272 (7th Cir. 2018). [↑](#footnote-ref-102)
103. . City of Chelsea v. Trump, No. 1:17‑CV‑10214‑GAO (D. Mass. Feb. 8, 2017). [↑](#footnote-ref-103)
104. . City of Philadelphia v Sessions, 309 F. Supp. 3d 289, 301 (E.D. Pa. Jun. 6, 2018). [↑](#footnote-ref-104)
105. . City of Seattle v. Trump, No. 17-497-RAJ, 2017 WL 4700144 (W.D. Wash. Oct. 19, 2017). [↑](#footnote-ref-105)
106. *. Cty. of Santa Clara*, 250 F. Supp. 3d at 497. [↑](#footnote-ref-106)
107. . Cty. of Santa Clara v. Trump, 275 F. Supp. 3d 1196, 1201–02 (N.D. Cal. Nov. 20, 2017), *aff’d in part, vacated in part, remanded sub nom*. City & Cty. of San Francisco v. Trump, No. 17-17478, 2018 WL 3637911 (9th Cir. 2018). [↑](#footnote-ref-107)
108. *. Id.* at 1202. [↑](#footnote-ref-108)
109. *. City & Cty. of San Francisco*, 2018 WL 3637911, at \*13. [↑](#footnote-ref-109)
110. *. New York*, 505 U.S. at 161. [↑](#footnote-ref-110)
111. . Printz v. United States, 521 U.S. 898, 925, 929 (1997). [↑](#footnote-ref-111)
112. *. See, e.g.*, *NFIB*, 567 U.S. at 519. [↑](#footnote-ref-112)
113. . Cara Cunningham Warren, *Sanctuary Lost? Exposing the Reality of the ‘Sanctuary-City’ Debate & Liberal States-Rights’ Litigation*, 63 Wayne L. Rev. 133, 162 (2018). [↑](#footnote-ref-113)