Federalism and State Legislative Opposition to the Affordable Care Act:

The Political Value of Legal Strategy

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Abstract

In the last six years, the American states have been the protagonists of a renewed push for sovereignty that has involved the enactment of different types of legislation to avoid the implementation of the federal health law within the state. George Mason Universityôs professors Paul L. Posner and Timothy Conlan have identified the causes of state resistance in the ideological conflicts reflecting growing political polarization in Washington: ñFederal programs have become a new battleground for states to demonstrate their fidelity to very different ideologies and political alliances.ò[1] The literature has upheld the legislative push against the reform as ñcapable of contributing under certain conditions to safeguarding federalism principles.ò[2] This research contributes to the literature on contemporary assertions of state sovereignty because it argues that the state legislative activity in opposition to federal law is a mechanism that cannot only safeguard federalism but can also enrich constitutional debate. This study combines an understanding of political science and legal method in an effort to provide a multi-disciplinary dimension to an understanding of the contemporary statesô rights phenomenon.

[1] Paul L. Posner & Timothy J. Conlan, *European-Style Federalism's Lessons for America,* GOVERNING (Nov. 12, 2014), http://www.governing.com/columns/smart-mgmt/col-europe-variable-speed-federalism-lessons-america.html.
[2] John Dinan, *Contemporary Assertions of State Sovereignty and the Safeguards of American Federalism*, 74 ALB. L. REV. 1637 (2010-2011).

Preface

As Senior District Judge Roger Vinson pointed out in *Florida v. United States Department of Health and Human Services* the political and legal dispute about the Affordable Care Act ñis not really about health care system at allò. It is, he argued, ñprincipally about our federalist system, and it raises very important issues regarding the constitutional role of the federal government.ò[3] This statement is at the core of the present research which is not ¬as may initially be supposed ¬a study of the Affordable Care Act or an analysis of the *Sebelius* decision. It is instead a study of the oppositional strategies put in place by the state legislatures to push back on the health reform, and as such a work that contributes to the growing literature on state sovereignty movements in the United States. In order to understand the contribution of this work, it is important to keep in mind that the state legislative opposition to the Affordable Care is viewed primarily as a case study intended to inform a broader analysis of contemporary sovereignty claims in the United States. This is in line with recent federalism scholarly work in the United States, in particular with the work of scholars contributing to *Publius: the Journal of Federalism*, for which I have worked as peer-reviewer. Publius is a leading American Journal funded in 1973 by Prof. Daniel Elazar, a preeminent scholar of federalism. The present work has been presented to numerous conferences in Europe and in the United States, including at the Section on Federalism and Intergovernmental Relations of the American Political Science Association 2017 Annual Meeting, where it was reviewed by federalism scholars and received a positive feedback.

[3] Fla. ex rel. Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256, 1263 (N.D. Fla.) (2012).

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Introduction: Legislative Opposition to the Affordable Care Act

Is the United States heading towards of a constitutional moment[4] that will re-define the balance of powers between Washington and the states?

During the Obama presidency, republicans increasingly opposed the expansion of federal power and played the constitutional politicsô game[5] transforming the debate over the significance of public policies in legal contests that often involved opposite views of the constitutional balance of powers between states and the national government. The most instructive example of such a trend was the battle over the health care reform; its constitutionality was challenged in federal courts and reached the Supreme Court which ruled that the reform was partly constitutional in the *National Federation of Independent Business v. Sebelius (NFIB)*[6] case. However, the decision did not resolve the political dispute which is still ongoing.[7] The controversy over the Affordable Care Act (ACA), popularly known as Obamacare, represents the tip of an iceberg that is the continuing dispute over the proper interpretation of constitutional provisions relating to the vertical distribution of powers that is

[4] The idea of constitutional moments is to be attributed to BRUCE A. ACKERMAN, WE THE PEOPLE: FOUNDATIONS 3-33 (1991). Prof. Ackerman studied the impact of popular movements on higher law making and reconceptualized American constitutional development as the product of a ódualist democracyô that alternates moments of ordinary lawmaking to constitutional moments (Founding, Reconstruction, and the New Deal) which, he argues, have been driven by popular mobilization.

[5] This is another expression used by Prof. Ackerman to indicate óthe series of political movements that have, from the Founding onward, tried to mobilize their fellow Americans to participate in the kind of engaged citizenship that, when successful, deserves to carry the special authority of We the People of the United States.ô Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989).

[6] 567 U.S. 519 (2012).

[7] Prof. Super argued that the litigation in the Supreme Court was important but by no means dispositive of these issues. *See* David A. Super, *The Modernization of American Public Law: Health Care Reform and Popular Constitutionalism*, 66 Stan. L. Rev. 873 (2014). *See* also DANIEL BELAND, PHIL ROCCO & ALEX WADDAN, OBAMACARE WARS: FEDERALISM, STATE POLITICS, AND THE AFFORDABLE CARE ACT 17 (2016): ñSharp disagreements between actors at the federal and state level can permit political controversy to persist long past the point of enactmentò. President Donald Trump promised a repeal of the ACA but failed to repeal and replace it in Congress.

at the heart of American federalism. This work defines the controversy as a ñbattle for the contours of the constitutionò that took place not only in court, with prolonged legal challenges, but was previously fought at legislative level by state legislatures that ð attempting to protect their individual interestsð introduced different types of legislation aimed at challenging the ACA.

The present research investigates the legislation and related constitutional arguments used by certain state legislatures between 2010-2016 to challenge the constitutionality of the ACA and contributes to the literature on state oppositional strategies in the United States.
In doing so, it emphasizes the interaction of policy interests and constitutional litigation in American federalism and invites cross-disciplinary discourse between political science and legal scholars.

Research aim and objectives

The aim of this research is to investigate the legislative measures put forward by some state legislatures to oppose the ACA as a recent example of state strategies to push back on federal government policies. This is to contribute to the legal/political theories concerning the value of state sovereignty legislation as a mechanism for safeguarding federalism.

Research Objectives

The objectives of this investigation are three-fold:

1. To examine the text of legislative measures against the ACA and classify them according to the constitutional provision/doctrine that they put forward to justify their claims;

2. To identify the organizations and interest groups that promoted the introduction of oppositional legislative measures to the ACA;
3. To investigate the use of state legislation to promote constitutional understanding and highlight the interaction of policy interests and constitutional principles in the American system.

Research Questions

The focus of this research is the state legislative opposition to the ACA. I have identified relevant legislation considered between 2010-2016 and prepared a taxonomy in order to illustrate the strategies that state legislatures have used to oppose the implementation of the individual mandate provision within their borders. The general research questions that I considered are:

1. How have state legislatures opposed the implementation of the ACA?
2. Is it possible to find patterns of opposition across the states?
3. Which constitutional doctrines/devices have state legislatures used to legitimate their opposition to the ACA?

These questions are peculiar to the ACA opposition. However, they raise much broader questions involving constitutional law, the balance of American federalism and the contribution of state legislatures to national policies. The breadth of this research goes beyond the study of the opposition to the health reform. It constitutes an investigation of the constitutional history and controversies surrounding the legislative measures used by the states which are studied as both strategies to safeguard federalism and attempts to shape the contours of the constitution. Further questions that the research addresses are:

4. What is the role of state opposition in the dynamics of federal and intergovernmental relations in the U.S.?
5. To what extent could be argued that the introduction of such bills constituted an attempt to influence constitutional adjudication?

The answers to these questions have been sought in the legislative history of bills passed by the state legislatures, in the transcripts of committeesô proceedings and in the identifiable links between the arguments put forward by the bills and by the relevant constitutional litigation.

Research territory and theoretical background

This research is framed by the theoretical investigation of contemporary American federalism. In particular, it draws on that branch of federal studies that investigate the mechanisms by which state governments advance their interests *vis- à -vis* the national government. The vast majority of work in this area has interpreted state interests as ósafeguards of federalismô and focused on the political[8] and the judicial mechanisms[9] by which states influence national policies. Prof. John Nugentôs study *Safeguarding Federalism: How States Protect Their Interests in National Policy Making*[10] is a milestone in the field as it laid the foundations of the study of the role of extra-judicial actors in the protection of state rights. Recent studies have expanded the territory of ósafeguards of federalismô and considered also the legislative mechanisms by which states advance their interests. At the forefront of the studies of legislative

[8] The line of enquiry concerning the political safeguard of federalism finds first theorization in the work of Herber Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). He argued that states had a strategic role in the selection of the Congress and the President and that such role would contribute to the ñsafeguard of American federalismò. His findings were later developed in JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980). Also, *see* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

[9] ñJudicial review works in conjunction with the political process to maintain the proper balance between federal and state powersò. *See* John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1313 (1997).

[10] JOHN NUGENT, SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICY MAKING (2009).

response to federal policies is the work of Prof. John Dinan from Wake Forest University, who considers contemporary assertions of state sovereignty as ñvaluable opportunities for states to wield influence in the U.S. federal systemò and ñcapable of contributing under certain conditions to safeguarding federalism principlesò.[11] The present research project has been inspired by the work of Prof. Dinan; it continues his line of enquiry on the value of statesô push back to Washington and extends his findings on sovereignty statutes[12] and constitutional amendments[13] to cover other forms of push backs, namely Anti-Commandeering bills[14] interstate compacts bills,[15] and art. V constitutional convention calls.[16]

The theoretical background that informs this work is the conception of ñvariable speed federalismò, a new model of intergovernmental relations theorized by Prof. Timothy Conlan and others to indicate an emerging trend of ñgeographic diversity in the application of federal laws and policies in the United States.ò[17] States increasingly bargain implementation of national policies and the result of the bargaining -coupled with Washingtonôs tolerance of state diversity- is the geographically diverse implementation of federal policies. The present project interprets anti-ACA legislation as evidence of a call for geographical differentiation of policies, and expands the theory of variable speed federalism with a constitutional theory sensitivity. More specifically, where Prof. Conlan and others have analyzed the opposition to federal policies from the perspective of its impact on intergovernmental relations, this work analyzes the impact of the opposition on constitutional understanding. Where there has been a push for

[11] Dinan, *supra* note 2, at 1635.
[12] *Id.*
[13] John Dinan, *State Constitutional Amendments and Individual Rights in the Twenty-First Century*, 76 ALB. L. REV. 2105 (2012-2013).
[14] Chapter three of this work.
[15] Chapter four of this work.
[16] Chapter five of this work.
[17] Timothy Conlan, Paul L. Posner & Mariely Lopez-Santana, *Unsafe at Any Speed? The Emergence of Variable Speed Federalism in the United States and the European Union*. APSA 2014 Annual Meeting Paper (2014), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2454136. *See* also Timothy J. Conlan & Paul L. Posner, *American Federalism in an Era of Partisan Polarization: The Intergovernmental Paradox of Obama's "New Nationalism*, 46 PUBLIUS: THE JOURNAL OF FEDERALISM 281 (Summer 2016).

a shift in the dynamics of American federalism, I will argue, we should also seek for a corresponding push for changing the contours of the constitution. Writing for Publius, the most influential journal on federalism studies in the United States, Prof. James Read has argued that polarization has also affected constitutional understanding: ñ[p]olarization of constitutional understanding in this domain is arguably more consequential for the future character of American politics than polarization on policy questions.ò[18] Can the polarization of constitutional understandingð as typified by the statesô opposition legislation to the ACAð be interpreted as a push for constitutional change? Referring to Ackermanôs theory of constitutional moment[19] and the literature on constitutional change and constitutional culture,[20] this work claims that there are signals of an emergent push for change in constitutional understanding and interprets the legislative opposition to the ACA as an extra-judicial attempt to trigger a constitutional moment. Drawing on the criticism to Ackermanôs work,[21] this work expands the definition of constitutional moment and suggests that the fact that the reform has been the target of persistent constitutional criticism and state legislatures have enacted statutes to question its constitutionality is in itself a call for constitutional change that has already started to shape the constitutional culture around states- national government relations.

The basic assumption is that a major role is not exclusively played by the judiciary but that non-judicial actors can also seek to contribute to the broad construction of constitutional

[18] James H. Read, *Constitutionalizing the Dispute: Federalism in Hyper-Partisan Times*, 46 PUBLIUS: THE JOURNAL OF FEDERALISM 338, 337- 365 (Summer 2016).

[19] ACKERMAN, *supra* note 4, at 266-27. In his book ñWe the Peopleò, Prof. Ackerman argued that the Constitution is not only changed via Art. V processes but it is affected by constitutional moments, expressing the distinction between times of deep public reflection on constitutional fundamentals and times of ordinary politics. According to Ackerman, there are four stages that characterize a constitutional moment. The first is a signaling phase, when the movement earns support and the reform is placed at the center of sustained public scrutiny. The second phase is the proposal for constitutional reform. The third phase is mobilized popular deliberation which can be rejected by the higher lawmaking system. However, if the movement emerges from its ñinstitutional trialò, the fourth phase is legal codification where the Supreme Court translates constitutional politics into constitutional law.

[20] See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era 2005-06*, 94 CAL. L. REV. 1323 (2006).

[21] Juliano Zaiden Benvindo, *The Seeds of Change: Popular Protests as Constitutional Moments*, 99 MARQ. L. REV. 363 (2015).

meaning. Prof. Fisher, for example, has investigated the contribution of Congress and the President to constitutional interpretation[22] and Prof. Paulsen has argued that the Executive has co-equal interpretive authority with the courts (and with Congress).[23] Larry D. Kramer has gone further by discussing constitutional interpretation as the idea that ordinary citizens, rather than the courts, are participants, ñmobilizersò, whose activities create and shape legal norms in routine social and political interactions.[24] This work will claim that the literature on non-judicial interpretation suffers from a remarkable oversight that is an understanding of how state legislatures potentially shape constitutional discourse and related litigation. Remarkably, in his book ñSafeguarding Federalism: How States Protect Their Interest in National Policymakingò John Nugent covered various strategies used by state officials to pursue statesô interest but did not cover state rights legislation.[25] The finding of this work will suggest that the germs of constitutional evolution should be sought in the laboratories of democracy, the states where political or constitutional issues are discussed before they arrive in Washington.[26]

Method and Interpretive framework

This research examines legislative challenges to the ACA considered by the state legislatures between 2010 and 2016. Data have been collected using two main databases:

[22] LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS A POLITICAL PROCESS (1988).
[23] Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).
[24] Larry D. Kramer, *Popular Constitutionalism*, 92 CAL. L. REV. 959, 972 (2004).

[25] NUGENT, *supra* note 10.
[26] The term ólaboratories of democracyô was coined by U.S. Supreme Court Justice Louis Brandeis in New State Ice Co. v. Liebmann, 285 U.S. 262 (1932): ñIt is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.ò (Brandeis, J., dissenting).

1. the National Conference of State Legislatures databases of legislation filed in response to the ACA (one for 2011-2013, one for 2014 and one for 2015-2016) available to the public on its website.[27]
2. LexisNexis State Net, a 50-state legislation tracking platform available under subscription.

The databases have been interrogated to find state legislation opposing the ACA. The National Conference of State Legislatures databases have been interrogated first. As explained above, there are three different databases for the years 2011-2013, year 2014 and years 2015-2016. The 2011-2013 and 2014 provided a filter criterion for ñChallenges, Opt-outs and Alternativesò and the 2015-2016 database a similar filter for ñFree Market; Challenges and Alternativesò. The interrogation returned a pool of 634 bills. The most significant unifying characteristic of these measures soon appeared to be their tendency to phrase objections to federal policy, or assertions of state authority, in constitutional terms. From this consideration emerged the idea of exploring the reasons why state legislatures engaged in constitutional debate and of understand the patterns of such engagement. Thus, I selected bills engaging with constitutional rights or theories and classified those bills in five different categories according to the constitutional principle or doctrine they used:

1. **Neo- nullification bills** declaring the ACA null and void within the borders of the state and, in some cases, also providing a penalty for state and federal officers implementing the reform;
2. **Health Care Freedom acts** that do not explicitly declare the ACA null and void but establish that residents of the state will not be compelled to purchase health insurance.

[27] The database for bills considered between 2011- 2013 is available at http://www.ncsl.org/research/health/health-reform-database-2011-2013-state-legislation.aspx. The database for bills considered in 2014 is available at http://www.ncsl.org/research/health/new-health-reform-database.aspx. The database for 2015-2016 is available at http://www.ncsl.org/research/health/health-innovations-database.aspx.

The main difference between nullification and health care freedom bills is that the latter do not explicitly nullify federal law;

3. **Anti-Commandeering bills and resolutions**. These measures oppose the ACA claiming that the federal government cannot commandeer the states to use their resources;
4. **Interstate Compact bills** that provide for the creation of the so-called Health Care Compact (HCC), a compact of states joining efforts to develop their own health care regulations in opposition to federal law;
5. **Art. V Convention resolutions** that propose an *ad-hoc* constitutional amendment to repeal the Obama Affordable Care Act in full.

This classification constitutes the backbone of the present research project. For each category of anti-ACA measure, I conducted at least one case study that illustrates how state legislators have made use of the related constitutional doctrine/ provision to oppose the implementation of the law. Each case study possesses its own significance and at the same time contributes to the overall interpretative framework.

The case studies involved the analysis of the legislative history of opposition measures, the identification of organizations that promoted them and a discussion of the constitutional controversies surrounding their passage. The legislative history of bills has been investigated both on the State Net database and on state legislaturesô websites online public archives. State Net enables the researcher to compare the text of different versions of bills and provides details on the sponsors of a particular measure. The online archives of some state legislatures provide minutes and videos of committee meetings and the House and Senate journals.

The present research used an interpretive approach, described by Mark Bevir as an approach that rests on a *philosophical analysis* of the meaningful nature of *human action*.[28] The analysis of the use of constitutional arguments in measures challenging the ACA (the *human action*) ultimately seeks to disclose meaning-making practices and theorize how those practices contributed to the polarization of constitutional understanding and the rise of a constitutional moment (*philosophical analysis*).

Research challenges

The major challenge of this research project related to the availability and reliability of the ancillary data on the legislative measures that I collected. The NCSL and the State Net databases are authoritative sources of information with regard to bill details (including different text versions and sponsors), but they are not always a reliable tracker of the legislative status of a bill which can potentially change day by day. The availability of information on the status of a bill was of fundamental importance for my case studies especially at the early stages of the research when some of the bills I considered were still pending in the state legislatures. To remedy and ensure accuracy of data, the legislative history of each bill has been cross-checked on the website of the state legislatures and in some cases I sought the help of state legislative analysts to access committee reports.

The websites of the grassroot organizations that promoted the introduction of bills such as the Tenth Amendment Center and the Convention of States have also been an incredibly useful source of information because they are often updated as events unfold and can provide alerts

[28] Mark Bevir and R. A. W. Rhodes, *Interpretation as Method, Explanation, and Critique: A Reply*, 6 BRIT. J. POL. & INTÔL REL. 156, 157 (2004).

to the introduction of future bills. The obvious issue with the information found on politicized websites is reliability; all information gained from those websites has been double-checked with official data from the legislature websites.

A secondary (but not negligible) challenge has been the difficulty of appraising the ñinfluenceò of legislation on constitutional debate. The main objective of this project was to demonstrate that the state legislation considered against the ACA had had some impact on the *Sebelius* constitutional litigation; however, the influence of state legislation on constitutional debate is as yet unknown research territory. Existing research has focused on the concepts of constitutional culture and the influence of social movements on constitutional change[29] but has not devised methods to describe the interactions between legislatures and the courts as they diverge from standard patterns of judicial law making. To address this methodological concern, I directed my enquiry towards the identification of similarities of legal arguments in the legislatures and in the courts and devised an interpretative framework to justify those similarities.

Structure

This work is composed of five main chapters.

Chapters I-V present a taxonomy of state legislation against the ACA between 2010-2016. Each of the chapters considers a category of state legislation, offers insights into the constitutional controversies that surround the enactments of such legislation and includes case studies in selected state legislatures.

[29] *See* Siegel, *supra* note 20, at 1324.

Chapter I considers ACA neo-nullification bills. It explores recent instantiations of nullification, outlines the history of the nullification doctrine and investigates contemporary nullifiersôpolitical rhetoric and constitutional understanding (or misunderstanding) in an effort to distinguish its present ideology and political function from the original framework. Particular emphasis is placed on investigating the legislative process that led to the enactment of North Dakota Senate Bill 2309 (2011).

Chapter II describes the phenomenon of the enactment of Health Care Freedom Acts between 2010-2012 across the 50 states and its close relation to the subsequent lawsuits. The case studies of Arizona, Virginia and Missouri Health Care Freedom Acts investigate the link between state legislation and federal lawsuit and therefore provide a new lens to interpret the motivations of the proponents of such legislation.

Chapter III turns the attention to Anti-Commandeering bills and resolutions. Anti-commandeering is a legal doctrine which forbids the federal government from commandeering state governments and allows the states to decide whether or not it is appropriate to deploy state resources to adopt a federal regulatory system. The chapter outlines the legislative history of Anti-Commandeering measures and questions whether they influenced the presentation of the legal issue to the courts.

Chapter IV is dedicated to the examination of the proposal for a Health Care Compact (HCC), a compact of states joining efforts to develop their own health care regulations in opposition to federal law. The chapter outlines the history of this constitutional device, analyzes the influence of interest groups in the introduction of HCC bills in the state legislatures and examines the legal issues surrounding the enactment of an interstate compact.

Chapter V investigates the recent phenomenon of state applications for an Art. V Convention. The chapter makes particular reference to Coloradoôs Art. V Convention proposal to repeal the

ACA and discusses contemporary legal issues surrounding this constitutional procedure that has never been used before.

The conclusions discuss the significance of data and theorize the legislative opposition as one strategy that states can use to influence constitutional discourse. Also, in light of the new political scenario under Trumpôs presidency, this research opens up to new research projects in the field of federalism and in particular to the study of blue statesôstrategies to oppose federal immigration policies with particular reference to sanctuary jurisdictions.

Contribution to knowledge

The literature has widely investigated the opposition to the ACA as an ideological and legal backlash against federal policies at national level. Nonetheless, scholarly work has largely disregarded the role performed by state legislatures and in particular the numerous legislative measures considered by the states to undermine the implementation of the reform. In attempting to fill those gaps, this study contributes to different literatures across the spectrum of political sciences and constitutional law.

The contribution of this work is three-fold:

1. The original taxonomy of state legislation against the ACA contributes to our knowledge of the strategies used by the state legislatures to oppose federal regulations and complements the investigation of the mechanisms by which state governments advance their interests in the American federal system.
2. The innovative interpretation of state legislation as means of extra-judicial constitutional interpretation contributes to the literature on the sources of constitutional

construction interpreted as a method of elaborating constitutional meaning in the political realm.[30]

3. It presents an argument for the recognition of the role of state legislatures as protagonists of the process that leads to constitutional adjudication.

Respectively, chapter I contributes to the literature on nullification with an in-depth analysis of the legislative process that led to the enactment of a nullification bill, contributing to the debate on the theoretical underpinnings of contemporary nullification efforts. Where the literature[31] argued that nullification is linked to secession and that its theoretical framework resides in a critique of the judicial supremacy, this work indicates that current nullification efforts are a transformed strategy aimed at influencing the judicial process and have lost their linkage to secession as well as the state interpretive legitimacy theoretical framework.

Chapter IIôs contribution resides in the demonstration of the link between state legislation and federal lawsuits, two strategies of federalism that the literature often addresses separately. It sheds light on the similarities of the arguments put forward by the Health Care Freedom acts in Virginia, Missouri and Arizona and the legal arguments used in the *Sebelius* case. Furthermore, the textual analysis of Oklahoma and Alabama Health Care Freedom Acts reveals an unexpected collaboration between the two state legislatures that passed identical Health Care Freedom acts.

[30] Keith E. Whittington theorized constitutional construction as a mechanism by which constitutional meaning is elaborated. He investigated how political struggles produce settlements that are resistant to change and dedicates one chapter of his book to the statesô construction following the nullification crisis. In particular, he argued that the nullification crisis was ó a corollary to a larger understanding of federalism, and it arose out of a creative process of continuing constitutional adjustment.ô *See* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (2001).

[31] SANFORD LEVINSON, NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT (2016).

Chapter III contributes to the literature on extra-judicial interpretation as it analyzes how state legislatures promoted a narrow interpretation of the Tenth Amendment by passing Anti-Commandeering resolutions whose arguments reverberated in court challenges.

Chapter IV contributes to the literature on interstate compacts as it investigates the proposal of utilizing this constitutional device for the purpose of creating a joint health care system between the states in opposition to the federal scheme. The health care compact has been discussed by bloggers and newspapers but never investigated from an academic point of view.

Chapter V contributes to the literature on Art. V Convention in its investigation of the Colorado proposal for a Convention to repeal the ACA. The chapter, prepared on the basis of data collected during a research trip to the National Conference of State Legislatures in Denver in March 2016, explores the concerns expressed by the states legislatures around the procedural aspects of an Art. V Convention.

The conclusions draw on the contributions of the preceding chapters and suggest a new lens for interpreting state legislative opposition as a means of enriching constitutional debate.

Overall, this thesis contributes to an understanding of the contemporary strategies used by the states to safeguard federalism and is directly relevant to the understanding of the role of state legislatures in the constitutional bargaining process.

Ethical Considerations

The research conducted for this work consists mainly of content analysis of bills and legislative measures that are publicly available on legal databases and state legislaturesô websites. The analysis of publicly available legislative measures does not create any ethical issues. This work

has benefitted from discussion with American political science scholars with full understanding of the task that I was engaged upon.

On May 11th 2015, I conducted a Skype interview with Michael Maharrey, the Tenth Amendment Centerôs communications director. The interview, discussed in chapter one, has been tape-recorded with the consent of the interviewee who also agreed that the content of the interview could be reported in my work. The 52 minutes tape-recording of the full interview is on file with the author and can be accessed upon request.

For the chapter on Anti-Commandeering bills and resolutions, on 28th April and 8th May 2017 I conducted an interview by email with Senator Scott Beason of Alabama. The interviewee authorized me to quote his statements in my work. The full text of the interview (846 words) is on file with the author and can be accessed upon request.

Both interviews were carried out in compliance with the Universityôs ethical guidelines and since full consent has been obtained from the interviewees, they do not raise any issues of ethical concern.

Chapter One: Neo-nullification Resolutions and Bills[32]

Introduction

Between 2010-2014, legislators in 39 states introduced statutes and resolutions that, in virtue of Tenth Amendmentôs alleged rights, declared specified federal health-care regulation unconstitutional and consequently considered that provision null and of no effect within their borders. Despite the considerable number of introduced ACA nullification bills, none has been enacted in its original form. In many cases the bills did not even reach the discussion stage; in others, the language moderated and the nullification bill was transformed in a sovereignty declaration. The enactment of these so called ósovereignty billsô has also been defined by Austin Raynor as ñthe new state sovereignty movementò. [33]

Much of the academic discussion around present-day nullification explains current nullification efforts in terms of a revival of pre-civil war nullification claims.[34] I argue, instead, that present nullification attempts do not constitute a revival of the traditional nullification doctrine but a transformed legislative strategy aimed at influencing the judicial process.

This chapter explores the past and present of nullification and offers an insight into its constitutional theory in an effort to distinguish its ideological roots from the present development and ultimately contrast its current political function with the original framework.

[32] Extracts from this chapter were included in a paper presented at the Edinburgh Postgraduate Law Conference in December 2014 and then published in the Edinburgh Student Law Review. Ilaria Di Gioia, *When Liberty Subverts Federalism: Is Nullification of Federal Law Legitimate?* in 4 Edinburgh Student L. Rev., 155-168 (2015).

[33] Austin Raynor, *The New State Sovereignty Movement*, 90 IND. L.J. 613 (2015).

[34] *See* Sanford Levinson, *The Twenty-First Century Rediscovery of Nullification and Secession in American Political Rhetoric: Frivolousness Incarnate or Serious Arguments to Be Wrestled With?,* 67 ARK. L. REV. 17 (2014) that calls nullification ñzombie constitutionalismò; James H. Read and Neal Allen, *Living, Dead, and Undead: Nullification Past and Present* 1 AM. POL. THOUGHT 263, 274 (2012) defines nullification as ñan antebellum relicò; Ryan S. Hunter, *Sound and Fury, Signifying Nothing: Nullification and the Question of Gubernatorial Executive Power In Idaho*, 49 IDAHO L. REV. 659, 692 (2013) defines nullification as ña discredited theory risen from the graveò.

Section I is the result of data collection. It provides a portrait of the 2010-2014 nullification phenomenon and guides the reader through the analysis of data. Section II explores the ideological origins of state legislative resistance to national policy. Section III presents the Tenth Amendment Center and the American Legislative Exchange Council, two organizations that have promoted nullification bills across the states and evaluates their influence. Section IV investigates the legislative process that led to the enactment of a nullification bill through a case study conducted on North Dakota Senate bill 2309 (2011). Section V discusses the constitutional controversy surrounding nullification and reveals that, despite the common roots in the works of Jefferson and Calhoun, todayôs resistance demonstrates a substantial development of the ideological framework and the political meaning of nullification.

I. The Neo-Nullification Phenomenon

The first group of statutes that I have identified in the original pool of bills challenging the ACA between 2011 and 2014 consists of 183 bills that declare the federal law void within the state borders and block state enforcement or participation with the federal health reform. I defined this group of bills as ñneo-nullification billsò.

The definition illustrates the main finding of this research project: the present day nullification movement should not be interpreted as reiteration of a political discourse that belongs to early American history and eventually led to secession and civil war. Instead I argue that it is better understood as a transformed sovereignty doctrine whose major goal is to empower the states in relation to constitutional interpretation. I expressly chose not to define them simply as ñnullification billsò because their reference to the nullification doctrine is mitigated by different objectives dictated by contemporary constitutional concerns which have resulted in a more cautious language and approach.

In particular, state legislatures used this category of bills to block (nullify) the operation of the individual mandate within their borders, adopting measures that in some instances prohibited state agencies or employees from enforcing the ACA provisions relating to the requirement for individuals to purchase health insurance and maintain minimum essential health insurance coverage. At the basis of these bills is a common allegation: 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 therefore states have the power to invalidate the individual mandate within their borders.

As shown in the table below, 2011 saw the highest amount of introduced bills: 116 in 38 legislatures. The figure dropped severely in 2012 to 21, increased on a small scale in 2013 with 29 bills and then decreased again in 2014 to 17.

Year	**Introduced neo-nullification bills**	**Enacted neo-nullification bills**	**Percentage of enacted neo- nullification bills**	**State legislatures that considered neo-nullification bills**
2011	116	12	10%	38
2012	21	0	0%	9
2013	29	0	0%	15
2014	17	2	12%	10
Tot.	183	14	7%	39

The high number of nullification bills considered in 2011 (116 bills) clearly represented the fears that followed the enactment of the ACA in March 23, 2010. The text of those statutes reveals a desperate attempt to protect residents from the implementation of the Act, and in particular from the requirement of the individual mandate. A typical example is the text of the

Alabama House Bill 60 (2011) enacted on June 9th 2011: [35]

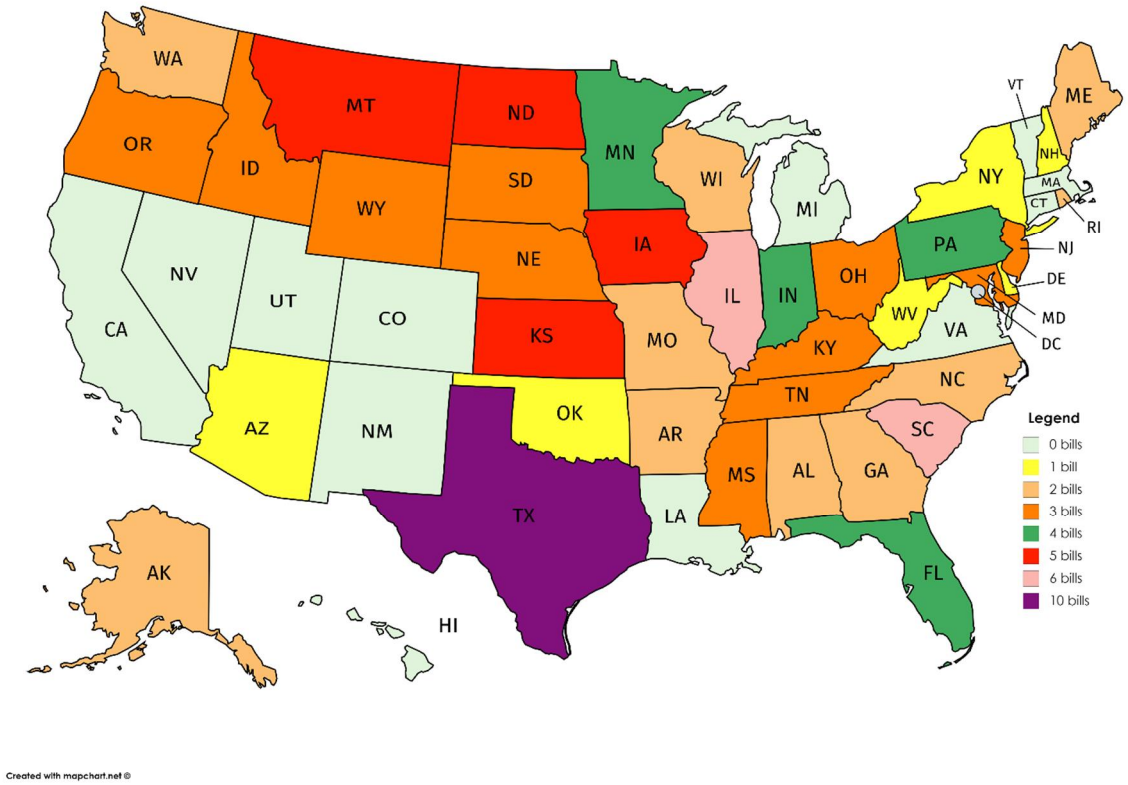
> In order to preserve the freedom of all residents of Alabama to provide for their own health care, a law or rule shall not compel, directly or indirectly, any person, employer, or health care provider to participate in any health care system. A person or employer may pay directly for health care services and shall not be required to pay penalties or fines for paying directly for lawful health care services.

Another example is the text of the Indiana Act No. 461 (2011): ña resident of Indiana may not be required to purchase coverage under a health plan. A resident may delegate to the resident's employer the residentôs authority to purchase or decline to purchase coverage under a health plan.ò[36]

The map below, created by the author with a map creator software, shows the number of bills considered by the state legislatures in 2011. It demonstrates that nullification was spread all over the United States, with different intensity. Texas is the state with the highest number of nullification bills (10) followed by South Carolina (6) and Illinois (6).

[35] H.R. 60, 2011 Leg., Reg. Sess. (Ala. 2011). If the Governor fails to return a bill to the house in which is originated within six days after it was presented to him (Sundays excepted), it becomes a law without his signature.
[36] S. 461, 117th Gen. Ass., Reg. Sess. (Ind. 2011).

Map 1: Neo-Nullification bills 2011

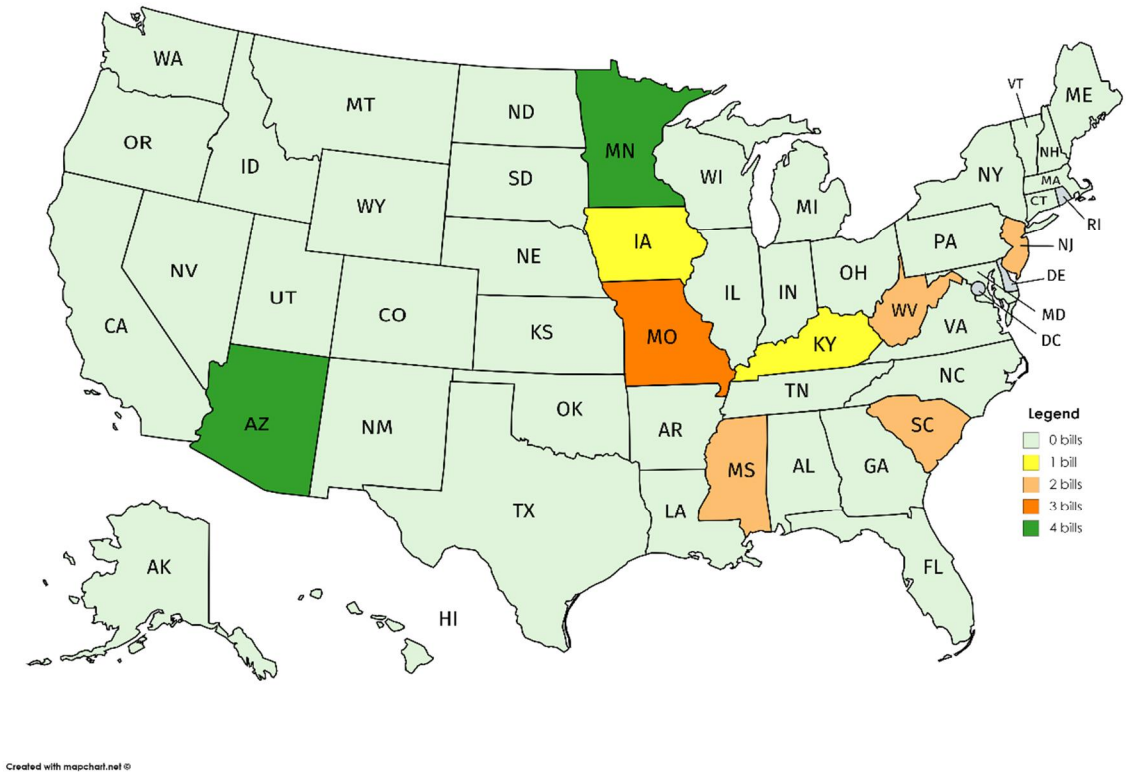


The big decline in 2012 (21 bills) is, in my opinion, due to two main factors: apprehension caused by the imminent elections and the expectation of a Supreme Court ruling on the healthcare reform.[37] These two circumstances created a sort of suspense and worked as deterrent for state legislature actions. Only 9 legislatures, curiously located in the east, continued to consider nullification bills perhaps in the hope of influencing the judicial process. The republican controlled legislature of Minnesota and the democratic controlled legislature of New Jersey led the movement respectively with 4 and 3 proposed bills each. In Minnesota, 2 bills were authored by Rep. Mary Franson, who seems to be a convinced supporter of nullification as she also introduced a bill (HF3094) to nullify the federal Environmental Protection Agencyôs power in Minnesota in March 2014. In New Jersey, one bill was authored

[37] The *Sebelius* case was argued in March and decided in June 2012.

by Sen. Doherty, a Tea-Party supporter who publicly endorsed Ron Paul and the nullification movement during a speech in September 2011.[38] The other two bills were authored by Rep. Allison Littell McHose,[39] who campaigned fiercely against the Affordable Care Act and likely used nullification as a mean to achieve that objective. The ñtransitionalò nature of this year is ultimately confirmed by the fact that no nullification bill survived the legislative process.

Map 2: Neo-nullification bills 2012



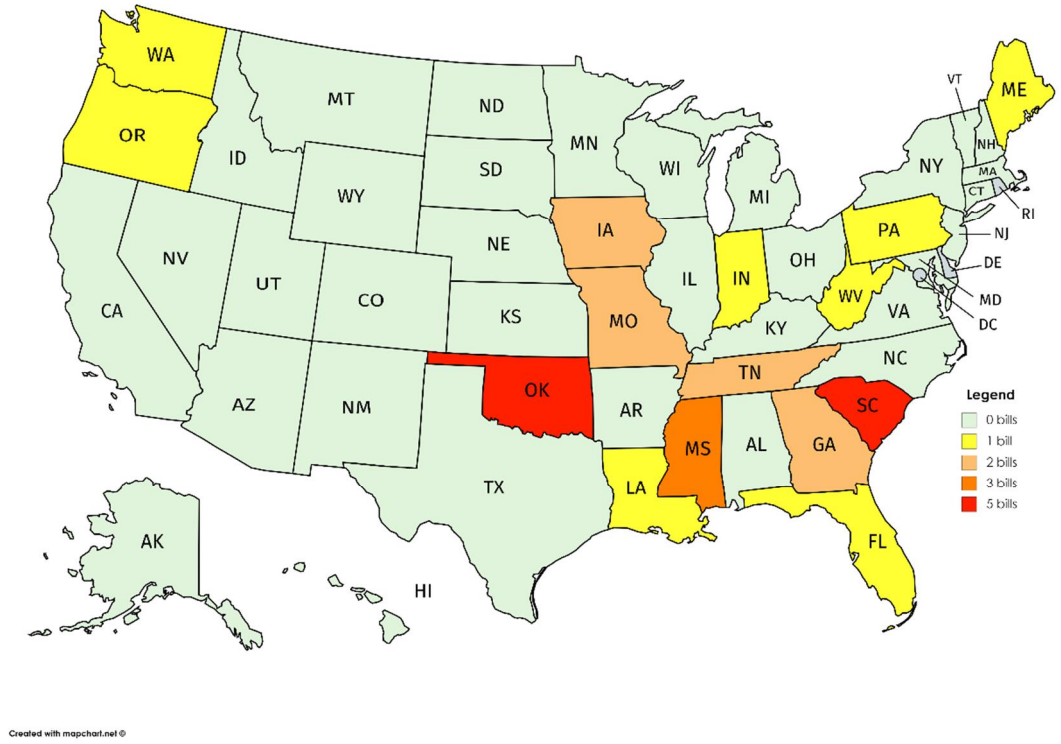
[38] Video of the speech is available on YouTube. RonPaulMobileApp, *Michael Doherty endorses Ron Paul, Ron Paul speaks to supporters - 9/26/2011* YOUTUBE (Sept. 6, 2011), https://www.youtube.com/watch?v=9u2ZdjOei8A.

[39] Allison McHoseôs website http://www.alisonmchose.com/ contains explicit reference to her battle against the health care reform, including an invitation to sign a petition to defund the Act.

The slight increase in 2013 (29 bills) represents the reaction of the states to the *Sebelius* ruling: four legislatures (Minnesota, Alabama, Kentucky and New Jersey) abandoned the cause but five (Iowa, Missouri, Mississippi, South Carolina and West Virginia) continued to make pressure and even increased the number of proposed nullification bills, despite awareness that nullifying the ACA would have now meant challenging the Supreme Courtôs authority.[40] Eight legislatures (Washington, Oregon, Indiana, Pennsylvania, Maine, Tennessee, Georgia and Florida) resumed the 2011 battle with a reduced number of bills. The case of Oklahoma is exceptional, it moved from one nullification bill in 2011, to 0 in 2012 and finally to 5 bills in 2013. Such an outbreak was paving the way for the 2014 *Oklahoma ex rel. Pruitt v. Burwell* lawsuit that aimed at dismantling the ACA by challenging the legality of IRS subsides in federal exchanges.[41] Notable also is the legislature of Louisiana that did not consider a nullification bill in 2011 and 2012 but came up with a bill authored by Rep. Hollis in 2013. The bill received 54 votes and 41 nays[42] but failed to get the two-thirds vote required for a constitutional amendment.

[40] This is particularly true for South Carolina that passed from 2 to 5 proposed bills.
[41] 51 F.Supp.3d 1080 (E.D. Okla. 2014). The U.S. District Court for the Eastern District of Oklahoma concluded that the IRS rule authorizing tax credits and cost-sharing subsidies for the purchase of health insurance in federal exchanges violated the text of the PPACA. The decision was notably overruled by King v. Burwell, 576 U.S. ___ (2015).
[42] For the detailed split of the House *see* the Louisiana State Legislature website: http://www.legis.la.gov/legis/ViewDocument.aspx?d=850052&n=House%20Vote%20on%20HB%20429%20FINAL%20PASSAGE%20(#515).

Map 3: Neo-nullification bills 2013



In 2014 the movement languished. Only 17 nullification bills were introduced in 10 state legislatures. The decline in the number of proposed statutes is however contrasted by the success of 2 nullification bills[43] that were enacted in Georgia and Idaho for the first time after two years of failures across the 50 states. The Georgia bill (GA S98) was aimed at nullifying the abortion coverage requirement and it was enacted in a period of turbulence created by the *Hobby Lobby* controversy[44] which was resolved by the Supreme Court with an exemption of the contraceptive mandate for some religious family-owned corporations. The Idaho bill (ID S 1355) instead was aimed at nullifying standards of care established by the ACA: ñno criteria, guideline, standard or other metric established or imposed by the Patient Protection and

[43] This figure is significant if we consider that in 2012 and 2013 a bigger number of bills was proposed but none of them was enacted.
[44] Burwell v. Hobby Lobby Stores, 573 U.S. __ (2014).

Affordable Care Act (PPACA), P.L. 111-148, [é] shall be used as a basis for establishing an applicable community standard of care.ò Remarkably, these bills only nullify single aspects of the ACA and are not aimed, like previous enacted bills, at attacking core features of the Act. The ñmoderateò content of the bills reflects a compromise achieved after 4 years of legislative battles and, perhaps, the shift of state legislatureôs attention to other hot federal issues such as gun control and Clean Air Act.

In 2014, the phenomenon of nullification of the ACA is no longer wide spread but mostly confined to southern, republican states: namely Mississippi (3), Alabama (2), Georgia (2) and Tennessee (2) that together considered 9 bills, more than half of the total. An exception is New Jersey (3) where Rep. McHose, the assemblywoman who authored 2 bills in 2012, introduced 2 more unsuccessful statutes. The same happened in Louisiana where Rep. Paul Hollis introduced a bill aimed at blocking state involvement in the ACA, very similar to the one he already introduced in 2013. The decline of the movement in 2014 may also be attributed to the expectation of a decision of the Supreme Court in the case *King v. Burwell.*[45] The case was an attempt to strike down the entire law and created real prospects for opponents: ñMy jaw dropped when I first saw this. This has the potential to sink Obamacare. It could make the current website problems seem minor by comparisonò commented CATO Instituteôs Michael Cannon.[46] Sandhya Stomachaches and Amy Goldstein of the Washington Post also commented: ñIf the decision going against the government is upheld, it will be more damaging to the law than a Supreme Court decision last month that limited coverage of contraceptives.ò[47] However, the expectations of a repeal vanished on July 22, 2014 when the Supreme Court

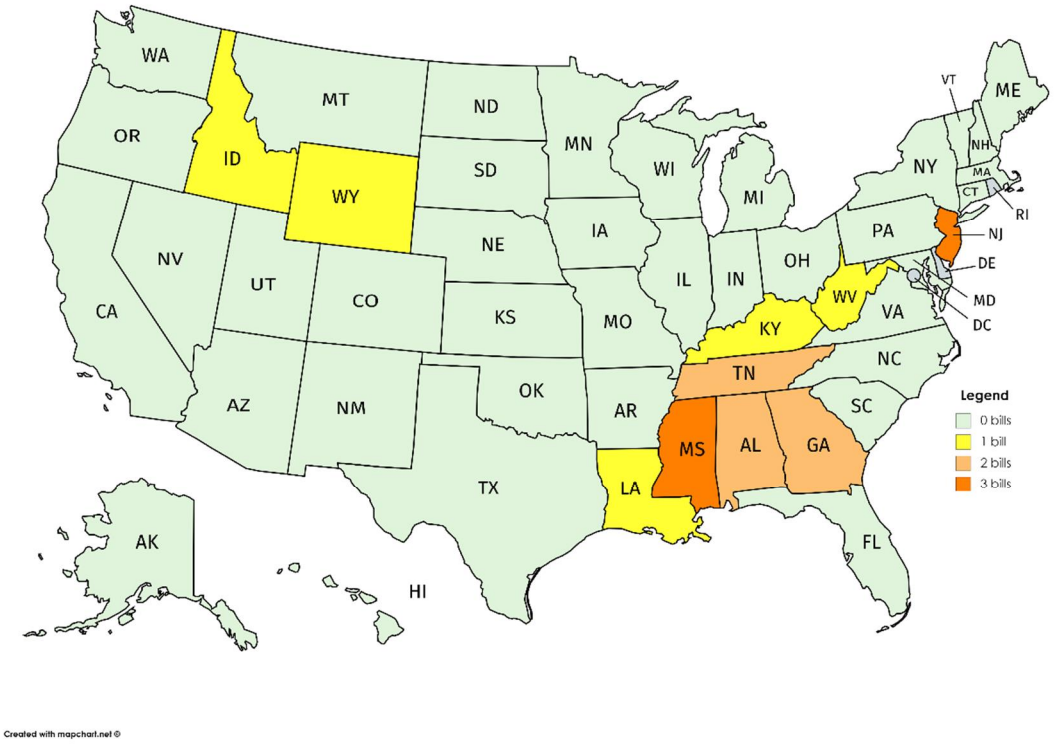
[45] 576 U.S. _____ (2015).

[46] Quoted in David G. Savage, *Could a Wording 'Glitch' Doom Obama's Healthcare Law?*, L.A. TIMES, Aug. 25, 2014, http://www.latimes.com/nation/la-na-health-law-flaw-20140825-story.html.
Law professor Jonathan Adler and Cato Institute health policy expert Michael Cannon have written the most definitive explanation of the argument in favor of the plaintiffs.

[47] Sandhya Somashekhar and Amy Goldstein, *Federal Appeals Courts Issue Contradictory Rulings on Health-Law Subsidies*, WASH. POST, June 22, 2014, http://www.washingtonpost.com/national/health-science/federal-appeals-court-panel-deals-major-blow-to-health-law/2014/07/22/c86dd2ce-06a5-11e4-bbf1-cc51275e7f8f_story.html.

confirmed the availability of tax credits and subsidies to federal-run market exchanges and effectively preserved the validity of the Act.

Map 4: Neo-nullification bills 2014



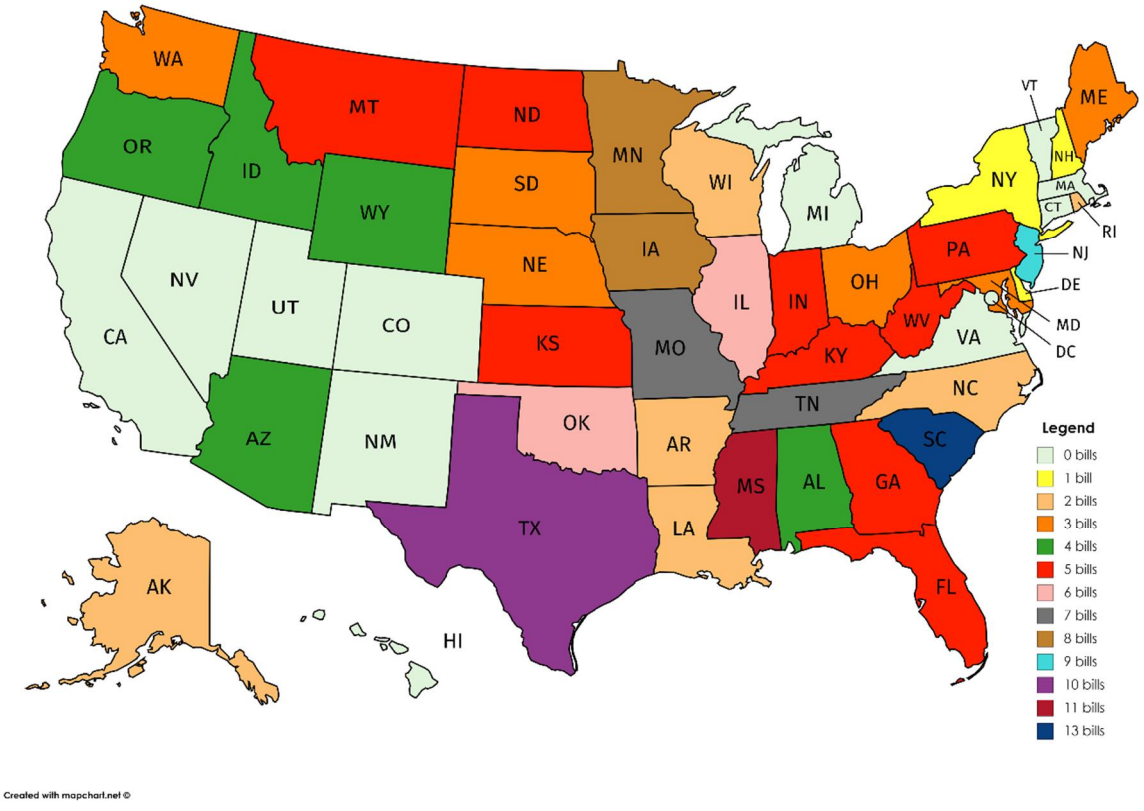
The map below shows the aggregated number of proposed bills between 2011-2014. The states with more than 10 introduced bills have been assigned the darkest shade. South Carolina is the legislature with the highest number of nullification bills with a total of 13 bills, followed by Mississippi (11) and Texas (10). South Carolina is the most prolific state and this is not surprising if we consider its major role in the history of nullification (as discussed below).[48]

[48] On November 24, 1832 South Carolina passed an ordinance of nullification, and threatened to secede.

The bills are, overall, distributed evenly between North and South while the West seems to be almost unaffected the phenomenon. A remarkable exception is Arizona with its four nullification bills. The legislature of Arizona has been particularly prolific with opposition measures that will be discussed later with reference to health care freedom acts and Anti-Commandeering bills.

Also, Arizona continued a broader nullification battle against federal gun control laws with its ñSecond Amendment Protection Actò, SB1330 passed by the Senate but held back by the House on March 2015.[49]

Map 5: Neo-nullification bills 2011-2014



[49] Arizona legislature bill tracking service includes videos of the House and Senate sessions: http://www.azleg.gov/DocumentsForBill.asp?Bill_Number=SB1330&Session_ID=114.

II. A First Distinction: Pure and Cautious Neo- Nullification Bills

When considering neo-nullification bills a clarification is imperative: not all bills are the same. Even though they share a common objective (to nullify federal law within the territorial boundaries) they use a variety of language and provisions; some, for instance, openly use nullification language and/or provide penalties for state officers found guilty of enforcing federal law; some others do not expressly invalidate federal law i.e. do not use nullification language but implicitly nullify federal law by declaring the protection of their citizens from the individual mandate.

From a language point of view, this project suggests a first distinction between ñ**pure neo-nullification bills**ò and ñ**cautious neo-nullification bills**ò. Pure nullification bills are a minority (I counted 37 bills); they explicitly use nullification language and therefore make clear reference to the controversial doctrine of nullification whose origins and development is discussed in the next sections. An example of these bills is 2011 WY H 35 which asserts that the federal health reform laws of 2010 ñare hereby declared to be invalid in the state, shall not be recognized by this state, are specifically rejected by this state and shall be considered null and void and of no effect in this state.ò

Cautious nullification bills instead oppose the ACA by prohibiting the implementation of certain provisions in their borders without an explicit reference to the nullification doctrine (I counted 146 bills). They are declaratory bills against the ACA, asserting that the federal government shall not impose an unwanted law and that residents shall be free to choose whether or not to buy coverage. Even if they do not explicitly nullify federal law, the ultimate effect of these bills is to make federal law ineffective in the state. An example is Alabamaôs amendment to its constitution with the Act No. 2011-617; the Act, also known as Amendment 6, was approved with 58.96% consensus on November 6, 2012 ballot. The Act reads: ñIn 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.ò The rest of the Act does not provide any legal grounds to justify such an assertion of sovereignty. Another example is represented by Kansas Act No. 2011-114: ñThe government shall not interfere with a residentôs right to purchase health insurance or with a residentôs right to refuse to purchase health insurance. [é] A person or employer may pay directly for lawful health care services and shall not be required to pay penalties or fines for paying directly for lawful health care services.ò

Pure and cautious neo-nullification bills use different language for the same practical objective: blocking the implementation of the ACA. In order to understand the reasons behind the variance in language, I conducted a case study on North Dakota Senate Bill 2309 (2011), one of the pure nullification bills that, in order to be approved, was transformed into a cautious bill. The case study, reported in section IV, demonstrates that legislators were well aware of the implications of using open nullification language and amended the bill several times to make it look less ñradicalò, however the language change did not affect the original nullification nature of the bill.

For this reason, I deemed it appropriate to group pure and cautious bills under the comprehensive definition of ñneo-nullification billsò. These bills share, indeed, a common ñDNAò and ultimate practical objective (to block the implementation of the law).

III. The Origins of the Nullification Doctrine

Founding Fathers

Proponents of nullification doctrine invoke the authority of founding fathersô writings to defend a certain conception of state sovereignty according to which the Constitution authorizes states to nullify laws passed by the Congress. Did the founding fathers themselves

ever support such a claim? This section examines founding fathersô writings and is intended to shed light on their conception of nullification.

The term nullification was first used by founding father Thomas Jefferson in his Kentucky Resolution (1798)[50] and the concept of statesô rights against the encroachment of the federal power was recalled by James Madison in his Virginia Resolution (1798).[51] The Resolutions were a protest against the Alien and Sedition Acts, four laws signed by President John Adams in 1798, in anticipation of what would be the quasi-war with France.[52] These acts, directed against Democratic-Republicans, increased the residency requirement for American citizenship from five to fourteen years, authorized the president to imprison or deport aliens considered ñdangerous to the peace and safety of the United Statesò and restricted speech critical of the government.[53] The Democratic-Republicans believed the acts to be a limit on their freedom of speech and press. In an effort to repeal those measures, the legislatures of Kentucky and Virginia passed the Resolutions asserting that the Acts were unconstitutional and the states as sovereign to ñconcur in declaring these void and of no forceò.[54] Both Resolutions endorsed a joint opposition by the states, which were said to be creators and parties to the compact and therefore ñthe solely authorized to judge in the last resort of the powers exercised under it.ò[55] However, the two resolutions differ in the use of language and in the conception of the role of the individual state in the nullification process. This

[50] Jefferson wrote two drafts of the resolutions which are reprinted, together with a fair copy of the 1798 resolution approved by the Kentucky legislature, in PAUL L. FORD, 8 THE WORKS OF THOMAS JEFFERSON 458-79 (1904-5). For a quick retrieval of my quotes, please use the PDF Ebook available at: http://lf-oll.s3.amazonaws.com/titles/805/Jefferson_0054-08_EBk_v6.0.pdf [hereinafter Ford, 8JeffersonWorks].
[51] Reprinted in JACK N. RAKOVE, JAMES MADISON: WRITINGS 589 (1999) [hereinafter Madison, Virginia Resolution].
[52] Between 1798 to 1800 the United States of America and the First French Republic engaged in the so-called Quasi-War, an undeclared war that mainly involved naval battles.
[53] Alien and Sedition Act, LIBRARY OF CONGRESS WEB GUIDES, http://www.loc.gov/rr/program/bib/ourdocs/Alien.html (last visited Jun. 16, 2015).
[54] Ford, *supra* note 50 at 322. In order to correctly interpret the Resolution, it should be noted that Jefferson was Vice-President at the time and did not want to be recognized as author of the Resolution. He only acknowledged the paternity of the document in a later stage.
[55] *Id.* at 321.

discrepancy is particularly relevant in distinguishing the nullification doctrine (present in Jefferson's Kentucky Resolution) from its moderate twin interposition (present in Madison´s writings).

In particular, Jefferson formally used the term nullification in his original draft of the Kentucky Resolution and defined it as "a natural right" on the part of a sovereign state to self-defense from the usurpation of the federal government. He argued that "where powers are assumed which have not been delegated, a nullification of the act is the rightful remedy"[56] 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".[57] Past studies have yielded some important insights into Jefferson's nullification doctrine and in particular wondered whether Jefferson believed that each state had authority to nullify federal law or the states could only do so collectively.[58] It would seem that Jefferson attached importance to collective action but would also have favored nullification by a single state:

> every State has a natural right in cases not within the compact, (*casus non fœderis*) to nullify of their own authority all assumptions of power by others within their limits (é) 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.[59]

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[56] *Id.*
[57] *Id.* at 327.
[58] See Ryan Card, *Can States 'Just Say No' to Federal Health Care Reform? The Constitutional and Political Implications of State Attempts to Nullify Federal Law,* 2010 BYU L. REV. 1795-1803 (2010). See also ALEXANDER JOHNSTON, AMERICAN POLITICAL HISTORY 1763ï 1876 197-198 (1905) and Wayne D. Moore, Reconceiving Interpretive Autonomy: Insights from the Virginia and Kentucky Resolutions, 11 CONST. COMMENT. 315, 319 (1994).
[59] Ford, *supra* note 50 at 321.

On the other hand, Madisonôs Virginia Resolution never mentioned nullification. In the second paragraph of the document, Madison describes Virginiaôs warm attachment to the Union of the States and justifies the Resolution as a mean to protect the Unionôs ñexistence and the public happinessò. Madison did not use the word ñnullificationò but introduced the term ñinterpositionò. Legal historian and a law professor Christian Fritz has explained the ambiguous term ñinterpositionò as

> an action that came between the people as the sovereign and the sovereignôs agent, the government. This interposition was not a sovereign act, since the people as the collective sovereign did not take that step. It did not break the ties between the people and their government by, for example, nullifying laws. Rather, the interposer, through public opinion, protests, petitions, or even the state legislatures acting as an instrument of the people, focused attention on whether the government was acting in conformity with the peopleôs mandates as expressed in their constitutions.ò[60]

From the text of the Resolution, it seems to me that Madison conceived ñinterpositionò as a joint 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

[60] *See* Christian G. Fritz, *Interposition and the Heresy of Nullification: James Madison and the Exercise of Sovereign Constitutional Powers*, 41 FIRST PRINCIPLES: FOUND. CONCEPTS TO GUIDE POL. & POLôY. 1 (2012), http:// www.heritage.org/research/reports/2012/02/interposition-and-heresy-of-nullification-james-madison-exercise-of-sovereign-constitutional-powers.

> the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them.[61]

The Virginia Resolution, rather than nullifying the law straight away, declares its unconstitutionality and invokes the concurrence of other states to take ñthe necessary and proper measures [é] for co-operating with this state, in maintaining the Authorities, Rights, and Liberties, referred to the States respectively, or to the peopleò.[62] Madison confirmed his position in 1830 when, witnessing the nullification crisis in South Carolina, he denied that he ever suggested that a state could resist the enforcement of alleged unconstitutional law.[63] Madisonôs comments are reported in two original letters addressed to Nicholas Philip Trist, private secretary to Andrew Jackson. The letters are available in ñThe James Madison Papersò collection of the Library of Congress and have been digitalized for public use.[64] In the letter dated December 1831 Madison stated:

> ñFor this preposterous & anarchical pretension there is not a shadow of countenance in the Constitn. [sic] and well that there is not; for it is certain that with such a deadly poison in it, no Constn. could be sure of lasting a year; there having scarcely been a year, since ours was formed, without a discontent in some one or other of the States which might have availed itself of the nullifying prerogative.ò[65]

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[61] Madison, Virginia Resolution.
[62] *Id.*
[63] See Kevin Gutzman, *A Troublesome Legacy: James Madison and the Principles of '98*, 15 J. OF THE EARLY REPUBLIC 569 (1995).
[64] Original document available in the collection ñThe James Madison Papersò at the Manuscript Division of Library of Congress. The Library also offers a digitalized version of the letters available at the following link: http://www.loc.gov/item/mjm021163/.
[65] *Id.*

Also, in a letter to Mathew Carey, a publisher and economist, Madison harshly commented on the events in South Carolina: ñthe strange doctrines and misconceptions prevailing in that quarter are much to be deplored; and the tendency of them the more to be dreaded.ò[66] In addition to the letters, a determinant document to understand Madisonôs position in relation to nullification is ñNotes, On Nullificationò of 1834.[67] The Notes are intended to be an explanation of the true meaning of the Virginia Resolution which Madison insists, is to be interpreted as a plea for ñconcurrent interpositionò by the states, not by a single state: ñThe resolution derives the asserted right of interposition for arresting the progress of usurpations by the Federal Govt. from the fact, that its powers were limited to the grant made by the States; a grant certainly not made by a single party to the grant, but by the parties to the compact containing the grant.ò[68] With reference to nullification by one state, Madison clearly expresses his opposition: ña plainer contradiction in terms, or a more fatal inlet to anarchy, cannot be imaginedò.[69] Hence, what mode of interposition was Madison proposing in the Virginia Resolution? How many states would need to associate in order to legitimately interpose against the federal government? After a careful scrutiny of Madisonôs Notes, it would appear that the proposal had been intentionally left vague. Madison did not have a clear idea in mind of a particular mode of interposition but wanted to leave the states free to decide themselves:

> It is sometimes asked in what mode the States could interpose in their collective character as parties to the Constitution agst usurped power. It was not necessary for the object & reasoning of the resolns & report, that the mode should be pointed out.

[66] The digitalized version of the letters is available on the Library of Congress website at the following link: http://www.loc.gov/resource/mjm.23_0903_0911/?sp=2&st=text.
[67] James Madison, 9 The Writings of James Madison, comprising his Public Papers and his Private Correspondence, including his numerous letters and documents now for the first time printed, (Gaillard Hunt ed. 1900). For a quick retrieval of my quotes, please use the PDF Ebook provided by the Online Library of Liberty at the following link: http://lf-oll.s3.amazonaws.com/titles/1940/Madison_1356-09_EBk_v6.0.pdf.
[68] *Id.* at 341.
[69] *Id.*

> It was sufficient to shew that the authy. to interpose existed, and was a resort beyond that of the Supreme Court of the U. S. or any authy. derived from the Constitn. The authy. being plenary, the mode was of its own choice, and it is obvious, that, if employed by the States as coparties to and creators of the Constn it might either so explain the Constn or so amend it as to provide a more satisfactory mode within the Constn itself for guarding it agst constructive or other violations.

In his Notes and in a letter to Everett dated Sep. 10th 1830, Madison also defended Jeffersonôs Kentucky Resolution from the accusation of providing the basis for the nullification doctrine. He argued that Jefferson upheld nullification only as the natural right ñagainst insupportable oppressionò[70] but not as a constitutional right: ñStill I believe that he did not attach to it the idea of a constitutional right in the sense of S. Carolina, but that of a natural one in cases justly appealing to it.ò[71]

Furthermore, Madison corroborated his interpretation of Jeffersonôs position in another letter to Everett, where he even argued that the word ñnullificationò was not present at the time of approval of the Resolution in 1798 but appeared on a later stage: ñThe term nullification to which such an important meaning is now attached, was never a part of the Resolutions and appears not to have been contained in the Kentucky Resolutions as originally passed, but to have been introduced at an after date.ò[72]

From my examination of Jeffersonôs writings, it seems to me that the Kentucky Resolution was intended to be a political maneuver to counter the Federal party ascendancy in Congress, a warning, an intimidation perhaps, rather than a real proclamation of the statesô rights to nullify federal law. Indeed, nullification never

[70] *Id.* at 427.
[71] The letter is quoted at 446 (395 of the original copy of the book).
[72] *Id.* at 442 (389 of the original copy of the book).

happened. Jefferson himself did not have a clear idea of the ultimate objective of the nullification doctrine or perhaps was conscious that it would have inexorably led to secession. For this reason, I argue that he intentionally left the matter open to the evolution of the events. In a letter to Madison he wrote:

> ñI enclose you a copy of the draft of the Kentucky resolves. I think we should distinctly affirm all the important principles they contain, so as to hold to that ground in future, and leave the matter in such a train as that we may not be committed to push matters to extremities, & yet may be free to push as far as events will render prudent.ò[73]

In another letter to John Taylor:

> ñFor the present I should be for resolving the alien & sedition laws to be against the constitution & merely void, and for addressing the other States to obtain similar declarations; and I would not do anything at this moment which should commit us further, but reserve ourselves to shape our future measures or no measures, by the events which may happen.ò[74]

This letter anticipates, in my opinion, the following compromise and explains the reasons why the Kentucky Resolutions remained a dead letter.

In conclusion, my analysis of primary sources such as the letters and Notes appears to suggest that the main reason for the present misuse of Founding Fathersô work is the vagueness of

[73] The letter is reported in Ford, *supra* note 5050 at 312. The letter is dated November 17, 1798.

[74] *Id.* at 324. The letter is dated Nov. 26, 1798.

Jefferson and Madisonôs positions and the lack of attention to complementary writings (letters and other manuscripts). Yet Jeffersonôs Kentucky Resolutions offer something less than a fully developed theory of nullification [é] Jefferson thus introduced the general idea of nullification but provided only fragmentary justification and did not translate theory into practiceð except to win election as president by campaigning against the Acts and then, once in office, letting them expire.[75]

Hence, the analysis of founding fathersô writings demonstrates that the seeds of current nullification debate can certainly be found in the early days of the federation, but also that those issues were vague at the time, have not been solved and are perpetually reappearing in different guises.

Calhoun, the South Carolina "Exposition" (1828) and the Ordinance of Nullification (1832)

The concept of nullification was expanded further by Vice-President John Calhoun, who led the South Carolina movement against the so called ñTariff of Abominationsò, a protectionist tariff passed by the Congress and approved by President John Quincy Adams on May 1828 to protect the northern industrial economy from competition with foreign imports. In particular, southern states were concerned by the fact that the tariff would have increased the price they had to pay for imports and therefore the cost of living in the agricultural South while at the same time harming exports of southern cotton to Britain. The tariff was denounced as a system of robbery and plunder, destructive to the southern states[76] and became the focus of southern rage against northern encroachments upon their internal affairs.

[75] Read & Allen, *supra* note 34.
[76] CHAUNCEY S. BOUCHER, THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA 22 (1916).

Historians recognize in the South Carolina nullification crisis ñthe beginning of the formidable antinationalist movement in the stateò[77] and argue that this event foreshadowed the state's announcement of secession nearly 30 years later.[78] John Calhoun expressed the discontent in a pamphlet entitled ñSouth Carolina Exposition and Protestò in which he vehemently opposed the tariff declaring it unconstitutional and therefore asserting the authority of the state of South Carolina to nullify its effects within its borders: ñMay the General Government, on the other hand, encroach on the rights reserved to the States respectively? To the States respectively each in its sovereign capacity is reserved the power, by its veto, or right of interposition, to arrest the encroachment.ò[79] Calhoun undoubtedly followed Jeffersonôs reasoning and did not miss the chance to emphasize the power of the compact to the detriment of Congress, which he defines only as ña creatureò of the Constitution. According to Calhoun, nullification suspended the operation of a federal statute and only a convention of states (deciding with a majority of three fourths) could withhold or confirm the right of a state to nullify a federal measure.

> There is provided a power, even over the Constitution itself, vested in three fourths of the States, which Congress has the authority to invoke, and may terminate all controversies in reference to the subject, by granting or withholding the right in contest. Its authority is acknowledged by all; and to deny or resist it, would be, on the part of the State, a violation of the constitutional compact, and a dissolution of the political association, as far

[77] *Id.* at 1.
[78] *See* WILLIAM W. FREEHLING, PRELUDE TO CIVIL WAR 93-96 (1968).
[79] John Calhoun, South Carolina Exposition and Protest (1828).

> as it is concerned. This is the ultimate and highest power, and the basis on which the whole system rests.[80]

Calhounôs pamphlet animated the protest and the situation became worse after the enactment of a new tariff bill with lower rates than the Tariff of Abominations but still too high for the southerners;[81] on 24th November 1832 a special intrastate convention ratified the ñSouth Carolina Ordinance of Nullificationò. The ordinance declared the tariffs ñunauthorized by the constitution of the United States (é) null, void, and no law, nor binding upon this Stateò and explicitly threatened secession in case Congress passed measures to repress the protest:

> we will not submit to the application of force on the part of the federal government (é) but we will consider the passage, by Congress, of any act authorizing the employment of a military or naval force against the State of South Carolina (é) to be null and void, otherwise than through the civil tribunals of the country, as inconsistent with the longer continuance of South Carolina in the Union; and that the people of this State will henceforth hold themselves absolved from all further obligation to maintain or preserve their political connection with the people of the other States; and will forthwith proceed to organize a separate government, and do all other acts and things which sovereign and independent States may of right do.[82]

[80] *Id.*
[81] *The South Carolina Nullification Controversy*, U.S. HISTORY PRE-COLUMBIAN TO THE NEW MILLENNIUM, http://www.ushistory.org/us/24c.asp.
[82] Calhoun, *supra* note 79.

The Congress responded first with the so called Force Bill[83] but, after intense negotiations conducted between Henry Clay and John Calhoun, enacted the Compromise Tariff of 1833 establishing that import taxes would gradually be cut over the next decade until, by 1842, they matched the levels set of 20%.[84] South Carolina accepted the deal and withdrew its secession threats.

Original documents, broadsides and other printed ephemera available at the ñPrinted Ephemera Collectionò of the Library of Congress, Washington, DC[85] demonstrate that nullification animated not only popular demonstrations but also meaningful discourse over the nature of the Union. Examples of popular involvement are the song ñJackson and the nullifiersò[86] and the ironic epitaph of the Constitution[87] whereas the interest of intellectuals is attested by the proposal of Thomas White for a tri-weekly newspaper that would have discussed ways to conciliate the interest of the Union and statesô rights.[88] The relevance of the debate surrounding nullification and federalism is also confirmed by the Hayne-Webster Debate, a series of speeches in the Senate that took place on January 19ï 27, 1830 during which Robert Hayne of South Carolina and Daniel Webster of Massachusetts put forward their conflicting visions of the Union; Hayne interpreted the Union as a ñconfederacyò of sovereign states and Webster advocated instead for an organic entity comprised of a Single People.[89]

[83] 4 Stat. 632 (1833), the legislation stipulated that the president could, if he deemed it necessary, deploy the U.S. Army to force South Carolina to comply with the law.
[84] DAVID AND JEANNE HEIDLER, HENRY CLAY: THE ESSENTIAL AMERICAN 253 (2011).
[85] The digital collection is available on the Library of Congress website at http://memory.loc.gov/ammem/rbpehtml/.
[86] *See* scanned copy of the original document in the Appendix at p. 263.
[87] *See* scanned copy of the original document in the Appendix at p. 264.
[88] The original text can be read in PDF format on the Library of Congress website at the link: https://www.loc.gov/resource/rbpe.18602500/.
[89] For an insight into the debate *see* Charles J. Reid, Jr., *Highway to Hell: The Great National Highway Debate of 1830 and Congress as Constitutional Interpreter*, 46 U. Tol. L. Rev. 1, 1 -2 (Fall2014) and also Maurice G. Baxter, ONE AND INSEPARABLE: DANIEL WEBSTER AND THE UNION 179-93 (1984).

The Ordinance of Nullification was largely condemned by the President Andrew Jackson and other state legislatures. The Presidential proclamation of Dec. 10, 1832 reproved the doctrine nullification as ñcarry[ing] with it internal evidence of its impracticable absurdityò[90] and ñincompatible with the existence of the Union, contradicted expressly by the letter of the Constitution, unauthorized by its spirit, inconsistent with every principle on which it was founded, and destructive of the great object for which it was formedò.[91]The proclamation is a plea to American citizens to value the achievements of the United States as a nation and terminates with a speculation on the nature and objectives of the American political system, a lucid example of an early treatise on U.S. federalism. Following the proclamation, a number of state legislatures joined the President in denouncing the South Carolina move and only Alabama supported the call for a Federal Convention; [92] in the first group it is possible to identify New Hampshire, Maine,[93] Massachusetts,[94] Connecticut, New York, New Jersey, Pennsylvania, Delaware, Virginia, North Carolina, Ohio, Indiana,

[90] ORDER OF THE GENERAL COURT OF MASSACHUSETTS, STATE PAPERS ON NULLIFICATION: INCLUDING THE PUBLIC ACTS OF THE CONVENTION OF THE PEOPLE OF SOUTH CAROLINA ASSEMBLED AT COLUMBIA, NOVEMBER 19, 1832 AND MARCH 11, 1833 (1834) [hereinafter State Papers], Google digital copy available at: https://books.google.co.uk/books/reader?id=4hUOAAAAIAAJ&hl=it&printsec=frontcover&output=reader&pg=GBS.PA79.

[91] *Id.* at 80.

[92] *Id.* at 223 ñwe consider the present Tariff of duties, unequal, unjust, oppressive and against the spirit, true intent and meaning of the Constitutioné [but] nullification, which some of our Southern brethren recommend as the Constitutional remedy for the evils under which we labor, is unsound in theory and dangerous in practice(é) Therefore, as a last resort, we recommend to our co-States the calling of a Federal Convention, to meet in the City of Washington on the first of March, 1834, or at such other time and place as may be agreed onò.

[93] *Id*. at 106 describing ñthose measures as utterly inconsistent with the spirit of forbearance and compromise in which our Union had its origin, and by a perseverance in which it can alone be maintainedò.

[94] *Id.* at 122 ñHad it been intended that the States should possess the important power of annulling or repealing at discretion the acts of the General Government, this power would undoubtedly have been given to them in express terms. It is not even pretended that the Constitution contains any such express concessionò.

Maryland[95] and Mississippi.[96] Georgia mistakenly sent an application to the Congress for a Federal Convention and allegedly rejected such a proposal.[97] The North Carolina resolution shows the essence of the debate in the southern states: i.e. a blend of strong criticism for the Tariff compensated by attachment to the Union:

> Resolved, That whatever diversity of opinion may prevail in this State, as to the constitutionality of the acts of Congress imposing duties on imports for protection, yet, it is believed, a large majority of the people think those acts unconstitutional; and they are united in the sentiment, that the existing Tariff is impolitic, unjust and oppressive; and they have urged, and will continue to urge its repeal. Resolved, That the doctrine of Nullification as avowed by the State of South Carolina, and lately promulgated in an Ordinance, is revolutionary in its character, subversive of the Constitution of the United States and leads to a dissolution of the Union.[98]

Ultimately, Calhounôs South Carolina ñExpositionò and the Ordinance of Nullification did not succeed in their intent to nullify federal law and a compromise was reached by the the two dominating personalities of the time, Henry Clay and President Andrew Jackson. The

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[95] *Id.* at 289 ñit is not in the power of any one State to annul an act of the General Government, as void or unconstitutional. That the power of deciding controversies among the different States, or between the General Government and a State, is reposed in the Federal Judiciaryò and at 290ñthe Ordinance of Nullification of South Carolina, is calculated to mislead her citizens from the true character of the Federal Government, and the just allegiance, which they owe to that Government.ò

[96] *Id.* at 229. The original document, together with letter of transmittal from the Governor, dated Feb. 6, 1833 is available at the Library of Congress in the digital collection ñAn American Time Capsule: Three Centuries of Broadsides and Other Printed Ephemeraò. Nullification is regarded as ñheresy, fatal to the existence of the Unionò. *See* scanned copy in the Appendix under n.1.

[97] *Id.* at 39, ñthe State of Georgia, in conformity with the Fifth Article of the Federal Constitution, hereby makes application to the Congress of the United States, for the call of a Convention of the people, to amend the Constitution afore said, in the particulars herein enumerated, and in such others as the people of the other States may deem needful of amendment.ò. From the state papers, it seems that the first Resolution was an error of the press ñI beg leave to correct an error, which occurred through the inadvertence of the press, and a want of proper scrutiny at this Department, in regard to a resolution, transmitted to you on the 28th of December last, and purporting to have been approved on the 22d of said month. The resolution forwarded to you, was rejected by the Legislature, and a substitute adopted (which you will find in the printed laws, pages 49 and 50.) The official signatures of the officers of both branches of the General Assembly, and that of the Governor, were improperly placed by the printer, to the resolutions heretofore forwarded to you, and forwarded from this Department without detecting the error.ò

[98] *Id.* at 201.

lack of clarity on what the practice of state interposition would look like became apparent once South Carolina attempted to nullify federal law.[99] Nonetheless, it should be noted that those assertions were strong enough to provoke a reaction of the Congress and a subsequent compromise bill. This dynamic could be the key to understanding the current nullification revival and its objectives.

Post-civil war nullification movement: *Brown v. Board of Education* and the Massive Resistance

The civil rights era offers another example of a national crisis (debate on desegregation) fought by southern states in the name of their independence from the federal government or, in this case, from the rulings of the Supreme Court. Between 1956 and 1958, eight southern states[100] approved Interposition Resolutions against the implementation of the desegregation decisions in *Brown v. Board of Education.*[101] The resistance became known as Massive Resistance to the federal governmentôs desegregation policies. [102] The Resolutions clearly resembled[103] Madison and Jeffersonôs language in the Kentucky and Virginia Resolutions in their call for nullification, interposition and for liberty from ña Supreme Court usurping the powers reserved to the statesò.[104] The first state to approve an interposition resolution was Virginia on Feb. 1, 1956 with a 36-2 vote in the Senate and 90-5 in the House. The interest for the doctrine of interposition was so widespread that the Senate instructed the Committee

[99] Lawrence Landerson, *Federalism and Massive Resistance: Southern Responses to Brown v. Board of Education*, Paper presented at the meeting of the International Political Science Association in Montreal, Quebec, Canada July 2014.
[100] Alabama (Feb. 2, 1956); Arkansas (Constitutional amendment of Apr 18, 1956); Florida (Apr. 18,1957); Georgia (Mar. 9, 1956); Louisiana (May 29, 1956); Mississippi (Feb. 29, 1956); South Carolina (Feb. 14, 1956); Virginia (Feb. 1, 1956). The resolutions have been reprinted in 1 RACE RELATIONS LAW REPORTER (1956).
[101] There were 2 decisions. Brown I, 347 U.S. 483 (1954) in which the Supreme Court held that segregated schools violated the Constitution and Brown II, 394 U.S. 294 (1955) which ordered state school authorities to dismantle the dual systems and move to a unitary system ñwith all deliberate speedò.
[102] See DEWEY GRANTHAM, THE LIFE AND DEATH OF THE SOLID SOUTH: A POLITICAL HISTORY 136ï 138 (1992) and George Lewis, MASSIVE RESISTANCE: THE WHITE RESPONSE TO THE CIVIL RIGHTS MOVEMENT (2006).
[103] *See* NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S 127 (1969).
[104] H.R.J. Res.174, 1957 Leg., (Fla. 1957). Reprinted in 1 RACE RELATIONS LAW REPORTER 707 (1956).

for Courts of Justice to prepare a report on the history and application of the doctrine. The report shows the firm interpretation of the Union as a compact of sovereign states and the consequent reservation of the powers not delegated to the States, or to the people: ñThe Committee do, indeed, perceive the Constitution to be a compact to which the States are parties.ò[105]

This belief is also confirmed by the Alabama Resolution, that reads: ñthere can be no tribunal above their [the states] authority to decide, in the last resort, whether the compact made by them be violated.ò[106] The Mississippi legislature forbade public employees from complying with desegregation orders.ò[107] The state of Arkansas even adopted a constitutional amendment to resist the Supreme Courtôs resistance:

> ñé the State of Arkansas shall take appropriate action and pass laws opposing in every Constitutional manner the Un-Constitutional desegregation decisionsé of the United States Supreme Court, including interposing the sovereignty of the state of Arkansas to the end of nullification of these and all deliberate, palpable, and dangerous invasions or encroachment upon rights and powers not delegated to the United States nor prohibited to the States by the Constitution of the United Statesé ò[108]

[105] Committee for Courts of Justice, The Doctrine of Interposition, Its History and Interpretation. A Report on Senate Joint Resolution 3 General Assembly of Virginia 1956 and Related Matters 6 (1957). The Report is available online at http://www2.vcdh.virginia.edu/civilrightstv/documents/images/DoctrineInterposition.pdf.
[106] H.R.J. Res. 42, 1956 Leg., Spec. Sess. (Ala. 1956). Reprinted in 1 RACE RELATIONS LAW REPORTER 437 (1956).
[107] WILLIAM P. HUSTWIT, JAMES J. KILPATRICK: SALESMAN FOR SEGREGATION 63 (2013).
[108] Ark. Const. amend. 44, §1 (repealed 1990).The text of the Amendment is quoted in Lawrence Landerson, *supra* note 99 and reprinted in 1 RACE RELATIONS LAW REPORTER 1117 (1956).

The Arkansas move during the Civil Rights era has probably inspired recent ACA nullification attempts to amend the constitutions of Florida (2011 Senate Joint Resolution 2)[109] New Jersey (2014 ACR 14 and SCR 59)[110] and Oklahoma (2014 HJR1084)[111].

To what extent can we say that current nullification measures are replicating the 1956 resolutions?

It is possible to recognize three elements of ñplagiarismò of the nullification doctrine:

1. implicit disregard of the Supreme Court`s authority (decision in *Brown*);
2. critique of the principle of judicial supremacy that establishes the Court as final arbiter of constitutional issues;
3. attribution of the authority to interpret the Constitution to the States.

It is unclear whether such doctrinal position was also underlying the Declaration of Constitutional Principle, also known as the Southern Manifesto, signed on Mar. 13, 1956 by 99 members of the Congress.[112] The Manifesto was intended to be an *exposé* of the resentment towards the alleged Supreme Courtôs overstep of powers but it does not explicitly attribute the authority to interpret the Constitution to the States: ñWe regard the decision of the Supreme Court in the school cases as a clear abuse of judicial power. It climaxes a trend in the Federal judiciary undertaking to legislate, in derogation of the authority of Congress, and to encroach

[109] Joint resolution would propose a State Constitutional amendment to prohibit laws or rules from compelling any person, employer, or health care provider to participate in any health care system, permit any person or employer to purchase lawful health care services directly from health care provider, or permit health care provider to accept direct payment from person or employer for lawful health care services.

[110] A proposed state constitutional ""Health Care Freedom Amendment"" would seek ""to preserve the freedom of the people of New Jersey to provide for their health care."" The proposed amendment would provide that "no State or federal law or regulation shall compel, directly or indirectly, any person to obtain health care coverage, any employer to provide health care coverage to its employees, or any health care provider to participate in any health care coverage plan or program.ò.

[111] Would propose a state Constitutional amendment to prohibit the "state from aiding in the enforcement of" federal health reforms, permitting residents subject to ACA-related fines to bring a right of civil action, also would permit a state tax deduction by residents who pay an ACA-related fine. Also would prohibit the state from establishing a health care exchange.

[112] *See* JOHN KYLE DAY, THE SOUTHERN MANIFESTO: MASSIVE RESISTANCE AND THE FIGHT TO PRESERVE SEGREGATION (2014) and MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT 1936-1941 240 (1994).

upon the reserved rights of the States and the people.ò[113] The declaration limited its scope to a condemnation of the Supreme Courtôs activism. This is a typical characteristic of a certain category of present nullification bills that I have named ñcautious neo-nullification billsò; this category of bills renounces a more radical approach to allow a broader consensus.

However, at state and Congressional level interposition remained ña theoretical exercise with little practical impactò[114] perhaps because of the lack of full and unanimous support by the states. *Brown* was not nullified, the Supreme Court rejected interposition in *Cooper v. Aaron*[115] and in *Bush v Orleans Parish School Board*[116] confirmed the ruling of a federal District Court finding the principle of the interposition ñdisavowed in the Preamble to the Constitutionò.[117]

IV. The organizations that promote nullification

Much of the current debate, both scholarly and political, considers nullification as buried in 1789,[118] a non-starter,[119] an antebellum relic,[120] a discredited theory risen from the grave,[121] or an example of contemporary zombie (or dinosaur) constitutionalism.[122] Nonetheless, my research of legislation in 50 states demonstrates that nullification is very much a live issue that has been discussed in several state legislatures. In the political battlefield, even Joni Ernst -a junior United States Senator from Iowa- seems to support nullification. In a video obtained by The Daily Beast, Ernst said on September 13, 2013 at a forum held by the Iowa Faith &

[113] Southern Manifesto on Integration (March 12, 1956). Source: Congressional Record, 84th Congress Second Session. Vol. 102, part 4. Washington, D.C.: Governmental Printing Office, 1956. 4459-4460.
[114] Landerson, *supra* note 99.
[115] 358 U.S. 1, 18-19 (1958).
[116] 188 F. Supp. 916 (E.D. La. 1960), aff'd, 365 U.S. 569 (1961).
[117] *Id.* at 923.
[118] Mark E. Brandon, *Secession and Nullification in the Twenty-first Century* 67 ARK. L. REV. 91-97 (2014).
[119] JOHN DINAN, HOW STATES TALK BACK TO WASHINGTON AND STRENGTHEN AMERICAN FEDERALISM 1 (Cato Inst., Policy Analysis No. 744, 2013).
[120] Read and Allen, *supra* note 34.
[121] Ryan S. Hunter, *Sound and fury, signifying nothing: nullification and the question of gubernatorial executive power in Idaho*, 49 IDAHO L. REV. 659-692 (2013).
[122] Levinson, *supra* note 34 at 17.

Freedom Coalition that Congress should not pass any laws ñthat the states would consider nullifying.ò[123]

The idea that states can nullify federal law has somewhat been revived since the publication of a 2010 book titled ñNullification: How to Resist Federal Tyranny in the 21st Centuryò[124] by right-wing historian Thomas E. Woods.[125] Woods holds a B.A. from Harvard University and a Ph.D. from Columbia University, both in History. He is an activist, blogger and also founder of Liberty Classroom, a website that offers pay-for-access courses in U.S. Constitutional history, Austrian economics and history of political thought. He was one of the founders of the League of the South, a neo-secessionist organization based in Alabama that has been identified by the Southern Poverty Law Center as a hate group.[126] Thomas Wood is an intellectual and his work has contributed to systematizing the nullification doctrine but it is hard to believe that his work, alone, reached the state legislatures. Also, the homogeneity of language used in the nullification bills suggests a common drafting hand.

What is the source of this multitude of nullification bills?

I have identified two organizations, of different nature and size, that drafted nullification bills and pushed them in the state legislatures: the Tenth Amendment Center and the American Legislative Exchange Council.

The Tenth Amendment Center (TAC)

According to Ryan Hunter, the center is the leading promoter of nullification:

[123] Ben Jacobs, *Exclusive: GOP Senate Candidate Caught Saying States Can Nullify Federal Laws*, DAILY BEAST (July 28, 2014), http:// www.thedailybeast.com/articles/2014/07/28/exclusive-gop-senate-candidate-caught-saying-states-can-nullify-laws.html.
[124] THOMAS E. WOODS, JR., NULLIFICATION: HOW TO RESIST FEDERAL TYRANNY IN THE 21ST CENTURY (2010).
[125] About Tom Woods, Tom Woods, http://www.tomwoods.com/about (last visited Aug. 8, 2015).
[126] The Southern Poverty Law Center defines the League as a neo-Confederate group that advocates for a second Southern secession and a society dominated by ñEuropean Americans.ò The league believes the ñgodlyò nation it wants to form should be run by an ñAnglo-Celticò (read: white) elite. *See League of the South,* SOUTHERN POVERTY LAW CENTER, https://www.splcenter.org/fighting-hate/extremist-files/group/league-south# (last visited Feb. 18, 2018).

ñThe disturbing aspect of the anti-PPACA nullification efforts in most other states is that a significant portion of the text of most of these bills is not an original product of the state legislatures, but is taken largely from an advocacy website run by the Tenth Amendment Center (TAC).ò[127]

The TAC is a small think tank that provides model legislation and keeps track of nullification bills across 50 states via its website which publishes weekly updates, video, articles and book reviews. The center aims to ñteach people about the original meaning of the Constitutionò[128] through multi-city event tours and conferences organized under the campaign ñNullify nowò. Relevant speakers at the ñNullify nowò events[129] include the historian Thomas E. Woods,[130] Gary Johnson[131], Randy Brogdon[132] and Joe A. Wolverton II. [133]

The founder of the center is Michael Boldin, a 38 year old activist ñrecovering Catholicò who sees himself as a ñNinety-eight' guyð as in 1798.òò[134] In a podcast interview at Adam vs The Man, [135] he defined himself as a reformed communist whose activism is rooted in objections to the Iraq War and declared that he never voted in his life. Apparently, he manages the organization from his house in Los Angeles, California and the organization is funded by voluntary donations or the purchase of products on sale in the website. Even if Michael Boldin

[127] Hunter, *supra* note 121 at 693-94 (2013).
[128] Definition on the Home Page of the website: http://tenthamendmentcenter.com/.
[129] *See* dates and venues at http://nullificationmovie.com/the-nullify-now-tour/.
[130] Author of The Politically Incorrect Guide to American History (2004) and Nullification: How to Resist Federal Tyranny in the 21st Century (2010).
[131] Former Governor of New Mexico, he served as the 29th Governor of New Mexico from 1995 to 2003. He was the Libertarian Party nominee for President of the United States in the 2012 election.
[132] He was a state senator for Oklahomaôs 34th senate district from 2002 until 2011, author of the Oklahoma 10th Amendment Resolution and Health Care Freedom Act. He is currently chairman of the Oklahoma Republican Party.
[133] Correspondent for The New American, a print magazine published twice a month by American Opinion Publishing Inc., a company owned by the John Birch Society (JBS).
[134] Stephanie Mencimer, *If at First You Don't Secede,* MOTHER JONES (Jul. /Aug 2010), http://www.motherjones.com/politics/2010/07/michael-boldin-tenth-amendment.
[135] Internet based podcast talk show hosted by Adam Charles Kokesh, an American libertarian. The interview can be viewed on You Tube: AdamKokesh, *Michael Boldin - Tenth Amendment Center*, YOUTUBE (Nov. 30, 2012), https://www.youtube.com/watch?v=Uy0RXEOBuhw.

officially takes distance from Koch brothersô funding[136] and has declared his communist background, it should be noted that the campaign ñNullify nowò has been sponsored by the John Birch Society,[137] an anti-communist organization whose leading founder was, indeed, Fred Koch. The Koch family is a politically active business family most noted for funding the campaigns of Republican candidates and a number of conservative and libertarian political organizations. The ideological position of the Tenth Amendment Center is therefore difficult to identify and certainly its mission does not identify with the program of a specific political party.

In order to support activists willing to join the movement, the center provides model legislation[138] named ñFederal Health Care Nullification Actò, contact names and telephone numbers of state legislators and encourages activists to ñstrongly, but respectfullyò contact the relevant state legislators and chase the introduction of the legislation.

On May 11th 2015, I interviewed the groupôs spokesman, Michael Maharrey to find out the strategy the organization has put in place to promote nullification across 50 states. He said that with very few resources (4 members of staff) and a budget of less than $100,000 per year the center adopts an 8 steps strategy:

1. contact with a legislator keen on statesôrights issues;
2. coalition building and support;
3. blogging/reporting in order to educate the general public;
4. action alerts published at every important step in the bill process;
5. email campaigns;

[136] *See* statement on the Tenth Amendment Center website. Mike Maharrey, *No Koch money here!,* TENTH AMENDMENT CENTER (Dec. 22, 2012), http://blog.tenthamendmentcenter.com/2012/12/no-koch-money-here/.
[137] *See* sponsorship announcement: Bill Hahn, *The John Birch Society Announces Sponsorship of Tenth Amendment Center's Nullify Now! Tour,* THE JOHN BIRCH SOCIETY (Sept. 1, 2010), https://www.jbs.org/more-press-room-articles/item/3261-the-john-birch-society-announces-sponsorship-of-tenth-amendment-center%E2%80%99s-nullify-now-tour.
[138] *Model Legislation: Nullify Obamacare in 4 Steps*, TENTH AMENDMENT CENTER http://tenthamendmentcenter.com/legislation/federal-health-care-nullification-act/ (last visited Jan. 24, 2018).

6. regular conference calls and communication with legislators and grassroots organizations in support of a nullification bill;
7. ad campaigns;
8. public testimony.

Mr. Maharrey also confirmed the different background of Tenth Amendment center members who mostly come from political right conservative or radical left. To my question ñWould you classify the movement as libertarian?ò he answered that ñthere is a lot of support from libertarians but it really depends on the issue at stake: for example the political lefties would support deregulation in marijuana and privacy issues but conservatives would support deregulation in healthcare and gun lawsò. The organization does not identify with a specific political movement but with the general principle of decentralization and empowerment of the states, in line with an originalist interpretation of the Tenth Amendment. In particular, my attempts to label Tenth Amendment Centerôs ideology were watered down by Mr. Maharreyôs answers during the interview which made clear that the movement itself is not conscious of the legal implications of nullification and, what is more concerning, of the difference between fully-fledged nullification of federal law and non-compliance with federal law. Michael Maharrey asserted ñthere is two ways to look at nullifications: the academic side with Jefferson and Madison doctrinal systematization and the practical side with non-cooperation and nullification of federal law in practice; an example of the latter being the non-prosecution for the use of marijuana in certain states.ò From the academic point of view, defining ñnon-cooperationò as ñnullification in practiceò is inaccurate; my taxonomy of sovereignty bills is indeed aimed at distinguishing between active and passive resistance, active resistance being seen as an open declaration of unconstitutionality of federal law and implying the non-effectiveness of federal rule in the state, passive resistance being interpreted as mere non-

compliance and refusal to use state resources to implement federal law. The difference is that where the first category of bills leaves no space to the federal government to operate in the state and also provide penalties for federal officials found guilty of implementing the law within the state, the second category represents only a refusal to cooperate and leaves the federal government free to use its own resources. An example of the latter is the establishment of federal exchanges in states that refuse to establish state exchanges themselves. Michael Maharrey does not seem to be aware of the profound constitutional implications of defining non-cooperation as ñnullification in practiceò, the two terms having different doctrinal origins. It is therefore apparent that the Tenth Amendment Center, rather than being concerned with doctrinal issues, is an activist organization that works in the field, towards a practical objective that is deregulation, without a coherent political or ideological perspective. My findings reveal that members of the movement themselves interpret nullification as abolition of every kind of regulation, both federal and state; therefore also misusing the Tenth Amendment as their flag. In light of my field research on the work and credo of the Tenth Amendment Center I conclude that, despite its role as leading promoter of nullification, the organization suffers from internal contradictions and lacks a uniform and convincing ideological framework. This is reflected in a populist rhetoric and tendency to manipulate the concept of decentralization in favor of the concept of deregulation.

The American Legislative Exchange Council (ALEC)

A highly influential, but more concealed activity in promoting nullification legislation is carried out by the American Legislative Exchange Council (ALEC), [139] an association of state

[139] Defined on its own website as the ñnationôs largest nonpartisan individual membership association of state legislatorsò.

legislators and private-sector members. ALEC was founded in 1973 as ña nonpartisan membership association for state lawmakers who shared a common belief in limited government, free markets, federalism, and individual liberty.ò[140] According to ALECôs declarations, approximately one-third of all state legislators are members, in addition to 78 ALEC ñalumniò in Congress and more than 300 private-sector companies, national trade associations, and nonprofit organizations.[141] The association is funded for more than 98% by corporations, corporate trade groups, and corporate foundations including the Koch family Charles G. Koch Foundation, the Koch-managed Claude R. Lambe Foundation, the Scaife family Allegheny Foundation and the Coors family Castle Rock Foundation.[142] ALEC showed fierce opposition to the ACA since the beginning and in 2013 published on its website the ñState Legislators Guide to Repealing Obamacareò[143] encouraging legislators to introduce the ñFreedom of Choice in Health Care Freedom Actò and providing them with model legislation. The ALEC bill sample, according to Christie Herrera, Director of the Health and Human Services Task Force at ALEC, was enacted in seven states via the legislature or the ballot box, and served as the basis of the lawsuit *Virginia ex rel. Cuccinelli v. Sebelius*,[144] Virginiaôs first-in-the-nation case about the constitutionality of the federal individual mandate.[145] The text of the draft bill prohibits any person, employer, or health-care provider from being compelled to purchase or provide health insurance; protects the right of a person or employer to pay directly for healthcare services; protects the right of health care providers to accept direct payment of healthcare services, and protects the existence of a private health insurance market. The

[140] *History*, AM. LEGIS. EXCH. COUNCIL, http://www.alec.org/about-alec/history/ (last visited Sep. 9, 2015).
[141] Letter from American Legislative Exchange Council to Robert C. Byrd, United States Senate and Nancy Pelosi, United States House of Representatives (Jul. 29, 2009). The letter has been published by Sourcewatch and is available at http://www.sourcewatch.org/images/6/6b/ALEC_Health_Care_letter_2009.pdf.
[142] *See What is ALEC?,* CENTER FOR MEDIA AND DEMOCRACY, http://www.alecexposed.org/wiki/What_is_ALEC%3F (last updated Oct.13, 2017).
[143] *State Legislators Guide to Repealing Obamacare*, AMERICAN LEGISLATIVE EXCHANGE COUNCIL, http://www.alec.org/publications/the-state-legislators-guide-to-repealing-obamacare/ (Nov. 8, 2011).
[144] Virginia ex rel. Cuccinelli v. Sebelius, 702 F. Supp. 2d 598 (E.D. Va. 2010), rev'd, 656 F.3d 253 (4th Cir. 2011).
[145] State Legislators Guide to Repealing Obamacare, *supra* note 143.

legislation was intended to provide standing to a state participating in litigation against the federal individual mandate; allow a state to launch additional, 10th-Amendment-based litigation and empower a state attorney general to litigate on behalf of individuals harmed by the mandate.[146]

ALEC is undoubtedly a major player in influencing state legislatures. It creates model legislation that is then pushed in the state legislatures by ALEC legislator members: ñEach year, close to 1,000 bills, based at least in part on ALEC Model Legislation, are introduced in the states. Of these, an average of 20 percent become law.ò[147] Considering such a high rate of success in introducing bills, this research project intended to assess the influence of ALECôs activity in the nullification movement.

In order to measure the impact of ALECôs work I have compared the sponsors of my 183 nullification bills against the list of ALECôs members. I assumed that if the same name appeared on both lists that would be a sufficient element to presume that the sponsor had proposed the bill under the influence of ALEC. The major obstacle I encountered is that ALEC does not officially disclose the names of all members. For this reason, I consulted a partial list of ALEC members published by Source Watch, a project of the Center for Media and Democracy, on their website.[148] The Center for Media and Democracy defines itself as ña national media group that conducts in-depth investigations into corruption and the undue influence of corporations on media and democracy (hence the name).ò[149] The list of ALEC politicians that I have used is the result of investigative journalism; it has been compiled mostly by taking names from ALEC statements, letters and correspondence addressed to

[146] *Id.* at 18.
[147] History, AM. LEGIS. EXCH. COUNCIL, *supra* note 140.
[148] *Alec politicians*, CTR. FOR MEDIA & DEMOCRACY, http://www.sourcewatch.org/index.php/ALEC_Politicians (last visited Jan. 24, 2018).
[149] *About us*, CTR. FOR MEDIA & DEMOCRACY, http://www.prwatch.org/cmd (last visited Jan. 24, 2018).

Congress and from other ALEC internal documents published by Common Cause[150] and used to file a formal whistleblower tax fraud claim against ALEC. The analysis does not claim to be definitive but to offer an additional dimension to my research project.

The comparison of the list of authors of nullification bills and the list of ALEC politicians shows that, overall, more than half of the bills (53.3%) have been introduced in state legislatures by ALEC members. The table below presents the number of nullification bills introduced by ALEC members for each year and compares that figure with the total of nullification bills introduced across state legislatures. The third column provides the result of that comparison as percentages.

Year	Total of nullification bills introduced in state legislatures	Number of nullification bills introduced by ALEC Members in state legislatures	Percentage of nullification bills introduced by ALEC Members
2011	**116**	**68**	**59%**
2012	**21**	**9**	**43%**
2013	**29**	**14**	**48%**
2014	**17**	**7**	**41%**
Tot.	**183**	**98**	**53.5%**

A remarkable figure is the peak of nullification bills introduced by ALEC members (59%) in 2011 and the significant decrease in the following years. The peak is to be seen as a reaction to the enactment of the reform and the hope of influencing the judicial process that would terminate with the 2012 *Sebelius* decision. This figure not only supports the claim that

[150] The organization describes itself as a ñnonpartisan, grassroots organization dedicated to restoring the core values of American democracy, reinventing an open, honest and accountable government that serves the public interest, and empowering ordinary people to make their voices heard in the political process.ò. *See* more at *About Us*, COMMON CAUSE, http://www.commoncause.org/about/ (last visited Jan. 24, 2018).

nullification is used mainly in view of influencing litigation but that ALEC is, to the greatest extent, concerned with the Court outcomes.

To conclude, it is possible to argue that ALEC is a key player in nullification efforts but at the same time, ALEC uses nullification only with the intent of influencing the judicial process; once the Court had declared the individual mandate provision of the ACA constitutional, ALEC backed out on nullification leaving the legislative battle in the hands of the libertarian movement.

V. North Dakota Senate Bill 2309 (2011), a Case Study on the Legislative History of a Neo-Nullification Bill

My study of the nullification movement has taken into consideration both enacted legislation and introduced-only bills. This is because, in my opinion, the analysis of introduced-only bills provides the researcher with valuable information about the original intent of nullificationists and is therefore necessary to understand the essence and origins of the phenomenon. I found that, in average, only 7% of proposed nullification bills passed all the stages of the state legislative process and have been finally enacted. It is even more interesting to compare the text of the failed and enacted bills; the analysis reveals that state legislators are reluctant to approve bills that contain express nullification language i.e. explicitly declare the ACA provisions unconstitutional, and prefer instead bills that invalidate the individual mandate by simply stating that citizens of the state will be not be obliged to purchase health insurance.

The first characteristic that appears to secure the passage of the statute in a state legislature is a moderate and vague language. Remarkably, none of the enacted statutes explicitly uses nullification language but, in most cases, the Act undergoes a process of ñlanguageò tweaking, transforming its resemblance but not its nature. In particular, most of the enacted bills avoid

the words ñnullò, ñvoidò and references to the nullification doctrine in favor of plain invitations to ñconsider enacting any measure necessary to prevent the enforcementò of the ACA.

The following case study describes this ñadaptive evolutionò process taking as exemplar the text of the North Dakota Senate Bill 2309, a neo-nullification bill that became Act No. 389 on 04/27/2011.[151] The case study examines the textual changes undergone by the bill as it went through the legislative process; the different versions of the bill are also presented in the appendix for the readerôs convenience.

The author of the bill is Republican Senator Margaret Sitte, well known for having also sponsored restrictive abortion measures in 2014.[152] The enacted bill is today a new section to chapter 54-03 of the North Dakota Century Code, relating to federal health care reform legislation. The legislative history of the bill provides an illuminating case study for investigating the influence of Tenth Amendment Center and ALEC in promoting the introduction of the bill, the original intent of legislators and the dynamics of compromise around the language and content of the bill. The rationale for the selection of this bill over others is the availability of the committee reports with the narrative of the discussion around

[151] S. 2309, 62 Leg., Reg. Sess. (N.D. 2011). The legislative history of the bill is available on the North Dakota Legislature website at http://www.legis.nd.gov/assembly/62-2011/bill-actions/ba2309.html.
The final text of the Act reads: An Act to create and enact a new section to chapter 54-03 of the North Dakota Century Code, relating to federal health care reform legislation. BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA: SECTION 1. A new section to chapter 54-03 of the North Dakota Century Code is created and enacted as follows:
Federal health care reform law.
1. The legislative assembly declares that the federal laws known as the Patient Protection and Affordable Care Act [Pub. L. 111 - 148] and the Health Care and Education Reconciliation Act of 2010 [Pub. L. 111 - 152] likely are not authorized by the United States Constitution and may violate its true meaning and intent as given by the founders and ratifiers.
2. The legislative assembly shall consider enacting any measure necessary to prevent the enforcement of the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010 within this state.
3. No provision of the Patient Protection and Affordable Care Act or the Health Care and Education Reconciliation Act of 2010 may interfere with an individual's choice of a medical or insurance provider except as otherwise provided by the laws of this state.

[152] *See* Henry Lebak Bismarck, *Margaret Sitte is Far From a Conservative*, THE BISMARCK TRIBUNE, bismarcktribune.com/news/opinion/mailbag/margaret-sitte-is-far-from-a-conservative/article_95900fdc-9091-11e3-b8c3-0019bb2963f4.html (Feb. 9, 2014).

the different version of the bill. I have examined the Senate[153] and House Committee meetingsô minutes,[154] including the testimony and reconstructed the debate around the bill.

The influence of the American Legislative Exchange Council and the Tenth Amendment Center

This study has examined contemporary nullification as a political movement and found that a major role in the promotion of nullification bills was played by ALEC and the Tenth Amendment Center. This section is concerned with the investigation of the role played by these two organizations in the introduction/enactment of North Dakota Senate Bill 2309. In order to assess the influence of ALEC I checked whether any member of the North Dakota House or Senate had ties with the association. In particular, I examined the legislative journey of the bill and checked the profile of the members of the House and senators that were involved in the legislative process.

The journey of the bill started in the North Dakotaôs legislature Senate Human Services Committee and in the House Industry, Business and Labor Committee.

The original bill was introduced on Jan. 24th 2011 and referred to the Senate Human Services Committee. The Committee was composed of four Republicans (Chairman Sen. Judy Lee, Vice Chair Sen. Gerald Uglem, Sen. Spencer Berry and Sen. Dick Dever) and one Democrat (Sen. Tim Mathern). The composition of the Committee appears to suggest a certain influence of ALEC: out of FIVE members, THREE are reported to have ties with ALEC. Specifically, according to the Center for Media and Democracy list, the Chairman of the Committee Sen. Judy Lee and the Vice Chairman Sen. Gerald Uglem used to be members of the ALEC Health

[153] STAFF OF N.D. S. HUM. SERVICES COMM., 62ND LEG., 2011 SENATE STANDING COMMITTEE MINUTES SB2309 (Comm. Print 2011). Access to the minutes has been kindly provided, upon request, by Richard M. Mikulski, reference librarians of the North Dakota Legislative Council. A copy of the minutes is on file with the author.

[154] STAFF OF N.D. H. INDUS. & LAB. COMM., 62ND LEG., 2011 HOUSE STANDING COMMITTEE MINUTES SB2309 (Comm. Print 2011). Access to the minutes has been kindly provided, upon request, by Richard M. Mikulski, reference librarians of the North Dakota Legislative Council. A copy of the minutes is on file with the author.

and Human Services Task Force,[155] Sen. Gerald Uglem was also member of ALEC Energy, Environment and Agriculture Task Force[156] and Sen.Dick Dever was member of the ALEC International Relations Task Force.[157] The Tenth Amendmentôs Center appears to have played a role in the introduction of the bill. In her testimony before the Senate Committee on Feb. 2nd, the author of the bill, Sen. Sitte openly used talking points from Thomas Woods of the Tenth Amendment Center. She argued that the bill had been drafted on the blueprint of Thomas Jeffersonôs and James Madisonôs Kentucky and Virginia resolutions.[158]

The bill was then considered by the House Industry, Business and Labor Committee. The Committee was composed of 14 members, 10 republicans (Chairman Rep. George Keiser, Vice Chairman Rep. James Kasper, Rep. Donald Clark, Rep. Robert Frantsvog, Rep. Nancy Johnson, Rep. Curt Kreun, Rep. Mike Nathe, Rep. Dan Ruby, Rep. Gary Sukut, and Rep. Don Vigesaa) and four democrats (Rep. Bill Amerman, Rep. Tracy Boe, Rep. Ed Gruchalla and Rep. Marvin Nelson). Three members of the Committee are reported to have ties with ALEC: Rep. Dan Ruby who is also member of the ALEC Commerce, Insurance and Economic Development Task Force,[159] Rep. Don Vigesaa who is also member of the Energy,

[155] Their names appear in the list of members of the Health and Human Services Taskforce provided by the Center for Media and Democracy. *ALEC Health and Human Services Task Force*, CENTER FOR MEDIA AND DEMOCRACY, https://www.sourcewatch.org/index.php/ALEC_Health_and_Human_Services_Task_Force (last visited Jan. 24, 2018).

[156] His name appears in the list of members of the Energy, Environment and Agriculture Task Force provided by the Center for Media and Democracy. *ALEC Energy, Environment and Agriculture Task Force*, CENTER FOR MEDIA & DEMOCRACY, https://www.sourcewatch.org/index.php/ALEC_Energy,_Environment_and_Agriculture_Task_Force (last visited Jan. 24, 2018).

[157] His name appears in the list of members of Federalism and International Relations Task Force provided by the Center for Media and Democracy. *ALEC Federalism and International Relations Task Force*, CENTER FOR MEDIA AND DEMOCRACY, https://www.sourcewatch.org/index.php/ALEC_Federalism_and_International_Relations_Task_Force (last visited Jan. 24, 2018).

[158] STAFF OF N.D. S. HUM. SERVICES COMM, *supra* note 153 (Feb. 2, 2011).

[159] His name appears in the list of members of the Commerce, Insurance and Economic Development Task Force provided by the Center for Media and Democracy. *ALEC Commerce, Insurance and Economic Development Task Force*, CENTER FOR MEDIA AND DEMOCRACY, https://www.sourcewatch.org/index.php/ALEC_Commerce,_Insurance_and_Economic_Development_Task_Force (last visited Jan. 24, 2018).

Environment and Agriculture Task Force [160] and finally, Chairman Rep. Kasper whose name appear in two ALEC headed letters respectively addressed to Nancy Pelosi (to reiterate concern with the federal health reform)[161] and to Majority leader Reid (to express concern with the plan to regulate greenhouse gases under the Clean Air Act).[162] The involvement of ALEC is also confirmed by the testimony material submitted by Sen. Sitte. Specifically she attached an e-mail from ALEC Legislative Analyst Monica Mastracco to Rep. Kasper; the email was an invitation to introduce the ALEC Freedom of Choice in Healthcare Act.

Sen. Sitte also disclosed ties with the Tenth Amendment Center when asked by Chairman Keiser in the House Committee testimony on March 21st to provide legal grounds for the proposed billôs assertion of sovereignty: ñThis is from the Tenth Amendment Center, Thomas Wood and you can google it, so itôs eleven states that have adopted this language. We are using the whole idea of state nullification, that states have the authority to nullify an Act of Congress if Congress have done something to overlap its boundariesò.[163] She also said that she had been in contact with the Center and had been reassured that, despite the Senate amendments, the bill would still have been considered part of the nullification movement. In the same testimony, she submitted a blog page from Tenth Amendmentôs website.[164] I conclude that it is therefore safe to assume that in the North Dakota SB 2903 case study both ALEC and the Tenth Amendment Center have played a central role in the promotion of the bill. This finding reinforces the initial assumption that nullification is appropriately studied as a political phenomenon with roots in those organizations that aim at influencing litigation.

[160] *Supra* note 156.
[161] ALEC letter to Nancy Pelosi *supra* note 141.
[162] Letter from American Legislative Exchange Council to Majority Leader Reid, United States Senate (Mar. 10, 2010). The letter has been published by Sourcewatch and is available at http://www.sourcewatch.org/images/3/3b/EPALetterforSenate.pdf.
[163] Staff of N.D. H. Indus. & Lab. Comm., *supra* note 154 (Mar. 21, 2011).
[164] *Id.*

The dynamics of compromise around the language and content of the bill

When discussing the two typologies of neo-nullification bills (pure and cautious) above, I also referred to the textual evolution process that most of the enacted statutes had undergone in order to be approved by the state legislatures. What follows is a critical analysis of the amendments made to the North Dakota Senate Bill 2309 before its final enactment.

The original bill, as proposed by Sen. Sitte, was a radical declaration of sovereignty. The text read: [165]

> ñThe legislative assembly declares that the federal laws known as the Patient Protection and Affordable Care Act [Pub . L. 111 - 148] and the Health Care and Education Reconciliation Act of 2010 [Pub . L. 111 - 152] are not authorized by the United States Constitution and violate its true meaning and intent as given by the founders and ratifiers and are declared to be invalid in this state, may not be recognized by this state, are specifically rejected by this state, and are considered to be null in this state. [é] Any official, agent, or employee of the United States government or any employee of a corporation providing services to the United States government who enforces or attempts to enforce an act, order, law, statute, rule, or regulation of the government of the United States in violation of this Act is guilty of a class C felony.ò

According to Sen. Sitte, such a vigorous declaration of sovereignty was justified as it represented the will of the people[166] and reflected the ruling of the federal Court that the individual mandate is an unconstitutional exercise of Congressional power. [167]

The nullification language was deleted in the very first consideration of the bill by the Senate Committee on Human Services. The engrossed Senate bill only left the first part of the phrase:

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[165] The full text of the bill can be found in the appendix, p. 269.
[166] STAFF OF N.D. S. HUM. SERVICES COMM, *supra* note 153 (Feb. 2, 2011).
[167] Florida ex rel. Atty. Gen. v. U.S. Dept. of Health & Human Serv's., 648 F.3d 1235 (11th Cir. 2011). The Bill was enacted before the Supreme Court ruling in Sebelius.

ñthe ACA is not authorized by the United States Constitution and violates its true meaning and intent as given by the founders and ratifiers.ò The compromise was found by Sen. Uglem after Chair Judy Lee declared to ñhave a little problem with declaring it invalid in the stateò.[168] Also, it should be noted that the Senate Committee deleted sections 3, 4 and 5, the provision that established penalties for federal or state officials found guilty of enforcing the federal health care reform law. A number of committee members indeed declared ñdiscomfortò[169] with this controversial provision. Chair Judy Lee explained: ñanything we do is going to put our state employees in legal jeopardy as wellò.[170] The committee amended the bill and granted a do pass as amended with a 3-1-1 vote.[171] The Senate reviewed the bill and passed in second reading with a 27-19 vote.

When the bill reached the House Industry, Business and Labor Committee the language became even more moderate, and words expressing possibility had been added to supplant the original assertiveness: ñ[the ACA is] *likely* not authorized by the United States Constitution and *may* violate its true meaning and intent as given by the Founders and ratifiers.ò [emphasis added] Rep. Kasper explained that the House Industry, Business and Labor Committee added ñlikelyò because ñthey had some consternation on their side on making a hard statement that it is unconstitutional because the federal courts have not ruledò.[172] In a later meeting, on March 30 he recognized the danger of an assertive language and said ñAfter the amendment was defeated, I talked to some people and found three concerns that the committee members had. The first one was the reference to federal law and the concern that we should not be talking about federal law in an amendmenté ò.[173] On Apr. 18th 2011 Rep. Kasper exposed his personal opinion

[168] STAFF OF N.D. S. HUM. SERVICES COMM, *supra* note 153 (Feb. 16, 2011).
[169] *Id.*
[170] Id.
[171] Senator Spencer Berry did not vote on Senate Bill 2309 when it was in Committee.
[172] Staff of N.D. H. Indus. & Lab. Comm., *supra* note 154 (Mar. 21, 2011).
[173] Staff of N.D. H. Indus. & Lab. Comm., *supra* note 154 (Mar. 30, 2011).

saying that he agreed with Sen. Dick Denver that the ACA was not authorized by the US Constitution but suggested that ñlikelyò and ñmayò were necessary for the survival of the bill: ñ[I] would agree but sometimes making those bold statements at a time like this might not be the right thing to say for the survival of the billò.[174] Rep. Ruby emphasized that a softer language would have left room for some kind of result at higher court level. At the center of the dispute was also the willingness to go a little further than HB 1165, a very similar but only declaratory bill that was enacted on 04/04/2011. HB 1165 provided that ña resident is not required to have a policy of individual health coverage, and would not be liable for any penalty, assessment, fee, or fineò. Also, the House added an entire section entitled ñHealth insurance coverage not required - Freedom to choose and provide medical services.ò The section would have implicitly nullified the individual mandate. However, under the suggestion of Sen. Dever that section was removed by the Conference Committee and replaced with a plain declaratory statement of citizen protection ñNo provision of the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010 may interfere with an individualôs choice of medical provider or their choice of an insurance provider except as provided by North Dakota State Law.ò The amended bill passed the Conference Committee and finally the House of Representatives with a 69-24 vote. The Governor signed Senate Bill 2309 on April 27, 2011. The final version of the statute, as anticipated, maintained the original objective but differed from the model significantly. In particular, the Act lost the original assertiveness in favour of a much more moderate language, exemplified by the use of future tense ñshallò,[175] and of words expressing eventuality such as ñmayò and ñlikelyò. The final Act looks more like a vague invitation to consider nullification as an option than a real assertion of sovereignty. The controversial legality of nullification appears to have played an essential role

[174] Staff of N.D. S. Hum. Services Comm, *supra* note 153 (Conference Committee Apr. 18, 2011).
[175] S. 2309, 62th Leg. Assemb., Reg. Sess. (N.D. 2011) at subsection 2: ñThe legislative assembly shall consider enacting any measure necessary to prevent the enforcement of the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010 within this state.ò

in shaping the language of the Act but what should be noted is that, despite language tweaking, the original nullification intent has not been affected. Whether legislators really believed that a nullification statute could have nullified federal law is the subject of the next section.

The intent of legislators

When reading a contemporary nullification bill a constitutional scholar cannot avoid wondering why states arrogate to themselves the ability to declare unconstitutionality of federal law and whether in drafting the bill the legislators have considered the traditional role of judicial review. Were legislators aware of the legal implications of such a class of bills or did they believe that the state legislature could stop the enforcement of federal mandates? Is the declaration of unconstitutionality the means or the final objective?

The minutes of the Senate Human Services Committee suggest that legislators were fully aware of the legal problems created by a bill aimed at nullifying federal law but limited their objection to language tweaking. Chair Judy Lee, well aware of the legal implications, proposed to convert the bill into a non-binding Resolution; Sen. Uglem reiterated the suggestion and his assertion exemplifies the position of legislators: ñNot comfortable with putting this into state law, is in agreement with the goal but donôt feel comfortable with it in law.ò [176] Awareness of the federal nature of the issues at stake is also showed by Sen. Mathern (Dem.) who objected to the fact that the bill was being considered by the Human Service Committee when it would have been more appropriate to refer it to the Judiciary Committee: ñ[We] are not called upon to evaluate healthcare; bill calls upon us to evaluate our relationship with the federal governmentò.[177] Legislators were clearly aware of the consequences of nullification and some of them, like Sen. Dick Dever, would have passed the bill as proposed. However, this position was not shared by more cautious legislators like Rep. Ruby who kept on drawing attention to

[176] Staff of N.D. S. Hum. Services Comm, *supra* note 153 (Apr. 18, 2011).
[177] *Id.* at Feb..2, 2011.

the pending federal litigation. The final version is the result of the compromise between these two factions.

To go back to our initial question, Is the declaration of unconstitutionality the means or the final objective? This case study, together with evidence from my interview with Tenth Amendment Centerôs Communication Director Michael Maharrey,[178] makes clear that legislators use nullification bills as a means and not as final objective. During her testimony, Sen. Sitte declared that the Act was not a solution but a way forward: ñThis is a third way of showing the will of the people: federal court decision, congress acting, and now the states actingò.[179] Rep. Kasper also explained that the scope of the bill was only to guarantee the rights of the citizens for their ability to seek medical care and the rights of the providers to provide it: ñWith the uncertainty of what is happening in Washington with the Health Care Protection Act and not knowing how the rules are going to come down they wanted to make a statement that our citizens and providers have certain rights that are protected in statuteò.[180] The comment of Rep. Kasper demonstrates that the major hope is to influence the judicial process: ñIf the Supreme Court acts between now and the special session, which is a possibility, this bill could be extremely important. If the Supreme Court does not act before the special session but there are new rules and regulations that the Department of Health and Human Services (HHS) promulgates that could be undesirable to our citizens and providers then this bill is also important.ò[181]

The analysis of the minutes of the committee meeting reveals that the intent of legislators was to influence the pending federal litigation by drawing attention to the alleged unconstitutionality of the individual mandate. Also, nullification is seen as one of three

[178] *See* interview analysis above ñI would still be happy with a piece of bread if I canôt get the whole loafò.
[179] STAFF OF N.D. S. HUM. SERVICES COMM, *supra* note 153 (Feb.2, 2011).
[180] *Id.* at Apr. 13,2011.
[181] *Id.* at Apr. 14, 2011.

different strategies to oppose the ACA ñWith so much of our freedom and prosperity at stake it is highly advisable to pursue all three strategiesò.[182]

It is also pertinent here to recall the conclusions of the section about ALECôs interest in promoting this kind of legislation. Legislatorsô action are often piloted by group interests with precise objectives and no interest in the practical means used to achieve a certain outcome. If we keep that in mind and we assume that the objective of interest groups was to block the implementation of the new regulations and influence the judicial process, it is easier to understand why legislators did not move from the original objective but only moderated the language of state bills: ñIf, for example, passing immigration reform or repealing healthcare at the federal level is politically unfeasible, private groups with a stake in these decisions might target state officials to seek alternative policies that would achieve substantially similar results in select jurisdictions.ò[183]

I would therefore conclude that the doctrine of nullification is knowingly utilized by interest groups to make their voice louder but it is clear that nullification is only a mechanism to put forward certain political objectives that would not otherwise be achieved.

VI. Nullification: the contemporary philosophical and constitutional controversy

Up until this point, my work has provided a portrait of the nullification phenomenon and demonstrated that the doctrine, in its contemporary and revised version, has lost vigor and is used only ï in a populist key- to achieve political goals that fall short of nullification as it was

[182] Testimony in support of Senate Bill 2309.
[183] Julia Preston, *Political Battle on Immigration Shifts to States*, N.Y. Times (Dec. 31, 2010), http://www.nytimes.com/2011/01/01/us/01immig.html?_ r=0.

intended in 1832. As seen in the North Dakota case study, state legislators are well aware of the implications of such a doctrine and only mean to use nullification to raise their voice, gather popular consensus and fight back against policies they do not like.

Eminent scholars[184] discussed the phenomenon of nullification during a symposium organized by the Arkansas School of Law in September 2013;[185] the main objective of the symposium was to assess the value (if any) of contemporary calls for secession, nullification, and/or interposition. The symposium ñ*Cooper*'s Shadow: Secession, Nullification and State Rights, Circa 2013ò was opened by University of Texas law Professor Sanford V. Levinson who defined contemporary nullification measures as products of ñzombie (or dinosaur) constitutionalismò[186] because of the similarities with Thomas Jefferson's Kentucky Resolutions of 1798. In the same symposium, Dr. James Read, Professor of Political Science at the College of Saint Benedict/Saint John's University also agreed that nullification was a revival of buried constitutional rhetoric that he had previously called ñundeadò.[187] The same idea of a revival of the theory of nullification has also been discussed in more recent literature on nullification that interpreted nullification bills as an attempt to ñstealing some pages from early American history's playbookò.[188]

I find myself in disagreement with the definition of current state measures against implementation of certain provisions of the ACA a *revival* of nullification era claims.[189] I would

[184] University of Arkansas law professor Mark Killenbeck, Stanford University historian Jack Rakove, Washington University in St. Louis philosopher Kit Wellman, Vanderbilt University law professor Mark Brandon and College of St. Benedict political scientist James Read.
[185] Symposium, Cooper's Shadow: Secession, Nullification, and States' Rights, 67 ARK. L. REV. 1 (2014).
[186] Levinson *supra* note 122.
[187] Read & Allen, *supra* note 34. ñContemporary nullification may or may not ultimately catch on as a living doctrine, powerful enough to bring a state and its citizens to a direct test of force with the federal governmentð as occurred in South Carolina in the 1830s and in several Southern states in the 1950s. But in the last few years nullification has at least rejoined the ranks of the óundead.ôò
[188] Keely N. Kight, *Back to the Future: The Revival of the Theory of Nullification,* 65 MERCER L. REV. 521, 522 (2014).
[189] *See id.* at 523 and James H. Read, *Changing the Rules; Leaving the Game; Nullification, Secession, and the American Future*, 67 ARK. L. REV. 103 (2014).

certainly concede that contemporary nullification efforts find roots in that historical moment and constitutional controversy but the contemporary nullification bills do not share the same objectives of the Kentucky and Virginia resolutions or the Calhounôs Exposition.

Using a metaphor, I would instead say that the doctrine of nullification was born with Jeffersonôs Kentucky Resolution, grew taller in 1832 with Calhoun, married secession, lived its golden age during the civil war but died in that conflict. Contemporary nullification is not a ñzombieò but only a ñdescendantò: it maintains philosophical grounds but developed a much more complex doctrine with very different objectives, modern constitutional concerns and consequent modern approaches. I instead find myself more comfortable with Professor John Dinanôs remarks against labelling current state measures against implementation of federal law as ñnullification effortsò. I quote here his findings:

> Upon closer examination, and contrary to the statements of supporters and critics alike, these recent state measures regarding health care, guns, driverós licenses, and medicinal marijuana fall short of invoking the clearly discredited doctrine of nullification embodied in the Kentucky Resolutions of 1798, the resolutions of several New England states in response to the Embargo of 1807,13 the South Carolina Nullification Ordinance of 1832, Wisconsinós nullification of the Fugitive Slave Law in 1859,15 and interposition acts adopted by eight southern states in 1956 and 1957 in response to the Supreme Courtós school desegregation rulings. Rather as I will argue, these recent state measures illustrate several ways that states are capable of safeguarding federalism principles without engaging in nullification.[190]

States legislatures do engage in nullification but in a different, evolved and more complex way.

[190] Dinan, *supra* note 2 at 1638.

The main difference between the original and contemporary conception of nullification is in its linkage to the doctrine of secession. The Arkansas symposium appropriately discussed nullification together with secession[191] because during the crisis of 1832 nullification and secession were two faces of the same coin and southern states demonstrated their willingness to secede 40 years later. However, the symposium failed to acknowledge that secession is no longer part of the contemporary nullification movement. With the exception of the Texas National Movement[192] I find it difficult to argue that there is any secession motive in the states or even secession intent in the mind of the authors of nullification bills. Such a discrepancy between the original and contemporary conception of nullification truly is, in my opinion, the key to understand the current movement. To recall the metaphor used by Prof. Read,[193] contemporary nullificationists do not even think for a moment of leaving the game but have much higher ambitions: changing the rules of the game. Fueled by the success of populist arguments on citizenship rights and state sovereignty, contemporary nullification sets up intentional legal paradoxes that originate in constitutional controversies regarding different doctrines of separation of powers. My argument here is that the real target of nullificationists is no longer the Congress but the separation of powers and Supreme Courtôs authority: nullificationists specifically challenge judicial review and judicial supremacy.

What follows is an analysis of the constitutional issues that lead me to this conclusion.

The main legal issue created by nullification is the clash with the **Supremacy Clause** which establishes federal law as the ñsupreme law of the land, and invalidates state laws that interfere with or are contrary to federal lawò.[194] As UCLA professor Adam Winkler comments - ñAny

[191] *See* Symposium *supra* note 185. In particular, Mark E. Brandon, *Secession and Nullification in the Twenty-First Century*, 67 ARK. L. REV. 91 (2014).
[192] The movement is an organization that works to promote the idea of an independent Texas. *See* their webpage Texas Nationalist Movement, http://texnat.org/ (last visited Jan. 20, 2018).
[193] James H. Read, *supra* note 189.
[194] ABC Charters, Inc. v. Bronson, 591 F.Supp.2d 1272 (S.D. Fla. 2008) (quoting *Lozano v. City of Hazleton*, 496 F.Supp.2d 477, 518 (M.D. Pa. 2007).

law that interferes with a valid federal law is unconstitutional. [é] The federal government can pass legislation in an area, and people who are citizens of the states have to obey that legislation.ò[195] Supremacy of federal law is a straightforward concept that would lead to a *tout-court* rejection of nullification.

The key point, however, is that the position of nullificationists is more subtle and controversial: they argue that the Supremacy Clause does not apply to the ACA because they believe that certain provisions of the law are unconstitutional, not ñmade in pursuance thereofò as the Supremacy Clause would require.[196] The evident assumption behind this argument is that sovereign states possess judicial review capacity, the power to interpret the Constitution and review the constitutionality of federal laws, even if this implies disregarding Supreme Courtôs rulings, i.e. the *Sebelius* decision. A paradox? Yes, if we take into account that in the American constitutional tradition judicial review is a prerogative of the Supreme Court (*Marbury v. Madison*) [197] and that states are bound by U.S. Supreme Court rulings *(Cooper v. Aaron)*. [198] However, the idea that the Supreme Court possesses judicial review power and finality over the meaning of the Constitution has been objected to by many constitutional theorists. What follows is an analysis of the literature that supports the philosophical underpinnings behind the two legal issues created by nullification: the rejection of the principle of *judicial review* (the fact

[195] Quoted in K. Mahnken, *Red States' Legally Dubious Strategy to Destroy Obamacare*, NEW REPUBLIC (28 Jan. 2014), http://www.newrepublic.com/article/116373/red-states-wage-legally-dubious-war-nullify-obamacare.

[196] Article VI, Paragraph 2. ñThis 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.ò.

[197] Marbury v. Madison, 5 U.S. 137 (1803). The decision formally established the principle of judicial review. ñIt is emphatically the province and duty of the judicial department to say what the law isò.

[198] Cooper v. Aaron, 358 U.S. 1 (1958). Cooper announced that ñthe federal judiciary is supreme in the exposition of the law of the Constitutionò and further that an ñinterpretation of [the Constitution] enunciated by th[e] Court . . . is the supreme law of the land.ò More importantly, the Supreme Court unanimously rejected the doctrines of nullification and interposition: ñthe 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 segregationé ò

that the Court has the power to strike down laws) and *judicial supremacy*[199](the fact that the Court is the final arbiter in the interpretation of the Constitution).

With regard to **judicial review**, relevant conservative literature[200] seems to be skeptical 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 never mentions judicial review as a power expressly granted to the Supreme Court:[201]

> Indeed, no specific language in the Constitution gives the Supreme Court the power to declare certain governmental conduct unconstitutional, let alone the exclusive authority to do so. Judicial review can be derived from some sections of the Constitution, but in almost every instance it is the power of federal courts to strike down state actions or to void congressional statutes that threatens judicial independence.[202]

Furthermore, 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: ñThe evidence seems to indicate that the Framers did not mean for the Supreme Court to have authority to void acts of Congress.ò[203] William Crosskey, one of the most provocative legal historians of recent times, [204] reaches the same conclusion: ñThe rationally indicated conclusion is that judicial review of congressional acts was not intended, or provided, in the

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[199] Robert Justin Lipkin, *Which Constitution? Who Decides? The Problem of Judicial Supremacy and the Interbranch Solution*, 28 CARDOZO L. REV. 1055, 1056-57 (2006).
[200] See CHARLES S. HYNEMAN, THE SUPREME COURT ON TRIAL 125 (1963); Louis Boudin, *Government by Judiciary* 26 POLIT. SC. QTLY. 238-248 (1911); James B. McDonough, *Usurpation of Power by Federal Courts* (1912) AM. L. REV. 45; JESSE. H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 62-63 (1980).
[201] It is here worth reporting the text of Art. III of the U.S. Constitution: ñThe 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 establishò.
[202] Neal Devins and Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 86 (1998).
[203] LEONARD LEVY, ORIGINAL INTENT AND THE FRAMERSôCONSTITUTION 100 (1988).
[204] So defined by Abe Krash in *The Legacy of William Crosskey,* 93 YALE L.J. 959 (1984).

Constitution.ò[205] A more recent publication by Prof. William Nelson reads: ñWhat makes [*Marbury*] even more important is the absence of any clear plan on the part of the Constitutionôs framers to provide the Court with this powerò.[206] Mark Graber insists: ñNo constitutional provision plainly states that elected officials are also bound by Supreme Court decisions on constitutional questions.ò[207]

On the other hand, modern scholarship[208] 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: ñJudicial 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.ò[209] The debate concerning the appropriate role of judicial review is wide and it not within the aims of this work to review the extensive literature in the field. However, it is relevant to note that recent defenses of a vigorous judicial review finds their roots in the pluralist theory. Examples are Terri Jennings Peretti, *In Defense of a Political Court* (1999) arguing that politically motivated constitutional decision making is beneficial to the American democracy and Louis Michael Seidman, Our Unsettled Constitution (2001) which develops a theory of ñunsettlementò, according to which the evolving interpretation of the Constitution allows political bargaining. Who is right and who is wrong? Maybe the Supreme Courtôs

[205] WILLIAM CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1000 (1953).
[206] WILLIAM E. NELSON, MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW 1 (2000).
[207] MARK A. GRABER, A NEW INTRODUCTION TO AMERICAN CONSTITUTIONALISM 115 (2013).
[208] See SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 89 (1990); James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers,* 101 COLUM. L. REV. 1515 (2001); William Michael Treanor, *Judicial Review before Marbury,* 58 STAN L. REV. 455 (2005); CLIFF SLOAN & DAVID MCKEAN, THE GREAT DECISION: JEFFERSON, ADAMS, MARSHALL, AND THE BATTLE FOR THE SUPREME COURT (2009).
[209] Randy Barnett, *The Original Meaning of the Judicial Power,* 12 SUP. CT. ECON. REV. 115, 120 (2004).

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;[210] what is certain is that it is a 200 years old legal tradition and factual reality in the United States. Nullification is clearly hitting right at the top of the constitutional pantheon.

With regard to ***judicial supremacy,*** academic criticism[211] has strongly opposed the idea that the Supreme Court should serve as the final, highest arbiter of the Constitution, as established by *Marbury* and *Cooper v. Aaron.*

A provocative argument is put forward by Prof. Paulsen[212] who contends that *Marbury* has created a myth and that a proper reading of Marshallôs decision would actually suggest that judicial review is not an ñexclusiveò power of the judiciary but should be shared between the three institutional branches and the statesô 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.[213]

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

[211] See Edwin Meese III, *The Law of the Constitution* 61 TUL. L. REV. 979, 986 (1987). In support of judicial supremacy arguments see Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1361 (1997).

[212] Michael S. Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 345 (1994) and, from the same author, *The irrepressible myth of Marbury*, 101 MICH. L. REV. 2706 (2003).

[213] *Id.* at 2721.

The broader idea that constitutional interpretation should be the result of a dialogue among all of three branches of government as well as the states and the general public is recalled by political scientist Dr. Louis Fisher and Prof. Neal E. Devins who named this conception a ñthree branch interpretationò theory in the introduction to their book *The Democratic Constitution*.[214] The book is the continuation of their previous joint work on the field[215] and although it does not explicitly challenge the supremacy of the Court, it emphasizes the role that non judicial actors play in shaping constitutional values. The interrelation with the work of other, more radical scholars is declared by the authors themselves: ñby arguing that courts can and should play a pivotal role in triggering both social movements and elected government actions, we part company with other scholars who have challenged the Courtôs status as ultimate interpreter of the Constitutionò. [216]

Prof. Robert Nagel is similarly critical of excessive judicial power denouncing the gap between ñlegal cultureò (intended as judicial opinions) and ñpolitical cultureò (the law as implemented by institutions, behaviors, and understandings) caused by judicial activism. The Supreme Court of the United States, he argued, should intervene in ñthose special occasions when some aberrant governmental action is emphatically inconsistent with constitutional theory, text, and public understanding as expressed in prolonged practiceò.[217] In all the other cases, Prof. Nagel asserts, public policy decision-making should be left to the other branches of the federal government or to the states.

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[214] NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION (2004).
[215] *See* LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS (2006); NEAL DEVINS & LOUIS FISHER, POLITICAL DYNAMICS OF CONSTITUTIONAL LAW (2000).
[216] NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION 5 (2004).
[217] Robert Nagel, *Constitutional Cultures: The Mentality and Consequences of Judicial Review,* 39 CATH. U. L. REV. 187 (1989).

Scholars based a more specific argument in defense of judicial deference to the Congress in particular provisions of the Constitution, notably Section Five of the Fourteenth Amendment.[218] As Prof. Kermit Roosevelt[219] suggests, this constitutional provision advances the argument that Congress is the primary body to enforce legislation and that the courts 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 ñThe Peopleò, is another challenge to interpretive judicial supremacy which finds its ideological roots in the so called ñconstitutional interpretations by non-judicial actorsò or ñpopular constitutionalismò, 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 Kramer[220] and in the work of Edward Hartnett: ñWith a Constitution made in the name of ówe the People,ô all of us are legitimately interested in the meaning of the Constitution--all of us must be welcome participants in the conversation.ò[221] Professors Balkin[222] and Robert Post and Reva B. Siegel[223] find constitutional authority in social movements and in the voice of the People arguing that originalismôs appeal grows out of the conservative constitutional ideals it expresses.

[218] ñThe Congress shall have power to enforce, by appropriate legislation, the provisions of this article.ò
[219]Kermit Roosevelt, Judicial Supremacy, Judicial Activism: Cooper v. Aaron and Parents involved, 52 ST LOUIS U. L.J. 1191, 1197 (Summer 2008).
[220] LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 221 (2004).
[221] Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123 (1999).
[222] Jack M. Balkin, Living Originalism 354-56 (2011).
[223] Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, *in* THE CONSTITUTION IN 2020 25 (Jack M. Balkin & Reva B. Siegel eds., 2009).

A comprehensive theory of the so defined ñpopulist constitutional lawò is developed by Prof. Mark Tushnet[224] who, starting from a full rejection of judicial supremacy, argues that the development of constitutional meaning should be left primarily in the hands of political rather than judicial actors. In his view, populist constitutional law would distribute constitutional responsibility throughout the population and increase the power of self-government.[225] He defines populist constitutional law as ña law oriented to realizing the principles of the Declaration of Independence and the Constitution Preamble. More specifically, it is a law committed to the principle of universal human rights justifiable by reason in the service of self-government.ò[226] He points out that only the Declaration and the Preamble should be considered the body of populist constitutional law. The main characteristic of this system is the ñthinnessò of its provisions that provide guidelines but leave space for its application ñit leaves a wide range open for resolution through principled political discussion- principled because they are oriented toward the Declarationôs principles.ò[227]

Judicial supremacy has also recently been at the center of the political dispute about same-sex marriage. On Jun. 26th 2015 the Supreme Court ruled in *Obergefell v. Hodges*[228] that state-level bans on same-sex marriage are unconstitutional. In spite of the decision, Kim Davis, a Kentucky county clerk, kept on refusing to issue marriage licenses to same-sex couples on grounds that issuing the licenses would violate her Christian beliefs. She was subsequently jailed for five days following a charge of contempt of court hearing.[229] Was Ms. Davis nullifying *de facto* the Supreme Court ruling? Can we interpret her behavior as a challenge to judicial supremacy?

[224] MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) 8-9, 14-15, 22-23.
[225] *Id.* at 174.
[226] *Id.* at 181.
[227] *Id*. at 185.
[228] 576 U.S. ___ (2015).
[229] U.S. District Court Judge David L. Bunning issued the decision. On August 26, 2015, a three-judge panel of the United States Court of Appeals for the Sixth Circuit upheld Judge Bunning's decision.

Former Arkansas Governor Mr. Huckabee did not miss the chance to point the finger to the Supreme Court on the day Ms. Davis was released: ñThe founders never gave one branch of government the power to make the law,ò referring to the Supreme Courtôs decision allowing same-sex marriage across the country. ñEvery one of us will have to decide whether we want to keep this great country or whether we want to surrender and sacrifice it to tyranny.ò[230] It is clear that the language of nullification still pervades conservative political discourse in the speeches of governors, state legislators, and even U.S. presidents.[231]

My finding is that, when seeking popular consensus, contemporary nullificationists borrow from the populist tradition much more than from Calhounôs teachings and their claims certainly fall short of invoking secession. The ultimate goal of contemporary nullificationists is to influence litigation and if possible to create a decentralized system of judicial review where states can reject a federal law because of constitutional concerns. The obvious objection to this hypothetical framework is that shared judicial responsibility would create chaos and anarchy. I would like to conclude, in this regards, with Prof. Paulsenôs reply to this corncern:

> ñDecentralization is not chaos; it is simply the antithesis of centralized interpretive authority. It is an example of ócheck and balances.ô If there is one thing we know about the Framers, it is that they feared the concentration of power and sought to prevent it in the design of the Constitution. [é] Division and shared responsibility admits of the possibility of disagreement, competing interpretations, ongoing tension, struggle, compromise (or deadlock), and lack of a definitive resolution. In other words, it admits of ð indeed, virtually assures ð exactly what separation of powers is designed to produce as a general proposition. Over time, and across a

[230] Reported in Alan Rappeport, *Mike Huckabee (Not Ted Cruz) Captures Spotlight at Kim Davis Event*, N.Y. TIMES, Sep. 8, 2015, http://www.nytimes.com/politics/first-draft/2015/09/08/mike-huckabee-captures-spotlight-not-ted-cruz-at-kim-davis-event/.

[231] DANIEL BELAND, PHIL ROCCO AND ALEX WADDAN, OBAMACARE WARS 28 (2016), QUOTING SAMUEL HUTCHINSON BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM (1993).

broad range of issues, such an arrangement tends to produce a kind of general equilibrium ð not perfect stability or repose, but general equilibrium. (Does a regime of judicial supremacy really do any better than that?). ò[232]

Conclusion: the Role of Nullification in Today's Society

My research of legislation in 50 states and analysis of the nullification doctrine reveals that todayôs nullification has evolved into a different phenomenon that only shares philosophical origins with Jefferson and Calhounôs conception. This is why I term current efforts neo-nullification. Beyond the nature of the phenomenon itself, this work is concerned with the theory of nullification and, ultimately, with the consequences of such a radical assertion of statesô rights for American federalism. In particular, the current phenomenon 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 issue;[233] state legislatures are claiming for themselves the ability to pronounce upon the constitutionality of federal laws, effectively trying to usurp the judicial function. What then can we say is the role of nullification?

Prof. Tushnet suggested that nullification is aimed at creating a constitutional crisis: ñNow consider what Governor Faubus might reasonably have thought he could accomplish by his actions [é] Not much. His actions were highly likely to generate and exacerbate social tensions, as they did.ò[234] I agree with Prof. Tushnet, especially considering the high number

[232] Michael Paulsen, *The irrepressible myth of Marbury*, *supra* note 212 at 633.
[233] *Id.* Prof. Paulsen pleads for a shared judicial review power between the three branches of government and the state governments.
[234] Tushnet, *supra* note 224 at 22.

of nullification bills that have been proposed in the state legislatures in the last five years. It would be inappropriate to conclude that all the bills have been proposed with a real hope of nullifying federal law, 1832 style. More realistically, they have been proposed to express deep disagreement and to feed a political struggle aimed at a constitutional revolution as described above. In this regard, I would like to recall the comments of Dr. James H. Read & Dr. Neal Allen: ñwhether 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.ò[235] On the other hand, Prof. John Dinan sees recent state measures as ñcontribut[ing] to restraining federal power and preserving state autonomy in several waysò.[236] In this sense, todayôs nullification is just like Jefferson imagined it, ña train as that we may not be committed to push matters to extremities, and yet be free to push as far as events will render prudentò.[237]

What is more concerning is, indeed, the reason for this political struggle. The discussion on the influence of ALEC would lead to the conclusion that the broader target is the federal governmentôs ability to regulate business. Traditionally, the aspiration to limited government and strong states was a characteristic of the radical right wing that found its resurgence in the Tea-Party movement. It would be interesting, but it is beyond the scope of this work, to investigate the influence of this party on the GOP.

In conclusion, I put forward a consideration, a conjecture and an admonition.

A consideration: as things stand, the debate on radical statesô rights movement (i.e. nullification) has captured the attention of enthusiastic constitutional theorists and of statesô legislators but has not yet reached Washington. A conjecture: in the current highly polarized

[235] James H. Read & Neal Allen, *supra* note 75 at 267.
[236] Dinan, *supra* note 2 at 1638 (2011).
[237] Jefferson, *supra* note 50.

political climate,[238] with a Republican Party agenda dominated by the increasingly influential libertarian Tea Party, this is arguably what Jason Frank[239] would call ña constituent momentò and therefore, a period of turbulence in federalism, American-style. Given the rise of popular constitutionalism and originalism,[240] 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 ñPopular Originalism? The Tea Party Movement and Constitutional Theory.ò[241] 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 (i.e. the idea that it is desirable for people other than judges to engage in constitutional interpretation). [242] 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:

[238] See, e.g., William A. Galston, *Political Polarization and the U.S. Judiciary*, 77 UMKC L. Rev. 307, 312-15 (2008) and Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 332 (2011) (ñ[O]ur radically polarized politics . . . reflect long-term structural and historical changes in American democracy that are likely to endure for some time to come.ò).
[239] JASON FRANK, CONSTITUENT MOMENTS: ENACTING THE PEOPLE IN POST REVOLUTIONARY AMERICA (2010).
[240] The term popular originalism is used by J. A. Goldstein, *Can Popular Constitutionalism Survive the Tea Party Movement?* 105 NORTHWESTERN U. L. REV. 288, 298 (2011).
[241] Rebecca E. Zietlow, *Popular Originalism? The Tea Party Movement and Constitutional Theory*, 64 FLA. L. REV. 483 (2012).
[242] *See* Larry D. Kramer, *Popular constitutionalism supra* note 220.

> 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.[243]

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 and constitutional conservatives have numerous issues of concern; controlled substances,[244] Second Amendment rights,[245] Right to Try,[246] immigration,[247] Agenda 21,[248] Common Core[249]. This debate deserves academic attention as it is likely to affect lawmakers and the broad U.S. political landscape in coming years with the potential to radically reshape our understanding of American federalism.[250] Perhaps more important than whether a state claimed to nullify the ACA is that some state legislators appeal to an interpretation of the

[243] Rebecca E. Zietlow, *supra* note 241 at 501 (2012).
[244] *See*, e.g., Cal. Health & Safety Code § 11362.5 (West 2007).
[245] Nine states have passed laws ñFirearms Freedom Acts (FFAs)ò which render federal laws regarding firearms inapplicable to firearms and ammunition produced, sold, and used exclusively within state borders. See, e.g., Wyo. Stat. Ann. § 6-8-404(a) (2013).
[246] ñRight to Tryò 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. *See Right to Try*, TENTH AMENDMENT CENTER, http://tracking.tenthamendmentcenter.com/issues/right-to-try/ (last visited Jan. 28, 2018).
[247] *See*, e.g., Support Our Law Enforcement and Safe Neighborhoods Act, ch. 113, Ariz. Sess. Laws 450 (2010) (codified as amended in scattered sections of Ariz. Rev. Stat. Ann. tits. 11, 13, 23, 28, and 41 (2010)).
[248] 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).
[249] 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).
[250] *See* also Austin Raynor *supra* note 33 at 614. ñNotwithstanding the threat of preemption, they are capable of generating significant effects in a variety of spheres, from federal enforcement policy to constitutional doctrine.ò

constitution according to which nullification is permitted.[251]As Dr. Alex Waddan argued, although such appeals are unlikely to result in the repeal of federal laws, they do place issues on the agenda that would not be there otherwise, often with the hope of scoring political points for negotiating with the federal government.

[251] *See* Landerson, *supra* note 99.

Chapter two: The Health Care Freedom Acts and Their Link with the Health Care Lawsuits in Arizona, Virginia and Missouri[252]

This case is not about whether the Act is wise or unwise legislation, or whether it will solve or exacerbate the myriad problems in our health care system. In fact, it is not really about our health care system at all. It is principally about our federalist system, and it raises very important issues regarding the Constitutional role of the federal government.

Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256, 1263 (N.D. Fla.)(2012)

Introduction

My search of ACA oppositional bills in the NCSL database revealed that some state legislatures did not limit themselves to the discussion of nullification bills but passed acts and constitutional amendments that explicitly prohibited the implementation of the individual mandate provision within their borders. This type of legislation takes the name of Health Care Freedom acts, i.e. state legislation in direct conflict with the individual mandate provision that explicitly aims at triggering a federal lawsuit.

This category of bills declares the right of residents to be free to choose whether to purchase health insurance. At first glance, these bills could fall in the category of ñneo-nullification billsò because they try to nullify the federal individual mandate provision according to which residents are required to carry health insurance. However, the main difference is that nullification bills are remonstrances; they declare state sovereignty and use statesô rights language whereas the Health Care Freedom acts are straight-forward prohibitions to implement the individual mandate in the state and, more importantly, they are fully-fledged legislation i.e.

[252] Extracts from this chapter were included in a paper ñThe Battle for a Constitutional Moment: State Legislative Opposition to the ACAò presented at the Political Science Association 67th Annual International Conference in April 2017.

acts. The legislatures passed these bills with the explicit intention of creating a justiciable conflict between federal and state law and they were meant to be part of a multi-state strategy. This is also the reason why they all take the same title: Health Care Freedom act. Furthermore, the analysis of the texts of the Health Care Freedom acts reveal the absence of typical nullification language, namely the express declaration of unconstitutionality of federal law. Timothy Sandefur observed, for example, that the Virginia Health Care Freedom Act did not constitute a nullification act because it ñmade no mention of ñstatesô rightsò or any sovereign authority to declare federal laws unconstitutional; it simply recognized and defined an individual right, one which is not conferred exclusively to federal protection.ò[253]

Did those statutes ever prevent the implementation of the individual mandate in the states? No, indeed they had no legal credibility. The main reason for their passage in certain state legislatures was, according to Prof. Dinan, to ñincrease the likelihood that the Court will deem such a challenge justiciable prior to 2014 when the individual mandate actually takes effect.ò[254]

In other words, 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. The strategist and promoter of this tactic was the American Legislative Exchange Council (ALEC) that provided state legislators with model legislation.

This chapter describes the phenomenon of the enactment of Health Care Freedom acts between 2010-2012 across the 50 states and their close relation to the subsequent lawsuits. The case studies of Arizona, Virginia and Missouri Health Care Freedom acts investigate the factors that influenced the enactment of the statutes, points the attention to the legal challenge that they had triggered and conclude on the role that they have played in the battle against the implementation of the health reform.

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[253] Timothy Sandefur, *State Standing to Challenge Ultra Vires Federal Action: The Health Care Cases and Beyond*, 23 U. FLA. J.L. & PUB. POLÔY 311, 326 (2012).

[254] Dinan, *supra* note 11 at 1661.

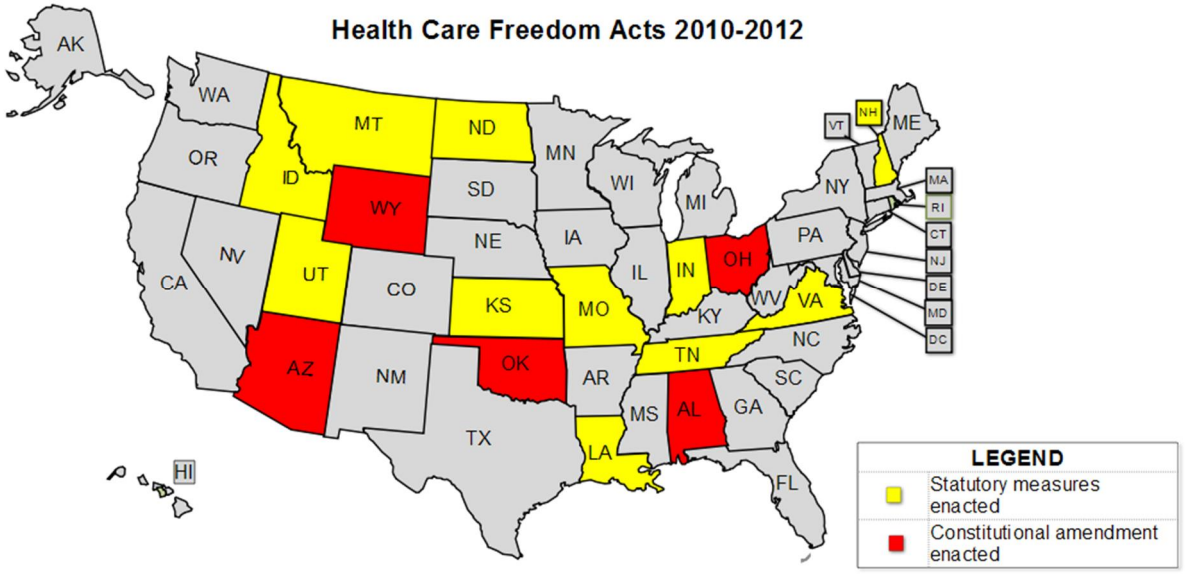
I. The Health Care Freedom Phenomenon

The label ñHealth Care Freedom of Choice Actsò identifies a certain category of bills enacted by 16 state legislatures between 2010-2012 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 health care system and would be free from the threat of penalty if they chose not to participate. However, since their declared objectives would have created an inevitable conflict with the federal requirement to carry health care insurance and such a conflict would have been resolved in favor of the federal law, it is somehow misleading to consider these measures as meaningless declaration of state sovereignty. Instead, the main argument put forward by this study is that the healthcare freedom acts were enacted in certain state legislatures with the main objective of sustaining a health care federal lawsuit and should therefore be considered in connection with the legal actions that they were meant to trigger.[255] This was particularly true in Virginia, Missouri and Arizona, as this work demonstrates.

The map below, created by the author with a map creator software, visualizes the Health Care Freedom acts phenomenon between 2010-2012. It distinguishes between yellow and red states: the 11 legislatures in yellow enacted statutory measures while the 5 legislatures in red passed constitutional amendments and submitted them to popular ballot. In certain legislatures, such as Florida and Colorado (Initiative 63 was on the November 2, 2010), the legislature passed a Health Care Freedom act but the constitutional amendment was not approved on the ballot.

[255] *See* Raynor, *supra* note 33 at 638 arguing that ñSovereignty laws can also have a significant effect on constitutional adjudicationò.

1. Map of Health Care Freedom acts 2010-2012



Map created with SmartDraw software, © IDG

Table 2 reports the text of the enacted Health Care Freedom acts in chronological order. The order is dictated by the date of the passage of the bill in the state legislature and not by the actual enactment. This is because some bills, such as the Arizona bill (n.1), had been already passed by the legislature in June 2009 but only enacted in November 2010 after a ballot vote. Since this study aims at understanding the intentions of state legislators, I considered it necessary to prioritize an overview of the legislaturesô activity which then pointed to investigating the reciprocal influence of the legislatures on each other. My analysis below will consider whether the passage of a Health Care Freedom bill in one legislature influenced the introduction of a similar bill in another legislature. Furthermore, as seen above, some bills were enacted as statutes and some others as constitutional amendments. Yet I did not consider it appropriate to examine them separately and have included statutes and constitutional amendments in the same table. This provides the reader with a comprehensive portrait of the phenomenon and aids a holistic analysis of the bills.

2. Table of Health Care Freedom Acts wording

Typology	State	Health Care Freedom Act wording
1 Constitutional amendment	Arizona November 2, 2010 on the ballot, Ariz. Const. art. XXVII, § 2 Resulting from 2009 HCR 2014, passed on Jun. 22, 2009.	Section 2. A. To preserve the freedom of Arizonans to provide for their health care: 1. A law or rule shall not compel, directly or indirectly, any person, employer or health care provider to participate in any health care system. 2. A person or employer may pay directly for lawful health care services and shall not be required to pay penalties or fines for paying directly for lawful health care services. A health care provider may accept direct payment for lawful health care services and shall not be required to pay penalties or fines for accepting direct payment from a person or employer for lawful health care services. B. Subject to reasonable and necessary rules that do not substantially limit a person's options, the purchase or sale of health insurance in private health care systems shall not be prohibited by law or rule.

2 Statute	**Virginia** Mar. 10, 2010 (2010 SB 283) Mar. 10, 2010 (2010 SB 311) Mar. 10, 2010 (2010 SB 417) Apr. 21, 2010 (2010 HB 10)	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.
3 Statute	**Idaho** Mar. 17, 2010 (2010 HB 391)	It is hereby declared that the public policy of the state of Idaho, consistent with our constitutionally recognized and inalienable rights of liberty, is that every person within the state of Idaho is and shall be free to choose or decline to choose any mode of securing health care services without penalty or threat of penalty by the

		federal government of the United States of America.
4 Statute	**Utah** Apr. 7, 2010 (2010 HB 67)	4) (a) An individual in this state may not be required to obtain or maintain health insurance as defined in Section 31A-1-301, regardless of whether the individual has or is eligible for health insurance coverage under any policy or program provided by or through the individual's employer or a plan sponsored by the state or federal government. (b) The provisions of this title may not be used to hold an individual in this state liable for any penalty, assessment, fee, or fine as a result of the individual's failure to procure or obtain health insurance coverage.
5 Statute	**Missouri** August 3, 2010 passed referendum. Resulting from May 11, 2010 (2010 HB 1764)	1.330. 1. No law or rule shall compel, directly or indirectly, any person, employer, or health care provider to participate in any health care system. 2. A person or employer may pay directly for lawful health care services and shall not be required by law or rule to pay penalties or fines

		for paying directly for lawful health care services.
6 Constitutional Amendment	**Oklahoma** Constitutional Amendment approved on November 2, 2010 on the ballot. Okla. Const. art. II, § 37 Resulting from 2010 SJR 59 passed on May 26, 2010 bill approved.	B. To preserve the freedom of Oklahomans to provide for their health care: 1. A law or rule shall not compel, directly or indirectly, any person, employer or health care provider to participate in any health care system; and 2. A person or employer may pay directly for lawful health care services and shall not be required to pay penalties or fines for paying directly for lawful health care services. A health care provider may accept direct payment for lawful health care services and shall not be required to pay penalties or fines for accepting direct payment from a person or employer for lawful health care services. C. Subject to reasonable and necessary rules that do not substantially limit a person's options, the purchase or sale of health insurance in private health care systems shall not be prohibited by law or rule.

7 Statute	**Louisiana** Jul. 2, 2010 (2010 HB 1474)	It is hereby declared that the public policy of this state, consistent with our constitutionally recognized and inalienable right of liberty, is that every person within this state is and shall be free from governmental intrusion in choosing or declining to choose any mode of securing health insurance coverage without penalty or threat of penalty
8 Statute	**Wyoming** Constitutional Amendment approved on November 6, 2012 Wyo. Const. art. I, § 38 Resulting from 2011 SJR 2 passed on February 19, 2011.	§ 38. Right of health care access Currentness (a) Each competent adult shall have the right to make his or her own health care decisions. The parent, guardian or legal representative of any other natural person shall have the right to make health care decisions for that person. (b) Any person may pay, and a health care provider may accept, direct payment for health care without imposition of penalties or fines for doing so. (c) The legislature may determine reasonable and necessary restrictions

		on the rights granted under this section to protect the health and general welfare of the people or to accomplish the other purposes set forth in the Wyoming Constitution. (d) The state of Wyoming shall act to preserve these rights from undue governmental infringement.
9 Statute	**Tennessee** Mar. 23, 2011 (2011 SB 79)	It is declared that the public policy of this state, consistent with our constitutionally-recognized and inalienable right of liberty, is that every person within this state is and shall be free to choose or to decline to choose any mode of securing healthcare services without penalty or threat of penalty; provided, however, the provisions of Titles 36 and 56 concerning requirements for healthcare coverage of children in child support cases shall not be altered in any manner by the provisions of this section.
10 Statute	**Montana** Apr. 5, 2011 (2011 SB 418)	The state or federal government may not: (a) mandate or require a person or entity to purchase health insurance coverage as defined in 33-22-140; or

		(b) impose a penalty, tax, fee, or fine of any type if a person or entity declines to purchase health insurance coverage.
11 Statute	**Indiana** May 12, 2011 (2011 SB 461)	Notwithstanding any other law, a resident of Indiana may not be required to purchase coverage under a health plan
12 Constitutional Amendment	**Alabama** Constitutional Amendment approved on Nov. 6, 2012 on the ballot. Ala.Const. Art. I, § 36.04 Alternatively cited as AL CONST Amend. No. 86 Resulting from 2011 HB 60 passed on Jun. 09, 2011.	Sec. 36.04. Mandatory participation in health care system prohibited. 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. A health care provider may accept direct payment for lawful health care services and shall not be required to pay penalties or fines for accepting direct payment from a person or employer for lawful health care services.

		(c) The purchase or sale of health insurance in private health care systems shall not be prohibited by law or rule.
13 Statute	**North Dakota** Jul. 07, 2011 (2011 H 1165)	The resident is not required to obtain or maintain a policy of individual health coverage except as may be required by a court or by the department of human services through a court or administrative proceeding. 2. This section does not render a resident of this state liable for any penalty, assessment, fee, or fine as a result of the resident's failure to procure or obtain health insurance coverage
14 Statute	**New Hampshire** Jul. 14, 2011 (2011 SB 148)	No resident of this state, regardless of whether he or she has or is eligible for health insurance coverage under any policy or program provided by or through his or her employer, or a plan sponsored by the state 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 health and human 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 state liable for any penalty, assessment, fee, or fine as a result of his or her failure to procure or obtain health insurance coverage.
15 Statute	**Kansas** Aug. 10, 2011 (2011 HB 2182)	A resident of this state has the right to purchase health insurance or refuse to purchase health insurance. The government shall not interfere with a resident's right to purchase health insurance or with a resident's right to refuse to purchase health insurance.
16 Constitutional Amendment	**Ohio** Constitutional Amendment approved on Nov. 8, 2011 (2011 Issue 3- citizen initiated constitutional amendment) Ohio Const. Article I, Section 21	OH Const. Art. I, § 21 O Const I Sec. 21 Preservation of the freedom to choose health care and health care coverage Section 21*(A) No federal, state, or local law or rule shall compel, directly or indirectly, any person, employer, or health care provider to participate in a health care system. Section 21*(B) No federal, state, or local law or rule shall prohibit the

		purchase or sale of health care or health insurance. Section 21*(C) No federal, state, or local law or rule shall impose a penalty or fine for the sale or purchase of health care or health insurance.

The first state to pass a Health Care Freedom act was Arizona (2009 HCR 2014 passed on Jun. 22, 2009 and constitutional amendment approved on November 2, 2010 on the ballot). Arizona was followed by the legislatures of Virginia (2010 SB 283- 2010 SB 311- 2010 SB 41, 7 Mar. 10, 2010) and Idaho (2010 HB 391, Mar. 17, 2010). It should be noted that the first three Health Care Freedom acts were enacted before the actual passage of the ACA (signed into law by President Barack Obama on March 23, 2010).[256] Arguably, instead of fighting an enacted piece of legislation, states were sending a message to Washington and equipping themselves to promptly resist the passage of the ACA with a lawsuit. Circuit Judge Diana Gribbon Motz noted that the Virginia legislature had considered its Health Care Freedom Act well before the enactment of the ACA and that the Virginia Governor Bob McDonnell signed the bill hours after Obama signed the ACA: ñVirginia filed this action on March 23, 2010, the same day that the President signed the Affordable Care Act into law. The Governor of Virginia did not sign the VHFCA into law until the next day.ò[257] This preventive push back strategy is key to understand the dynamic of state resistance especially in its relation to subsequent legal actions.

[256] The preventive passage of bills that conflict with anticipated federal polices is a technique that the states have used also in relation to the possibility that the Obama administration could enact gun laws.
[257] Virginia ex rel. Cuccinelli v. Sebelius, 656 F.3d 253, 267 (4th Cir. 2011). The bill history reported by the Virginia Legislature (http://lis.virginia.gov/cgi-bin/legp604.exe?ses=101&typ=bil&val=sb417) shows the bill as enacted on Mar. 3, 2010 but the actual signature might have been delayed.

The link with the lawsuits is particularly emphasized by the Idaho Healthcare Freedom Act which explicitly called for the Attorney Generalôs action: ñThe attorney general shall take such action as is provided in section 67-1401(15), Idaho Code, in the defense or prosecution of rights protected under this act.ò[258]

On Apr. 7, 2010 the Utah legislature passed its Health Care Freedom act and it was followed in May by the Missouri statute (2010 HB 1764). Oklahomaôs legislature passed a constitutional amendment on May 26, 2010 and the same was approved on the ballot on Nov. 2, 2010. In Colorado a citizen initiative proposed constitutional amendment was rejected on the November ballot. The last state legislature to pass a Health Care Freedom Act in 2010 was Louisiana (2010 HB 1474, Jul. 2, 2010).

The situation in Florida was unique: the Health Care Freedom Act (2010 HJR 37), a proposed amendment to the State Constitution, was approved by the legislature for inclusion on the November 2, 2010 general election ballot but it was challenged in court for its controversial language that was deemed by plaintiffs to be ñpolitical rhetoric that invites an emotional response from the voter materially misstating the substance of the amendment.ò[259] The wording of the amendment resembled the measures enacted in other states[260] but the actual ballot question was construed in a way that the Leon County Circuit Court[261] deemed violated the requirements of Florida Statute 161.101(1), [262] according to which ballot questions should contain clear and unambiguous language. The Florida Supreme Court struck down the

[258] Idaho Code Ann. § 39-9004 (West).
[259] Mangat v. Dept. of State, 2010 WL 6331989 (Fla.Cir.Ct.) (Trial Order).
[260] The amendment read: ñHEALTH CARE SERVICES.--Proposing an amendment to the State Constitution to prohibit laws or rules from compelling any person, employer, or health care provider to participate in any health care system; permit a person or employer to purchase lawful health care services directly from a health care provider; permit a health care provider to accept direct payment from a person or employer for lawful health care services; exempt persons, employers, and health care providers from penalties and fines for paying or accepting direct payment for lawful health care services; and permit the purchase or sale of health insurance in private health care systems.ò
[261] *Id.*
[262] Fla. Stat. Ann. § 101.161 (West) requires ñclear and unambiguous languageò.

amendment on Aug. 31, 2010, holding that the ballot summary was misleading in providing that the amendment would ensure ñaccess to health care without waiting listsò, would ñprotect the doctor-patient relationshipò and that it constituted ambiguous political rhetoric when it referred to the amendment as a ñguard against mandates that don't workò.[263] Two similar bills (FL S2 and FL H 1193) were enacted in May 2011 and June 2011 proposing another constitutional amendment. They were presented in the November 6, 2012 state ballot as the Florida Healthcare Amendment but were defeated by 51.5% of votes. Health care freedom legislation was never approved in Florida but the same state led the biggest multi-state lawsuit across the nation and was joined by 25 other states in a case that reached the Supreme Court: *National Federation of Independent Business v. Sebelius*.[264]

Wyoming opened 2011 with a Senate Joint Resolution passed on Feb. 19, 2011 and was followed by Tennessee (2011 SB 79) and Montana (2011 SB 418). The Montana statute was enacted on Apr. 5, 2011 —before the *Sebelius* decisionð and passed the ballot on November 6, 2012 ð after the *Sebelius* decisionð with 318,612 votes in favor and 155,536 against.[265] The statute provided ñThe state or federal government may not:(a) mandate or require a person or entity to purchase health insurance coverage as defined in 33-22-140; or (b) impose a penalty, tax, fee, or fine of any type if a person or entity declines to purchase health insurance coverage.ò[266] The bill was authored by republican Sen. Art Wittich who presented it to the Senate Committee on Business, Labor and Economic Affairs on 03/23/2011 as a measure aimed at creating a justiciable case that would reach the Supreme Court and that it was worth

[263] Florida Depôt of State v. Mangat, 43 So. 3d 642 (Fla. 2010).
[264] 567 U.S. 519 (2012). The lawsuit started in the District Court for the Northern District of Florida, No. 3:10-CV-00091-RV-EMT, with Bondi v. U.S. Dept. of Health and Human Services, brought by the Attorneys General and/or Governors of twenty-six states, two private citizens and the National Federation of Independent Business (ñNFIBò).
[265] Source: Montana Secretary of State General Election Canvass sos.mt.gov/elections/2012/2012_General_Canvass.pdf.
[266] S. 418, 62nd Leg., Reg. Sess. (Mont. 2011).

to fight.[267] This is an explicit declaration of intent and a fundamental evidence of the assumption that the main objective was to provide support in a health care federal lawsuit .

On May, 10 2011 the Indiana Governor signed a bill titled ñHealth Care Reform Mattersò which was effectively another way to call a Health Care Freedom act. The statute had been worded to explicitly invalidate the individual mandate provision of the ACA as it read ñnotwithstanding any other law, a resident of Indiana may not be required to purchase coverage under a health planò. It is clear that the Indiana legislature referred to the ACA when it mentioned ñany other lawò and the act was therefore targeting a specific piece of legislation. The Indiana Legislature also considered a constitutional amendment (2010 Senate Joint Resolution 14) but the bill remained in the Senate Committee on Judiciary as the legislature adjourned and no action was ever taken.

The Alabama Legislature passed its health care constitutional amendment (2011 HB 60) on Jun. 09, 2011 followed by the statutes of North Dakota on Jul. 07, 2011 (2011 H 1165), New Hampshire on Jul. 14, 2011 (2011 SB 148) and Kansas on Aug. 10, 2011 (2011 HB 2182).

The last state to pass a health care freedom act was Ohio with a citizen initiated constitutional amendment (2011 Issue 3) that was approved on the Nov. 8, 2011 ballot. The measure was not followed by a lawsuit and initially the state did not join the multi-state lawsuit mainly because of the opposition of Ohio Attorney General Richard Cordray who believed the lawsuits were ñwithout merit and would be a waste of taxpayer dollarsò. However, Ohio eventually joined the Florida multi-state lawsuit together with Kansas and Wisconsin.[268]

[267] *Id.* , *House Committee on Business and Labor*, MONTANA LEGISLATURE (Apr. 5, 2011) http://montanalegislature.granicus.com/MediaPlayer.php?clip_id=5185&meta_id=55419 between 00:49:50 ï 00:50:50.

[268] Second Amended Complaint, Florida ex rel. Bondi v. U.S. Dept. of Health & Hum. Servs., 780 F. Supp. 2d 1256 (N.D. Fla. 2011) (No. 3:10-cv-91).

Finally, a note on the Georgia battle against the ACA. In Georgia there had been a series of failed Health Care Freedom bills.

(2010) GA SR 794-- 01/11/2010

(2011) GA SR 55-- 01/26/2011

(2013) GA SR 99-- 01/29/2013

(2014) GA H 707-- 02/18/2014

2014 GA H 707 --- 01/13/2014[269]

In Apr. 15th 2014 the legislature passed a much moderate Health Care Freedom Act[270] (HB 707 then incorporated into HB 943)[271] but this study has not included the measure in the list of Health Care Freedom acts because its wording was limited to a declaration that the state would not have use its resources to implement the ACA and there was no explicit rejection of the individual mandate requirement. It seemed therefore more appropriate to consider this act as Anti-Commandeering legislation:

> Neither the state nor any department, agency, bureau, authority, office, or other unit of the state nor any political subdivision of the state shall expend or use moneys, human resources, or assets to advocate or intended to influence the citizens of this state in support of the voluntary expansion by the State of Georgia of eligibility for

[269] Prohibits powers, assets, employees, agents, or contractors of the state or any political subdivision, municipality, or other local government authority from engaging in an activity that aids any agency in the enforcement of provisions of the federal Patient Protection and Affordable Care Act of 2010; prohibits establishment of a health care exchange for the purchase of health insurance, participation in or purchase of insurance from a health care exchange established by a nonprofit organization.
[270] 2014 Ga. Laws 243; O.C.G.A. §§ 31-1-40, -23 (Supp. 2014).
[271] For an analysis of the legislative history *see* Walter S. Freitag and Jason D. Freiman, *Health*, 31 Ga. St. U. L. Rev. 113 (2014).

medical assistance in furtherance of the federal ñPatient Protection and Affordable Care Actòé [272]

Anti-Commandeering legislation will be further examined in Chapter III.

II. The Link Between Legislation and Constitutional Adjudication

It has been argued that sovereignty laws ñcan 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.ò[273] In the case of Arizona, Virginia and Missouri Health Care Freedom legislation and litigation were closely interrelated. Arizonaôs plaintiffs claimed that the Arizona Health Care Freedom Act would have offered protection from the individual mandate and federal law did not pre-empt this particular state legislation;[274] the Commonwealth of Virginia used the Virginia Health Care Freedom Actôs conflict with the provisions of the ACA to claim standing ñto defend its legislative enactmentsò[275] and Missouri plaintiffs alleged the violation of the Due Process Clause because the ACA ñPPACA violates these Missouri citizensô right to determine their own appropriate health care, a right they have under Missouri's Health Care Freedom Act.ò[276] With regard to the other states that passed health care freedom act legislation but did not file any lawsuit, Prof. John Dinan noted that their legislation was aimed at increasing

[272] Ga. Code Ann. § 31-1-40 (West).
[273] Raynor, *supra* note 33 at 638.
[274]Coons v. Geithner, No. CV-10-1714-PHX-GMS, 2012 WL 6674394, at *1 (D. Ariz. Dec. 20, 2012), aff'd sub nom. Coons v. Lew, 762 F.3d 891 (9th Cir. 2014), as amended (Sept. 2, 2014).
[275] Virginia ex rel. Cuccinelli v. Sebelius, 702 F. Supp. 2d 598, 603 (E.D. Va. 2010), rev'd, 656 F.3d 253 (4th Cir. 2011).
[276] Peter D. KINDER, Missouri Lieutenant Governor, Dale Morris, Robert O. Osborn, Geraldine F. Osborn, Samantha Hill, Julie Keathley, individually and as parent and guardian for M.K, her minor son, Plaintiffs, v. Timothy F. GEITHNER, Secretary of Treasury, Kathleen Sebelius, Secretary of HHS, Eric H. Holder, Jr., Attorney General, Hilda L. Solis, Secretary of Labor, Defendants., 2010 WL 4063085 (E.D.Mo.).

the chances for a successful Supreme Courtôs case and to present the Court with an opportunity to rule on the Commerce Clause doctrine:

> Although a lawsuit presenting a challenge to the constitutionality of the ACA could be filed in the absence of these state acts--and in fact, the multi-state suit includes a number of plaintiff states that have not yet passed such acts-- the purpose of these state acts, which by themselves are seemingly preempted by the ACA and therefore have no independent meaningful effect, is to increase the likelihood that the Court will deem such a challenge justiciable prior to 2014 when the individual mandate actually takes effect.[277]

Another possibility, as Austin Raynor pointed out, is that state legislatures expected to catalyze a flood of private lawsuits[278] that never took place. Instead, the big battle was fought by twenty-six states, several individuals, and the National Federation of Independent Business in the federal courts[279] and eventually in the Supreme Court.[280]

The following sections analyze the circumstances in which Arizona, Virginia and Missouri passed their Health Care Freedom acts and their relation with the lawsuits.

Arizona Health Insurance Reform Amendment

Arizona had been at the forefront of the opposition to the requirement to carry health insurance since 2008 when a citizen initiated constitutional amendment ñFreedom to Choose Actò sought

[277] Dinan, *supra* note 2 at 1663 (2011). Prof. Dinan also referred to the declaration of Alabama state senator Scott Beason in a news account by David White, *Alabama Senate Passes Health Care Opt-Out Bill*, BIRMINGHAM NEWS (April 1, 2010), available at http:// blog.al.com/spotnews/2010/04/senate_passes_health_care_opt-.html: ñBeason said his bill or a similar bill from another state could serve as a vehicle for a court challenge claiming the health care law violated the U.S. constitution's 10th amendment.ò

[278] *Supra* note 33 at 613.

[279] The lawsuit started in the District Court for the Northern District of Florida: Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256 (N.D. Fla.) and was appealed in the Court of Appeals for the Eleventh Circuit: Florida ex rel. Atty. Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011).

[280] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

to prevent the legislature from introducing a state health insurance mandate. The amendment was narrowly rejected at the 2008 November ballot[281] but in 2009, when the enactment of the ACA was imminent, the legislature considered a similar Health Care Freedom constitutional amendment (Proposition 106-2009 HCR 2014). The measure, sponsored by Rep. Barto, was first passed by the Arizona State Senate and the Arizona House of Representatives and then submitted for approval at the 2010 ballot where it was approved.

The text of the amendment, that today constitutes Art. XXVII, section 2 of the Arizona Constitution, reads:

> Section 2. A. To preserve the freedom of Arizonans to provide for their health care:
>
> 1. A law or rule shall not compel, directly or indirectly, any person, employer or health care provider to participate in any health care system.
>
> 2. A person or employer may pay directly for lawful health care services and shall not be required to pay penalties or fines for paying directly for lawful health care services. A health care provider may accept direct payment for lawful health care services and shall not be required to pay penalties or fines for accepting direct payment from a person or employer for lawful health care services.[282]

In this state, the anti-ACA constitutional amendment was followed by a lawsuit, *Coons et al v. Geithner et al*[283] in the United States District Court for the District of Arizona. The lawsuit has been called the ñGoldwater suitò[284] as it was mainly orchestrated by the Goldwater Institute, a

[281] *See* Dinan, *supra* note 2 at 1660 (2011) citing data from 2008 General Election, Ariz. Sec. of State, http://www.azsos.gov/results/2008/general/BM101.htm (last updated Nov. 25, 2008).
[282] See Ariz. Rev. Stat. (ñA.R.S.ò) § 36ï 1301; ARIZ. CONST. XXVII, § 2(A).
[283] Coons v. Geithner, Not Reported in F.Supp.2d- No. CV-10-1714-PHX-GMS, 2012 WL 6674394, at *1 (D. Ariz. Dec. 20, 2012), aff'd sub nom. Coons v. Lew, 762 F.3d 891 (9th Cir. 2014), as amended (Sept. 2, 2014).
[284] Matthew R. Farley, Challenging Supremacy: Virginia's Response to the Patient Protection and Affordable Care Act, 45 U. RICH. L. REV. 37, 62 (2010)

Phoenix based think-tank. The plaintiffs were Nick Coons (a citizen of Arizona with no private medical insurance) and two members of the United States House of Representatives, Jeff Flake and Trent Franks. The close relationship between state legislation and lawsuits is exemplified by the fact that the plaintiffs sought a declaration that the Arizona Act was not pre-empted by the Affordable Care Act.[285] The other grounds of the claims included the alleged violation of Article I legislative power under the Commerce Clause, Necessary and Proper Clause, Spending Clause, and taxation power. District court judge G. Murray Snow dismissed plaintiffs' claims on Aug. 31, 2012, holding his decision until the Supreme Court issued the *Sebelius* decision. On appeal, Circuit Judge Susan P. Graber affirmed the district court decision in part and ruled that the Arizona Health Care Freedom Act was preempted:

> The Arizona Act provides that its citizens may forego minimum health insurance coverage and abstain from paying any penalties, Ariz. Const. art. XXVII, § 2, which is exactly what the individual mandate requires. The Arizona Act thereby stands as an obstacle to Congress' objective to expand minimum essential health coverage nationwide through the individual mandate, 26 U.S.C. § 5000A, and is, therefore, preempted under the Supremacy Clause.[286]

The lawsuit was a failure for the proponents of the legal challenge and the supporters of the Health Care Freedom Act who saw their whole strategy struck down by the courts. Josh Blackman noted that Governor Brewer changed her attitude towards the ACA immediately

[285] Coons v. Geithner, No. CV-10-1714-PHX-GMS, 2012 WL 3778219, at *1 (D. Ariz. Aug. 31, 2012), aff'd in part, vacated in part sub nom. Coons v. Lew, 762 F.3d 891 (9th Cir. 2014), as amended (Sept. 2, 2014).
[286] Coons v. Lew, 762 F.3d 891, 902 (9th Cir. 2014), as amended (Sept. 2, 2014), cert. denied, 135 S. Ct. 1699, 191 L. Ed. 2d 675 (2015).

after the *Sebelius* decision; she chose to participate in a federally facilitated exchange and expanded Medicaid in 2013.

> One of the first governors to push back against the Medicaid expansion was Arizona Governor Jan Brewer. Brewer vigorously opposed Obamacare for nearly three years. However, after the Court upheld the law, and gave states the option to opt into the Medicaid expansion, Brewer pulled a 180, and supported joining Obamacare.[287]

Other scholars have suggested that her decision to participate in a federally facilitated exchange was a political strategy dictated ñby the desire to see the exchange experiment fail, label that failure as a matter of poor federal management, and thereby damage the ACA, particularly the exchange component.ò[288]

The Virginia Health Care Freedom Act (VHCFA)

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.[289] Three identical bills were filed by different sponsors in the Senate: SB 283,[290] 311,[291] 417. [292]

[287] Josh Blackman, *Obamacare Comes Full Circle in Arizona,* Josh Blackmanôs blog (Sep. 12, 2013), http://joshblackman.com/blog/2013/09/12/obamacare-comes-full-circle-in-arizona/.
[288] John Stuart Hall & Catherine R. Eden, Arizona: Round 1, State-Level Field Network Study of the Implementation of the Affordable Care Act, ROCKEFELLER INSTITUTE OF GOVERNMENT (Mar, 2014).
[289] SB 283, 311, 417 (identical but sponsored by three different senators), HB 10, HB 722 (these bills contain a slightly stronger language and invoked ña personós natural right and power of contract to secure the blessings of libertyò. After their passage in the House, were revised by the Senate to be identical to SB 283, 311, 417), HJR 7 (amendment to art. 1 of the Virginia Constitution, failed in the House Privileges and Elections committee. For a report of the texts and circumstances of the passages of these bills *see* Shirley p 53-55.
[290] S. 283, 2010 Leg., (Va.2010).
[291] S. 311, 2010 Leg., (Va.2010).
[292] S. 417, 2010 Leg., (Va.2010).

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.[293]

Two constitutional amendments were considered by the House, HB722[294] and HB10.[295] The text of HB10 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.[296]

The final version of the House bill, passed in February 2010, was identical to the above-mentioned Senate Bills.

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[293] *Id.*
[294] H.D. 7, 2010 Leg., Reg. Sess. (Va.2010).
[295] H. 10, 2010 Leg., Reg. Sess. (Va.2010) (enacted as Act of Apr. 21, 2010, ch. 818, 2010 Va. Acts ___).
[296] *Id.*

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 but failed in the House Privileges and Elections committee in mid-February, and it was never taken up again because the lawsuit was already in advanced stage.[297]

The first bill to pass in the Senate was SB 417 (the Virginia Health Care Freedom Act). The bill was introduced on 13th Jan. 2010 by Senator Jill Holtzman Vogel, [298] an affirmed attorney with national reputation and native Virginian who also served as Deputy General Counsel at the Department of Energy.[299] 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. SB 417 was approved by the Committee on Commerce and Labor and also passed the Senate of Virginia on February 1, 2010 with a vote of 23-Y and 17-N.[300] The discussion around the bill in the Senate was minimal because it followed a broad discussion of the other identical bill ð SB 283ð sponsored by Senator Frederick M. Quayle from Suffolk. During the discussion about SB 283 the sponsor commented: ñthis 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 anythingé ò.[301] The bill was criticized by democratic senators such as Senator Petersen from Fairfax who expressed concerns that the measure ñwould create problems in situations when ð as part of a divorce

[297] See Matthew R. Farley, Challenging Supremacy: Virginia's Response to the Patient Protection and Affordable Care Act, 45 U. Rich. L. Rev. 37, 56ï 57 (2010).
[298] *See* S. JOURNAL, Senate of Va., Reg. Sess. ___ (2010), available at http://lis.virginia.gov/cgi-bin/legp604.exe?ses=101&typ=bil&val=sb417.
[299] *See* Sen. Jill Holtzman Vogel website, http://www.senatorjillvogel.com/about/.
[300] *See* S. JOURNAL, Senate of Va., Reg. Sess. ___ (2010), available at http://lis.virginia.gov/cgi-bin/legp604.exe?ses=101&typ=bil&val=sb417.
[301] Video of *02/01/2010 Senate Proceedings*, RICHMOND SUNLIGHT (Feb. 1, 2010) at 24 min., https://www.richmondsunlight.com/minutes/senate/2010/02/01/.

settlementð a Court requires to provide health insurance for a minor children or when an organization such an athletic club that requires its members to carry health insuranceò[302] and Senator Saslaw from Fairfax who, pointing to the U.S. Constitution Supremacy clause, belittled the bill as ñnot worth the paper it is written onò and ñabsolutely meaninglessò.[303]

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.[304] The three bills received harsh comments from some democratic representatives such as Joseph D. Morrissey from Henrico: 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 valueò.[305]

Governor Bob McDonnell subsequently made recommendations to this bill, including the exemptions that the democratic senators pointed to during the senate discussion. [306] The recommendation was agreed to by the Senate of Virginia on March 4, 2010 with a vote of 25-Y and 15-N. The House of Delegates also agreed to the Governor Bob McDonnell 's recommendation on March 10, 2010 with a vote of 90-Y and 3-N. 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

[302] *Id* at 28.
[303] *Id* at 33.
[304] 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.
[305] Video of *02/12/2010 House Proceedings*, RICHMOND SUNLIGHT (Feb. 12.2010) at 28 min. https://www.richmondsunlight.com/minutes/house/2010/02/12/.
[306] The Governor recommended adding that the provision did not exempt from the requirement to carry health insurance in two circumstances:

1. when required by a court or the Department of Social Services. 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. students, when required by universities as a condition of enrollment. 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.

by the Governor, it became law without his signature when the House of Delegates adopted the Governor's amendment on March 10, 2010.[307]

In the event, Bills SB283 (Chapter 106, 2010 Acts of Assembly), SB311 (Chapter 107, 2010 Acts of Assembly), SB417 (Chapter 108 of the 2010 Acts of Assembly) and HB10 (Chapter 818, 2010 Acts of Assembly) were signed in a signing ceremony held in the Governor's Cabinet conference room in the Patrick Henry Building on Capitol Square. Of particular significance was the presence of Attorney General Ken Cuccinelli who commented ñVirginians 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 todayò.[308] 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. On the face, however, the legislation was praised by Lieutenant Governor Bill Bolling[309] for sending a message to Washington and for asserting Virginiaôs right to refuse the implementation of the individual mandate provision:

> Needless to say, I was very disappointed to see the United States Congress turn the cheek of indifference to the will of the American people and approve a massive federal takeover of our healthcare delivery system. However, here in Virginia we have sent a strong message that we want no part of this national fiasco. By signing these bills today, we affirm that in Virginia we will not stand idly by and allow any level of government to force our citizens to obtain health insurance against their will. We believe that this is a clear overreaching of the federal government's

[307] Kenneth T. Cuccinelli, II et. al., *State Sovereign Standing: Often Overlooked, but Not Forgotten*, 64 Stan. L. Rev. 89, 92 (2012)
[308] 2010 VA S 283: Governor's Message - 05/24/2010 available through StateNet on VA S 283 page.
[309] He was unable to attend the ceremony due to an unavoidable scheduling conflict.

authority, and we again assert that decisions of this nature should be made on the state level, not in Washington. DC.[310]

The legislation was codified under Virginia Code Section 38.2ï 3430.1:1 (2010) and was effective on July 1, 2010. [311] The final text of the provision is reported below, with the final amendments (exceptions to the exemption) requested by the Governor in italics.

§ 38.2-3430.1:1. Health insurance coverage not required.

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*.ò[312]-

[310] Id.
[311] The history of passage of SB 437 is also commented by Farley, *supra* note 297.
[312] Va.Code Ann. § 38.2ï 3430.1:1.

This provision is directly (and purposely) in conflict with the individual mandate, Section 1501 of the Patient Protection and Affordable Care Act. 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 ñsovereign injuryò and that the individual mandate conflicted with its ñexercise of sovereign power over individuals and entities within the relevant jurisdiction,ò which ñinvolves the power to create and enforce a legal code.ò[313] He emphasized that Virginia had standing ñsolely because of the asserted conflict between that federal statute and the VHCFAò.[314]

The lawsuit started in the District Court for the Eastern District of Virginia on March 23, 2010, the same day that President Obama signed the Affordable Care Act into law against the Department of Health and Human Services Secretary *Sebelius*. A similar multi-state lawsuit was filed on the same day in Florida but Cuccinelliôs rationale for filing apart from McCollum and the other attorneys general was to take advantage of the Eastern District of Virginiaôs renowned speedy resolution of civil litigation sometimes mocked as ôRocket Docketô.[315] The complaint requested declaratory and injunctive relief from the individual mandate and asked the Court ñto declare that § 1501 of PPACA is unconstitutional because the individual mandate

[313] Virginia ex rel. Cuccinelli v. Sebelius, 656 F.3d 253, 268 (4th Cir. 2011) 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).

[314] Id.

[315] The Eastern District of Virginia is known as the ñRocket Docketò for its speedy disposition of cases and controversies.

exceeds the enumerated powers conferred upon Congress.ò[316] The main issue to resolve was whether Virginia could claim standing on its own and not on behalf of any individual.[317]

Cuccinelliôs case was heard by District Judge Henry E. Hudson who held that the VHCFA provided Virginia with standing:[318] ñThe 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 itò[319] and that the individual mandate was unconstitutional.

The decision of Judge Hudson was a victory for Attorney General Ken Cuccinelliôs strategy and it provided hopes across the 50 states for a repeal of the ACA. However, the defendant appealed and on September 8, 2011 and Circuit Judge Diana Gribbon Motz held that Virginia could not challenge the ñindividual mandateò provision for lack of Article III standing[320] and dismissed this case: ñBecause 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.ò[321] The Judge expressly avoided ruling on the constitutionality of the individual mandate ñBecause we hold that Virginia lacks standing, we cannot reach the question of whether the Constitution authorizes Congress to enact the individual mandate.ò[322] and defined the VHCFA ña smokescreen for Virginia's attempted vindication of its *citizens'* interests.ò[323]

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[316] Complaint for Declaratory and Injunctive Relief, Complaint for Declaratory and Injunctive Relief COMMONWEALTH OF VIRGINIA ex rel. Kenneth T. Cuccinelli, II, in his official capacity as Attorney General of Virginia, Plaintiff, v. Kathleen SEBELIUS, Secretary of the Department of Health and Human Services, in her official capacity, Defendant., 2010 WL 3875236 (E.D.Va.) 20.

[317] See also Timothy Sandefur, State Standing to Challenge Ultra Vires Federal Action: The Health Care Cases and Beyond, 23 U. Fla. J.L. & Pub. Polôy 311, 312 (2012).

[318] For an account of the standing issues at stake *see* Raynor, *supra* note 33 at 640.

[319] Virginia ex rel. Cuccinelli v. Sebelius, 702 F. Supp. 2d 598, 605-06 (E.D. Va. 2010), rev'd, 656 F.3d 253 (4th Cir. 2011).

[320] 656 F.3d 253, 4th Cir.(Va.), Sep. 08, 2011.

[321] Virginia ex rel. Cuccinelli v. Sebelius, 656 F.3d 253, 267 (4th Cir. 2011).

[322] Virginia ex rel. Cuccinelli v. Sebelius, 656 F.3d 253, 267 (4th Cir. 2011).

[323] Virginia ex rel. Cuccinelli v. Sebelius, 656 F.3d 253, 269 (4th Cir. 2011).

Virginia failed in its attempt to struck down the individual mandate[324] provision but other states attempted the same strategy.

The Missouri Health Care Freedom Act

Representative John Diehl (R-87) introduced the Missouri Health Care Freedom Act (House Bill 1764), also known as Proposition C, on Jan. 21, 2010.[325] The introduced bill concerned the liquidation of domestic insurance companies[326] but ð with the proposal of State Senator Jane Cunningham, an ALEC board memberð it was amended (substituted)[327] to include the prohibition of the individual mandate on May 4, 2010. The resulting bill was therefore composed of two parts: the prohibition of the individual mandate and the provision on insurance companiesô liquidation. The bill was passed by both Senate and House on May 11, 2010[328] and, because of its controversial nature, was referred for submission to the state-wide ballot taking place on August 3, 2010.[329] The language of the ballot was: ñShall the Missouri Statutes be amended to: Deny the government authority to penalize citizens for refusing to purchase private health insurance or infringe upon the right to offer or accept direct payment for lawful healthcare services?ò[330]

[324] Another case challenging the individual mandate as unconstitutional was unsuccessfully brought before the attention of the Virginia courts: Liberty Univ., Inc. v. Geithner, 671 F.3d (4th Cir. 2011), cert. granted, judgment vacated sub nom. Liberty Univ. v. Geithner, 133 S. Ct. 679, 184 L. Ed. 2d 452 (2012) abrogated by Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012)

[325] H.R. Journal, 95th Gen. Assemb., 2d Reg. Sess. 128 (Mo. 2010).

[326] H.1764, 95th Gen. Assemb., 2d Reg. Sess. (Mo. 2010); Mo. Rev. Stat. § 375.1175 (2010).

[327] State Senator Jane Cunningham proposed a bill that substituted the original. For a brief history of the process leading up to Prop C's enactment *see* Raquel Frisardi, *Missouri's Health Care Battle and Differential Judicial Review of Popular Lawmaking*, 89 WASH. U.L. REV. 207, 211 (2011) ñSenator Cunningham's substitute language maintained the repeal of section 375.1175, but would also ñenact in lieu thereof two new sections relating to insurance, with a referendum clause.ò While the revised bill did not aim to amend the state constitution, it clearly adopted the language of Resolution 48.29 This revised bill would become known as the Health Care Freedom Act.ò

[328] *See* Missouri House Journal, 95th Mo. Leg., 2d Sess., p. 1458 (May 11, 2010).

[329] H. 1764, 95th Gen. Assemb., 2d Reg. Sess. (Mo. 2010): ñThis act is hereby submitted to the qualified voters of this state for approval or rejection at an election which is hereby ordered and which shall be held and conducted on Tuesday next following the first Monday in August, 2010, pursuant to the laws and constitutional provisions of this state for the submission of referendum measures by the general assembly, and this act shall become effective when approved by a majority of the votes cast thereon at such election and not otherwise.ò

[330] H. 1764, 95th Gen. Assemb., 2d Reg. Sess. (Mo. 2010).

Despite an initial litigation over the legitimacy of a referendum on a bill that included multiple subjects, violating the single subject rule, Proposition C was on the statewide ballot in Missouri, where it was approved with 669,073 yes (71.1%).[331] The primary advocacy group for the enactment of Proposition C is reported to be Missourians for Health Care Freedom (ñMHCFò) and it would seem that the group used the Tenth Amendment rhetoric to promote the legislation as protecting ñfreedomò from ñgovernment control.ò[332]

The legislation, as codified in Missouri Revised Statutes, Section 1.330 (2010) (ñFreedom Actò) read:

> No law or rule shall compel, directly or indirectly, any person, employer, or health care provider to participate in any health care system. A person or employer may pay directly for lawful health care services and shall not be required by law or rule to pay penalties or fines for paying directly for lawful health care services.[333]

It is again evident that the Missouriôs provision triggers conflict with the individual mandate provision of the ACA ñsince it seems clear that no citizen could simultaneously ñdenyò the federal government's authority to impose tax penalties on individuals without health care and comply with a law imposing those same tax penalties.ò[334] Raquel Frisardi has discussed whether the fact that the legislation was approved by popular vote would have conferred a special status to the legislation and therefore requested a special process of inquiry for the court before invalidating it as unconstitutional under the Supremacy Clause.[335]

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[331] *See* Missouri Secretary of State, Aug. 3, 2010 Primary Election Results, Proposition C, available at http://www.sos.mo.gov/enrmaps/20100803/ballot_Issue_map.asp? eid=283&oTypeID=20&Tuesday, Äugust 03,2010.
[332] Raquel Frisardi, *Missouri's Health Care Battle and Differential Judicial Review of Popular Lawmaking*, 89 Wash. U.L. Rev. 207, 239 (2011).
[333] Mo. Ann. Stat. § 1.330 (West).
[334] Frisardi, *supra* note 332 at 217 (2011).
[335] *Id.*

The argument put forward by the present study, however, is that the Missouri Health Care Freedom Act ð just like the Virginia Health Care Freedom Actð was enacted with the purpose of supporting a lawsuit rather than with a real intention to pre-empt federal law. In the circumstances, a lawsuit to challenge various portions of the ACA was brought by Missouri Lieutenant Governor Peter Kinder, joined by seven Missouri citizens on July 7, 2010 before the ballot vote that approved the Health Care Freedom Act. The complaint, originally built on numerous grounds such as the Anti-Commandeering doctrine,[336] the Commerce Clause,[337] the violation of the Equal Protection, the Privileges and Immunities Clause[338] was purposely amended on Aug. 18, 2010 to include the violation of the Due Process Clause because of the conflict with the Missouri Health Care Freedom Act.[339] This is perhaps even more intriguing and confirms the value attributed to the enactment of the Missouri Health Care Freedom Act.

However, the strategy did not work. The United States District Court for the Eastern District of Missouri, Rodney W. Sippel, J., 2011 WL 1576721, dismissed the suit for lack of standing and the complaint for lack of jurisdiction.[340] On appeal, Circuit Judge Steven M. Colloton affirmed the judgment of the district court (lack of standing to sue, no Article III case or controversy)[341] and pointed out that the merits of the individual mandate dispute had been settled by the Supreme Courtôs *Sebelius* decision: ñBecause neither Hill nor Kinder pleaded

[336] Complaint at Count 1, Kinder v. Geithner, 2010 WL 2827627 (E.D. Mo. 2011) (No. 1:10 CV 101 RWS). ñthe PPACA is unconstitutional because it commandeers Missouri state employees and compels them to enforce a federal health care scheme in contravention of Missouri's sovereignty.ò
[337] *Id.* Count 5.
[338] *Id.* Count 7.
[339] Amended complaint at Count 9, Kinder v. Geithner 2010 WL 4063085 (E.D. Mo. 2011) (No. 1:10 CV 101 RWS). ñBecause it violates constitutionally-protected liberty interests belonging to Samantha Hill and the other Missouri citizens, without due process of law, PPACA violates these Missouri citizens' right to determine their own appropriate health care, a right they have under Missouri's Health Care Freedom Act.ò
[340] Kinder v. Geithner, No. 1:10 CV 101 RWS, 2011 WL 1576721, at *10 (E.D. Mo. Apr. 26, 2011). Only the Westlaw citation is currently available. The court held that the plaintiffs failed to allege a personal injury.
[341] Kinder v. Geithner, 695 F.3d 772, 778 (8th Cir. 2012).

sufficient facts to establish an injury-in-fact, both plaintiffs lack standing to sue, and there is no Article III case or controversy. The judgment of the district court is affirmed.ò[342]

Kinder v. Geithner suggests that also in Missouri the bill was enacted with the intent to create a justiciable case. This is confirmed in the Brief of the Appellants: ñI wish to exercise my legally protected right pursuant to the Missouri Health Care Freedom Act to not purchase the health insurance policy mandated by PPACA or otherwise participate in the ñhealth care systemò established by PPACA.ò[343]

[342] *Id.*

[343] Brief of the Appellants at 29, Kinder v. Geithner, 695 F.3d 772 (8th Cir. 2012) (No. 11-1973), 2011 WL 2529647.

III. The Health Care Freedom Acts as the Result of States' Joint Action

The text of the constitutional amendments enacted in Arizona, Oklahoma and Alabama reveal the use of an identical language:

> A law or rule shall not compel, directly or indirectly, any person, employer or health care provider to participate in any health care systemò and ñA 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. A health care provider may accept direct payment for lawful health care services and shall not be required to pay penalties or fines for accepting direct payment from a person or employer for lawful health care services.

To a certain extent, all the Healthcare Freedom acts seem to be inspired by the same model and can be analysed as a phenomenon rather than individual state measures. This study suggests that a key role in the promotion of the Health Care Freedom acts phenomenon was played by the American Legislative Exchange Council (ALEC).[344] This organization conducted a wide campaign to promote opposition to the ACA (the ALECôs Health Care Freedom Initiative)[345] and provided state legislators with model legislation, the so called ñFreedom of Choice in Health Care Actò.[346] ALEC is undoubtedly a major player in

[344] Defined on its website as the ñnationôs largest nonpartisan individual membership association of state legislatorsò. ALEC is an association of state legislators and private-sector members. It was founded in 1973 as ña nonpartisan membership association for state lawmakers who shared a common belief in limited government, free markets, federalism, and individual libertyò. Souce: History, AM. LEGIS. EXCH. COUNCIL, https://www.alec.org/membership (last visited Jan. 28, 2018).

[345] *ALEC's Health Care Freedom Initiative*, AM. LEGIS. EXCH. COUNCIL, http://alec.devhm.net/initiatives/health-care-freedom-initiative/ (last visited Jan. 28, 2018).

[346] *Freedom of Choice in Health Care Act*, AM. LEGIS. EXCH. COUNCIL, https://www.alec.org/model-policy/freedom-of-choice-in-health-care-act/ (last visited Jan. 28, 2018).
The text of the model legislation reads: ñThe people have the right to enter into private contracts with health care providers for health care services and to purchase private health care coverage. The legislature may not require any person to participate in any health care system or plan, nor may it impose a penalty or fine, of any

influencing state legislatures. Its website states that it is responsible for the introduction of about 1,000 bills each year and an average of 20 percent become law.[347]

The campaign was supported by the publication of the ñState Legislators Guide to Repealing ObamaCareò[348] a guide for state legislators willing to introduce the measures in their state. The model legislation, according to Christie Herrera, Director of the Health and Human Services TaskForce at ALEC, was enacted in seven states via the legislature or the ballot box, and served as the basis of *Commonwealth v. Sebelius*, Virginiaôs first-in-the-nation lawsuit against the federal individual mandate.[349]

Herreraôs declarations confirm my assumption that the health care freedom acts were intended to be the basis of the following lawsuits. In the ALEC published ôGuide to Repeal Obamacareô, she expressly declares the link between oppositional legislation and lawsuits:

> ALECôs Freedom of Choice in Health Care Act, if passed by statute, can provide a state-level defense against ObamaCareôs excessive federal power. Particularly, the measure can provide standing to a state participating in current litigation against the federal individual mandate; allow a state to launch additional, 10th-Amendment-based litigation if the current lawsuits fail; and empower a state attorney general to litigate on behalf of individuals harmed by the mandate once it goes into effect in 2014. If enacted as a constitutional amendment, ALECôs Freedom of Choice in Health Care Act will not only help defend against the federal individual mandate as

type, for choosing to obtain or decline health care coverage or for participation in any particular health care system or plan. ñ

[347] *History,* AM. LEGIS. EXCH. COUNCIL, http://alec.devhm.net/about-alec/history/ (last visited Jan. 28, 2018).

[348] Herrera, *supra* note 143.

[349] Herrera, *supra* note 143.

> indicated above, but it will also prohibit a Canadian-style, single-payer system, which legislators in some states have been advocating even before Obamacare. [350]

Further confirmation of this is found in statements reported on ALEC website. On the Health Care Freedom Initiative webpage[351] ALEC promoted Freedom of Choice in Health Care statutes as means to support a legal action and Freedom of Choice in Health Care constitutional amendments as legal protection against a state-level requirement to purchase health insurance.

Conclusion

This chapter has considered the Health Care Freedom bills enacted in Arizona, Virginia and Missouri and their relation to the health care lawsuits. It has been argued that in those three states the link between health care freedom legislation and health care lawsuits was evident because plaintiffs used the legislation to support their legal case.

This strategy, orchestrated by ALEC and implemented by the individual states, is key to understanding the current dynamics of state constitutional contestation. It is clear that statesô legislatures did not aim at nullifying the ACA and did not hope that the acts would have ever prevented the implementation of the individual mandate but they still passed the legislation.

This is because they had hope in the effectiveness of the judicial process and believed that their legislation could increase the chances of success of the multi-state lawsuit on its way to the US Supreme Court. This argument would be supported by the reasons provided by Montana Sen.

[350] Herrera, *supra* note 143 at 18.
[351] *Health Care Freedom Initiative,* AM. LEGIS. EXCH. COUNCIL, http://alec.devhm.net/initiatives/health-care-freedom-initiative/ (last visited Jan. 28, 2018).

Wittich when questioned by Sen. Reinhart, a Committee Member, on the significance of passing a bill that tries to overturn federal law:

> If you haven't read the district court decision from Florida by judge Vinson I commend you to do that, there is an excellent description of the Commerce Clause and I also recommend you to read the Supremacy Clause because in the Supremacy Clause there is a qualifier, that it has to be in pursuance of the Constitution itself… it is qualified… this is not a stretch… I think that it will withstand the challenge, I think it is worth adding Montana's voice to those other states around the country that are trying to do this… I think the Supreme Court will uphold Vinson's decision… [352]

In this case, it is clear that Sen. Wittich intended to convince the Montana legislature of the importance of raising the voice and sustain the lawsuit with the legislation. The link between legislation and lawsuit is evident again.

[352] *House Committee on Business and Labor*, MONTANA LEGISLATURE (Apr. 5, 2011) http://montanalegislature.granicus.com/MediaPlayer.php?clip_id=5185&meta_id=55419 between 00:46:37 and 00:49:55.

Chapter Three: Tenth Amendment and Anti-Commandeering Resolutions

To date, however, the literature on popular constitutionalism has been entirely historical and theoretical: no one has studied a constitutional moment in real time. The battle over whether health care reform will be entrenched or repealed provides a rare opportunity to do so.

David A. Super, *The Modernization of American Public Law: Health Care Reform and Popular Constitutionalism*, 66 Stan. L. Rev. 873 (2014).

While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.

New York v. United States, 505 U.S. 144 (1992).

Introduction

Nullifications bills have been considered as part of a phenomenon that Prof. Levinson termed ñZombie constitutionalismò,[353] the resurrection of ideas that no longer form part of the American constitutional framework. The previous chapter has instead argued that contemporary nullification is a different phenomenon that does not share some of the premises of previous nullification attempts such as the link with secession. Furthermore, this work has pointed to the relationship between nullification bills and lawsuits and has discussed to what extent nullification legislation constituted an attempt by state legislatures to influence

[353] Levinson, *supra* note 122.

constitutional adjudication. The present chapter continues this line of enquiry with the examination of Anti-Commandeering resolutions and bills considered by some state legislatures in anticipation of a response to the passage of the Affordable Care Act. After a preliminary exploration of the Anti-Commandeering jurisprudence, I will analyse the use of the doctrine in state resolutions and bills considered between 2010-2011 and will question whether the passage of Anti-Commandeering resolutions and bills had any influence on the presentation of the legal issue to the courts and – ultimately– on the *Sebelius* holding that the authority to penalize states that chose not to participate in Act's expansion of Medicaid program exceeded Congress's power under the Spending Clause.

I. Anti-Commandeering Jurisprudence

The Anti-Commandeering doctrine has been developed by a trio of Supreme Court's milestone decisions: *New York, Printz and Sebelius*. The doctrine, with different nuances in each decision, established that the Federal Government cannot compel the States to enact, legislate for or administer a federal regulatory program. The literature has contextualized the elaboration of the doctrine in the renewed "commitment to Tenth Amendment jurisprudence"[354] and the so called "revival of constitutional federalism"[355] that characterized the 90s.

This work considers the recent resurrection of the doctrine in state legislation and in the Supreme Court jurisprudence as evidence of the ongoing polarization of constitutional interpretation and examines to what extent state legislatures have contributed to this development.

[354] David T. Woods, *A Step Toward Stability in Modern Tenth Amendment Jurisprudence: The Supreme Court Adopts A Workable Standard in Printz v. United States*, 42 ST. LOUIS U. L.J. 1417, 1428 (1998).
[355] Lang Jin, *Printz v. United States: The Revival of Constitutional Federalism*, 26 PEPP. L. REV. 631 (1999).

***New York v. United States (1992):* Congress does not have the power to compel the States to enact or administer a federal regulatory program**

The Anti-Commandeering doctrine debuted in Supreme Court jurisprudence in *New York v. United States*. The case involved the constitutionality of three provisions of a federal statute involving the disposal of radioactive waste: the Low-Level Radioactive Waste Policy Amendments Act of 1985 (LLRWPA). The statute established the responsibility of states to provide ñeither by itself or in cooperation with other States, for the disposal of ... low-level radioactive waste generated within the State.ò[356] In order to encourage the states to comply with this obligation, the statute provided three types of incentives that were objects of the legal challenge:

1. Monetary incentives for states with disposal sites (part of the surcharges collected by the sited states will be transferred to an escrow account and then be redistributed by the Secretary of Energy to virtuous states);
2. Access incentives for states with disposal sites (states that do not arrange for disposal sites and do not meet federal deadlines would face first an increase of the cost of access to other statesôsites and then the denial of access altogether);
3. Take title provision: states that fail to comply with the federal scheme and timetable of regulations must ñtake titleò i.e. assume ownership and possession of, as well as legal liability for the waste.

The issue before the court was whether Congress may compel the states to legislate and implement federal regulations ñin a particular field or a particular wayò.[357] Petitioners argued that the Act was inconsistent with the Tenth Amendment and the Guarantee Clause because it

[356] 42 U.S.C. § 2021c(a)(1)(A).
[357] New York v. United States, 505 U.S. 144, 161 (1992).

imposed ñintrusive affirmative obligations upon sovereign state governmentsò.[358] The core of the argument was that Congress had imposed legislative obligations ñwithout the Stateôs consent, and with no option for the Stateôs withdrawal from the role of regulator or actor in the fieldò[359] undermining the opportunity for state citizens ñto decide, through their state governmental process, whether state fiscal and legislative resources should be devoted to the problem of low-level waste disposal.ò[360]

Justice OôConnor (joined by Chief Justice Rehnquist and justices Scalia, Kennedy, Souter and Thomas) delivered the majority opinion which affirmed that the monetary and the access incentives provided by the LLRWPA were constitutional under the Commerce and Spending Clauses. However, she argued, the ñtake title provision is of a different characterò[361] and ñdoes not represent the conditional exercise of any congressional power enumerated in the Constitution.ò[362]

> Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program. The Constitution permits both the Federal Government and the States to enact legislation regarding the disposal of low level radioactive waste. The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes. It does not, however, authorize Congress simply to direct the States to provide for the disposal of the radioactive waste generated within their borders. While there

[358] Brief for Petitioner State of New York at 2, New York v. U.S., 505 U.S. 144 (1992), (No. 91ï543, 91ï558 and 90ï563), 1992 WL 526118.
[359] *Id.* at 21.
[360] *Id*. at 23.
[361] *New York,* 505 U.S. at 174.
[362] *Id.* at 176.

> may be many constitutional methods of achieving regional self-sufficiency in radioactive waste disposal, the method Congress has chosen is not one of them.[363]

The decision elaborated for the first time the so called Anti-Commandeering doctrine. Remarkably, Justice OôConnor did not use the term ñcommandeerò to illustrate the reasons of her decision. The term is present in the courtôs opinion only when Justice OôConnor cited to a *dictum* in the *Hodel*[364] case: ñCongress may not simply ñcommandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory programò[365] In *Hodel* ð Justice OôConnor explainedð the Court upheld the Surface Mining Control and Reclamation Act of 1977 precisely because it did not ócommandeerôthe States into regulating mining; states were not compelled participate in the federal regulatory program in any manner whatsoever. [366] By contrast, the Low-Level Radioactive Waste Policy Actôs ñtake titleò provision exceeded the powers of Congress because it compelled states to choose between accepting ownership of waste generated within their borders or regulating according to instructions of Congress (i.e. commandeering the legislative processes of the States). The problem was not whether the Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, but whether it has the power to compel the States to require or prohibit those acts.[367] Professor Evan H. Caminker has argued that the Courtôs use of the term ñcommandeer,ò with its connotation of a militaristic conscription, is perhaps quite revealing of the Courtôs negative attitude toward this congressional strategy. More neutral terms would be ñdirect,ò ñorder,ò ñmandate,ò and ñenjoin.ò [368]

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[363] *Id*. at 188.
[364] Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 288 (1981).
[365] *Id.* at 288.
[366] *Id.* at 161.
[367] *Id.* at 166.
[368] Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?,* 95 COLUM. L. REV. 1001, 1089 (1995).

***Printz v. United States (1997*): Congress does not have the power to direct the actions of State executive officials**

The Anti-Commandeering doctrine was further expanded in *Printz v. United States*[369] (1997) to include commandeering of state executive officials.

The case involved the constitutionality of interim provisions of the Brady Handgun Violence Prevention Act[370] requiring local chief law enforcement officers (CLEOs) to conduct background checks of prospective handgun purchasers until a national system for instantly checking backgrounds was in place. County sheriff Jay Printz challenged the constitutionality of the Brady Actôs interim provisions arguing that the requirement to conduct a background check was actually compelling state officers to execute federal law. The question before the court was whether congressional action compelling state officers to execute federal laws is unconstitutional. The Supreme Court granted certiorari following a split in the circuit courts where the Second[371] and Ninth Circuit[372] agreed that the provision was constitutional and the Fifth Circuit concluded that it was unconstitutional because violated the Tenth Amendment.

In a 5 to 4 decision the Supreme Court struck down the interim provision of the Brady Act as an unconstitutional command to state officers.

Justice Antonin Scalia delivered the majority opinion joined by Rehnquist, C.J., OôConnor, Kennedy, and Thomas, JJ. Because there is no constitutional text speaking to this precise questionð he explainedð the opinion considered the historical understanding and practice, the structure of the Constitution, and the jurisprudence of this Court.ò[373]

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[369] 521 U.S. 898 (1997).
[370] Pub. L. No. 103-159, §§ 101--106, 107 Stat. 1536--44 (1993) (codified as amended at 18 U.S.C. §§ 921--925A (1994); 42 U.S.C. § 3759 (1994)).
[371] Frank v. United States, 78 F.3d 815, 830 (2d Cir. 1996).
[372] Mack v. United States, 66 F.3d 1025, 1033 (9th Cir. 1995).
[373] Printz v. United States, 521 U.S. 898, 905(1997).

With regard to historical understanding, Justice Scalia reviewed early legislation including statutes that required state courts to record applications for citizenship[374] but argued that they did not impose obligations on the Statesô executive and were therefore not relevant.[375]

As to the structure of the Constitution, Scalia emphasized the importance of separation of powers to protect liberty[376] and argued that federal control of state officers would jeopardize the equilibrium of powers between the three branches of the Federal Government:

> The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, ñshall take Care that the Laws be faithfully executed,ò Art. II, § 3, personally and through officers whom he appoints (é) The Brady Act effectively transfers this responsibility to thousands of CLEOs in the 50 States, who are left to implement the program without meaningful Presidential control.[377]

Lastly, referring to the jurisprudence of the court, Scalia contended that the Governmentôs attempt to distinguish *New York* on the basis that the Brady Act leaves no ñpolicymakingò discretion with the State was not convincing because CLEOs were still expected to make policy: ñutterly no policymaking component is rare, particularly at an executive level as high as a jurisdictionôs chief law enforcement officer.ò[378]

The opinion concluded that Congress does not have the power to direct the actions of State executive officials and therefore cannot require ñlocal chief law enforcement officersò

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[374] *Id.*
[375] *Id.* at 908.
[376] *Id.* at.921. õThis separation of the two spheres is one of the Constitution's structural protections of libertyô.
[377] *Id.* at 922.
[378] *Id.* at 927.

(CLEOs) to perform background-checks on prospective handgun purchasers. The decision invalidated portions of the Bradyôs Act:

> We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the Statesô officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.[379]

Justice Scalia used the word ócommandeeringô and expanded OôConnorôs Anti-Commandeering doctrine to include the prohibition for the federal government to commandeer state officials to assist in the implementation of federal law:

> the ñfederal government may neither issue directives requiring the States to address particular problems, nor command the Statesô officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.ò[380]

David Woods argued that *Printz* had strengthened the Anti-Commandeering doctrine and represented ña step toward stability in modern Tenth Amendment jurisprudence.ò[381]

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[379] *Id.* at 935.
[380] *Id*. at 935.
[381] David T. Woods, *A Step Toward Stability in Modern Tenth Amendment Jurisprudence: The Supreme Court Adopts A Workable Standard in Printz v. United States*, 42 ST. LOUIS U. L.J. 1417 (1998).

***National Federation of Independent Business v. Sebelius* (2012)**

Sebelius has been mentioned in the previous chapters as the decision that upheld the constitutionality of the individual mandate. However, the decision really involved two separate issues. The first issue before the court concerned the extent to which the single mandate provision of the ACA is authorized by the Commerce Clause power of the federal government. Roberts, C.J., 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. The other issue was whether the ACA coerced the states into participating in the Actôs expansion of the Medicaid program, thus exceeding the scope of Congressôs spending power. A majority of the justices (7-2)[382] agreed that the expansion of Medicaid was not a valid exercise of Congressôs spending power as it would coerce states to either accept the expansion or risk losing existing Medicaid funding. After 15 years, the Anti-Commandeering doctrine returned in the Supreme Court. In the majority opinion, the Chief Justice made reference to *New York* and *Printz* to argue that threatening the states with the loss of federal funding was equal to commandeering the states and that Medicaid expansion represented an indirect coercion on the states to adopt a federal regulatory system.[383] In the words of Justice Roberts the conditional spending grant was a ógun to the headô.[384] The court not only used the Anti-Commandeering doctrine as elaborated in *Printz*; it extended the definition of what constitutes a federal command to indirect coercion. Some scholars have speculated on the implications of the decision for a number of federal statutes underwritten by the spending power that could

[382] Justices Stephen Breyer and Elena Kagan joined the five most conservative justices.
[383] NFIB v. Sebelius, 567 U.S. 519 (2012).
[384] *Id*. at 2604.

suffer legal challenges as a consequence of the *Sebelius* decision. [385] It has been argued: ñThe Court has reconceptualized what constitutes a federal command to the states, and consequently re-defined the scope of the Anti-Commandeering principle. Previously, the Court had invalidated federal statutes as commandeerings only when those statutes formally compelled the states to govern in a particular fashion.ò[386] With the decision on Medicaid, the Supreme Court sanctioned a new course for the Tenth Amendmentôs jurisprudence, whose development remains to be seen. This study now questions how the Anti-Commandeering doctrine returned to the Supreme Court and if there had been any external influence.

Dr. Amanda Hollis-Brusky has recently conducted a study on the influence of the Federalist Society on Supreme Court decisions. She argued that the Anti-Commandeering doctrine elaborated in *New Yor*k and *Printz* reads like a scripted response to the complaints articulated for over a decade at Federalist Society meetings and in network scholarship and that once that script was written, the Supreme Court could expand the doctrine ñwith relative jurisprudential easeò in *Sebelius*.[387] She points to the fact that 3 Supreme Court Justices were members of the society (Thomas, Scalia and Alito) and that the final statement where Justice Roberts[388] emphasized that the United States is a system of limited government and dual sovereignty recalls language often recited within Federalist Society network. Her research sheds light on the influence of an epistemic association on the *Sebelius* decision and further shows that three

[385] See Christopher Roma, *To Yoder or Not to Yoder? How the Spending Clause Holding in National Federation of Independent Business v. Sebelius Can Be Used to Challenge the No Child Left Behind Act*, 34 PACE L. REV. 1320, 1335 (2014); Erin Ryan, *The Spending Power and Environmental Law After Sebelius*, 85 U. COLO. L. REV. 1003, 1066 (2014); David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States*, 35 CARDOZO L. REV. 567, 625 (2013). For a different perspective on the future of the anticommandeering doctrine see also Andrew B. Coan, *Judicial Capacity and the Conditional Spending Paradox*, 2013 WIS. L. REV. 339, 341 (discussing the distinguish between commandeering and coercive exercises of the conditional spending and concluding that the judicial capacity model predicts that the Court is likely to retreat and retrench from NFIB's anti-coercion principle).

[386] Bradley W. Joondeph, *The Health Care Cases and the New Meaning of Commandeering*, 91 N.C. L. REV. 811, 833 (2013).

[387] Amanda Hollis-Brusky, IDEAS WITH CONSEQUENCES, THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 142 (2015).

[388] *Sebelius*, 567 U.S. at 91.

amicus curiae briefs contain Federalist Societyôs signatories, respectively Richard Epstein, Steven G. Bradbury and James F. Blumstein providing evidence of their involvement. This chapter extends Hollis-Bruskyôs findings by suggesting that the very first signals of the influence of interest groups (academic societies, stakeholders and lobbies alike) can be found in the legislatures which represent the laboratories for the preparation and discussion of certain constitutional challenges.

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,*[389] a case that started in the United States District Court, N.D. Florida, Pensacola Division and that was finally heard by the Supreme Court as *NFIB v. Sebelius*. The challenge was set up first on Mar. 23, 2010 (the same day of the enactment of the ACA) in the Pleading where 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.
>
> [é]
>
> 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.[390]

[389] 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. 2011), and aff'd in part, rev'd in part sub nom. Florida ex rel. Atty. 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).

[390] Complaint at 58, Florida v. HHS, 780 F. Supp. 2d 1256 (N.D. Fla 2011) (No. 3:10-cv-91), 2010 WL 1038209.

The claim was reiterated on Aug. 06, 2010 in a Motion filed by the states plaintiffs, assisted by Baker & Hostetler LLPôs lawyers David B. Rivkin and Lee A. Casey. The motion relied on a ñcoercion and commandeeringò 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.[391]

However, the refined claim that the threat to lose the federal matching funds amounted to commandeering was further developed in a Motion filed on Nov. 04, 2010 where state plaintiffs used the *South Dakota v. Dole*[392] test to argue that Medicaid passed the ñpoint at which pressure turns into coercionò and therefore was unconstitutional:

> The ñchoiceò 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.[393]

The challenge was further refined by Paul Clement, a former United States Solicitor General under G.W. Bush, who authored the state plaintiffsô argument in the Eleventh Circuit Court

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[391] Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss at IV, 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.).
[392] South Dakota v. Dole, 483 U.S. 203, 211 (1987).
[393]Memorandum in Support of Plaintiffs' Motion for Summary, 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.).

of Appeal. The Anti-Commandeering doctrine ultimately reached the Supreme Court in the *Reply Brief of State Petitioners on Medicaid*[394] 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 state petitioners, in reply to the federal governmentôs 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.[395]

The analysis of the filings pertaining to the *Sebelius* case 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 Amendmentôs 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 adopting Tenth Amendment resolutions in three states: Alabama,[396] Wyoming[397] and Utah.[398] It might well be the case that such resolutions 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 understand legal challenges.

[394] Reply Brief of State Petitioners on Medicaid, Florida ex rel. Atty. Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011) (No. 11-400), 2012 WL 864598.
[395] *Id.* at 7.
[396] S.J.Res. 27 (Al. 2010).
[397] H.J. Res. 2 (Wy. 2010) and H.J. Res. 9 (Wy. 2010).
[398] H.C.Res. 2 (Ut. 2010) and S.J. Res. 3(Ut. 2010).

This work now explores Tenth Amendment resolutions that preceded the legal challenges and seeks to demonstrate that state legislators prepared the ground for the lawsuits.

II. The Anti-Commandeering Resolutions

Between 2010-2011, at least five legislatures (Alabama, Utah, Arizona, Virginia and Wyoming) passed resolutions containing Anti-Commandeering language to push back federal legislation seen as intrusive and unconstitutional. The resolutions claimed Tenth Amendment sovereignty and declared the rejection of any federal legislation that would impose mandates to the states. The Anti-Commandeering doctrine was later used in court to challenge the constitutionality of the ACA and ultimately by Chief Justice Roberts who declared the expansion of Medicaid unconstitutional. In 2014, the Anti-Commandeering doctrine was resurrected by the Arizona state legislature which passed a constitutional amendment later approved at the poll.[399]

To what extent were the state resolutions aimed at influencing the argument used by the subsequent lawsuits and shaping the constitutional discourse around the legitimacy of the ACA? This section explores the legislative history of the five Anti-Commandeering resolutions (case studies) andð through the analysis of the respective legislative debatesð will seek to expound the intent of legislators and the dynamics behind the push back strategies devised by state opponents. The rationale for the choice of the five resolutions is that they are the only resolutions passed before the *Sebelius* decision and that have arguably influenced the decision. The first two sub-sections explore Alabama and Wyomingôs resolutions which did not explicitly target the ACA but used state rights rhetoric to push back on various federal

[399] H.C.Res. 2001 (Az. 2010).

mandates. Subsections three, four and five explore resolutions that targeted the implementation of the ACA more explicitly.

Alabama Senate Joint Resolution 27 (2010)

The first legislature to pass an Anti-Commandeering resolution was Alabama on Jan. 22nd 2010 (signed by Governor Riley) before the enactment of the Affordable Care Act (March 23rd, 2010). The resolution is a declaration of sovereignty under the Tenth Amendment and, after recalling founding fathersô statements on the vertical separation of powers as a double security to the people, it relies on the Anti-Commandeering doctrine as elaborated in *Printz*: ñWHEREAS, 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.ò[400] The resolution continues with a call for the prohibition or repeal of ñcompulsory 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 fundingò. It also demanded ñto the federal government, as our agent, to cease and desist, effective immediately, mandates that are beyond the scope of these constitutionally delegated powersò.[401]

The Alabama legislature does not publish the records from the legislative debate and, in order to enquire on the nature and objectives of the resolution, on April 28th and May 8th 2017 I interviewed by e-mail Senator Scott Beason, the author of the resolution. Senator Beason had been a member of the Alabama Senate from 2006 to 2014, representing the 17th District[402] and is mainly known to be the author of the controversial ñ Beason-Hammon Alabama Taxpayer and Citizen Protection Actò, a controversial immigration bill signed by Governor Robert Bentley on June 9, 2011 that required immigration checks by law enforcement, educational

[400] S.J.Res. 27 (Ala. 2010).
[401] *Id.*
[402] The 17th Senate District comprises northern and western Jefferson County and a large portion of St. Clair County.

institutions, and employers, as well as restrictions on public benefits based on an individualôs immigration status.[403] More interestingly for this research project, in January 2010 Sen. Beason sponsored the above mentioned Anti-Commandeering resolution together with other nine republican senators.[404] I asked Sen. Beason what was his intent in introducing the resolution in the Alabama Senate and he replied that it was meant to be ña reminder to the federal government of what our rights as a state are in generalò.[405] To my question on whether the resolution intended to prepare the ground for the following legal challenges that led to the *Sebelius* case, he answered that the intent was to raise the voice of the states and that the courts might have been sensitized to the issue of state sovereignty:

> I cannot say whether the Tenth Amendment resolutions from any of the states had a direct impact on the actions of the states' Attorneys General or on the federal courts. The federal courts have been ignoring the states for many years, but the resolutions did reflect a rising sentiment among the people of the different states that we do not all have to govern ourselves in the same fashion. Alabama and California should be able to be radically different in their worldview and subsequent policies. It could easily have been that the overall feeling which was reflected in the resolutions caused the courts to pause, not because the court "remembered" that the states have rights, but in order to tamp down the growth of the anti-federal government sentiment across the country. It is possible that they

[403] Beason-Hammon, Alabama Taxpayer and Citizen Protection Act, H. 56, 2011 Gen. Assem., Reg. Sess. (Ala. 2011).
[404] The resolution had been authored by Senators Beason and sponsored by Senators Sanford, Glover, Brooks, Smith, Erwin, Marsh, Holley, Pittman and Orr.
[405] Email from Sen. Scott Beason, Member of the Alabama Senate to the author (Apr. 28, 2017) (on file with author).

> would allow for a cooling down period before returning to policies that centralize more and more power in the federal government.[406]

The other characteristic of the resolutions is that the language is very similar to model resolutions circulated by the Tenth Amendment Center [407] and by ALEC.[408]This would suggest that both the grassroots organization and the association of legislators played a major role in promoting the resolutions but the actual influence of each of them is hard to track without the collaboration of the sponsor. I asked Senator Beason how he would explain the similarity of language used in the resolutions and, although he recognized the use of a template, he was quite vague as to the source of the latter:

> it may have been that another state's resolution was used as template or it may have been based on the wording that was circulating among legislators from different states to be used as a template. It may have been that we stated to our Legislative Reference Service what we wanted to say and do, and this was the draft that we liked the best from the choices that were generated. Like I said earlier, 2010 was a long time ago.[409]

The similarity of the language of the Alabama resolution to the sample resolution published by the Tenth Amendment Center and to the one published by ALEC suggests that the resolution was part of a broader project aimed at challenging national policies via the use of legal

[406] Email from Sen. Scott Beason, Member of the Alabama Senate to the author (May 8, 2017) (on file with the author).
[407] *10th Amendment Resolution*, TENTH AMENDMENT CENTER, http://tenthamendmentcenter.com/10th-amendment-resolution/ (last visited Jan. 29, 2018).
[408] *Resolution Reaffirming Tenth Amendment Rights,* AM. LEGIS. EXCH. COUNCIL, https://www.alec.org/model-policy/resolution-reaffirming-tenth-amendment-rights/ (last visited Jan. 29, 2018).
[409] Email from Sen. Scott Beason, Member of the Alabama Senate to the author (Apr. 28 2017) (on file with author).

expedients. This is confirmed on the Tenth Amendment website by Michael Boldin (the founder of the organization) who suggests that the resolutions are a ñfirst step in the overall process of the Tenth Amendment movementò and that they are meant to ñhelp create fertile ground for future actionsò.[410] We know that the Anti-Commandeering doctrine had been at the core of the Sebelius decision on Medicaid and have now reason to speculate that the Alabama resolution was the first sign, a ñnoticeò ð as Boldin saysð of an underlying battle that would take place two years later in court.

Wyoming House Joint Resolution 2 and House Joint Resolution 9 (2010)

The Legislature of Wyoming also adopted two Tenth Amendment resolutions in 2010: HJR 2 and HJR 9. The first is a pure Tenth Amendment resolution with a demand to Congress to prohibit or repeal ñall compulsory federal legislation that directs states to comply under threat of civil or criminal penalties or sanctions or that requires states to pass legislation or lose federal fundingò[411] and a reiteration of the states right under Section 4, Article IV of the Constitution (the guarantee clause), the Ninth Amendment (non-enumerated rights retained by people) and the Anti-Commandeering doctrine. HJR 9, instead, is a request to the Wyoming Congressional delegation and Congress to take action to initiate the amendment process provided by article V of the Constitution to amend the Tenth Amendment and article I, section VIII (the Interstate Commerce Clause), of the Constitution of the United States. The requested amendments are aimed at reducing the extent to which the courts can extend Congressional power and start a new course for Supreme Courtôs jurisprudence that would limit Congressô powers. In particular, the Wyoming legislature proposed to include the word ñexpresslyò in the Tenth Amendment to read: ñThe powers not *expressly* delegated to the United States by the

[410] *Alabama Affirms Sovereignty,* TENTH AMENDMENT CENTER, http://blog.tenthamendmentcenter.com/2010/01/alabama-affirms-sovereignty/ (last visited Jan. 29, 2018).
[411] H.J.Res. 2, 60th Leg., Budget Sess. (Wyo. 2010).

Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the peopleò and to further add that the ñamendment 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.ò[412] With this request the House manifested its commitment to promote a narrow interpretation of the Tenth Amendment and to influence the constitutional debate around statesô rights. The amendment to the Commerce Clause was instead aimed at circumventing Congressô power to regulate interstate commerce to ñmatters that are primarily intrastate with only an insignificant or collateral effect upon interstate commerceò. The amendment is an open criticism to the Supreme Courtôs jurisprudence that expanded the scope of the Congressional Commerce Clause power and attempts to tackle the 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. Even if these resolutions are political non-starters, it can be argued that they contributed to raise the profile of the constitutional debate around the legitimacy of federal mandates and shed light on a legal issue that will be later discussed in the Supreme Court.

Utah 2010 House Concurrent Resolution 2 and Senate Joint Resolution 3: Tenth Amendment Rights

The Governor of Utah signed a House Joint Resolution very similar to that of Alabama on Mar. 23, 2010, the same day of the passage of Obamacare. The language of the preamble is in fact

[412] The full amendment to Tenth Amendment reads as follow: 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. [emphasis added]

identical.[413] This would suggest a joint action of the states ordó againð the influence of the Tenth Amendment Center and ALEC. The title of the resolution was ótenth Amendment Rightsôand the sponsor was Rep. Julie Fisher.

The resolution urged the federal government and the United States Congress to óimmediately cease and desist the issuance of mandates and laws that are beyond the scope of these constitutionally delegated powersôand óto repeal existing regulations and laws that direct states to comply under threat of civil or criminal penalties or sanctions or that require states to pass legislation or lose federal fundingô. The audio recording of the Committee hearings[414] shows that the resolution was presented by Rep. Julie Fisher as a ótenth Amendment Resolutionô; she expressed concern for the federal debt[415] and explained that this resolution was meant to join the national movement to pass sovereignty bills.[416] This statement confirms that state resolutions were the expression of a sovereignty movement led by political organizations and lobbies committed to defy Obamacare. State legislators do not explicitly identify the organizations but the similarity of the language used in the state resolutions and in the sample resolutions promoted on the ALEC and Tenth Amendment website is an indication that these two organizations played a role in pushing the resolutions through the legislatures. Further on in her presentation of the resolution, Rep. Fisher linked the resolution to HB 67[417] passed by the same legislature on March 22, 2010.[418] HB 67 was an act that formally prohibited a state agency or department from implementing any provision of the federal health care reform unless

[413] S. J. Res.27, (Ala.2010). The preamble reads: ñWHEREAS, the Tenth Amendment to the United States Constitution reads as follows: ótThe 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 peopleô.
WHEREAS, the Tenth Amendment defines the total scope of federal power as being that specifically granted by the United States Constitution and no more.ò

[414] *House Government Operations Committee Feb. 16, 2010*, UTAH LEGISLATURE, http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=14493&meta_id=507997 (last visited Jan. 29, 2018).

[415] *Id.* at 1.28.00.

[416] *Id.* at 1.28.40.

[417] H.R. 67, Gen. Sess. (Utah 2010).

[418] *Id.* at 1.29.41.

the agency reported to the Legislature on the impact of such implementations. In other words, the state legislature was claiming sovereignty over healthcare and trying to avoid the direct implementation of federal provisions in the state. The reason why she linked the two measures is that the resolutions do not have any direct legal effect and are often referred to as ñpostcardsò to Congress. One of the questions asked was whether a similar resolution could trigger a legal challenge.[419] Rep. Fisher responded that the resolution was a ómessage bill rather than an actual challengeô[420] and that HB 67 could instead trigger the challenge. The statements by Rep. Fisher demonstrate that the intention of legislators passing Anti-Commandeering resolutions was, unlike the enactment of Health Care Freedom acts, purely to raise the importance of the issue and call the attention of Congress: ñWe are sending the message to Congress that we have reached our boiling point.ò[421] Three days later, on 03/26/2010, the Utah Governor signed Senate Concurrent Resolution 3, a sovereignty resolution introduced three months before by Senator Stuart Adams. The resolution uses the same Tenth Amendment rhetoric of HCR 2. However, where HCR mentioned N*ew York*, SCR 3 also mentioned *Printz* and did not request Congress to cease and desist from the issuance of mandates but more specifically to ñto prohibit or repeal all compulsory federal legislation that directs states to comply under threat of civil or criminal penalty or sanction or that requires states to enact legislation or lose federal fundingò.[422] I cannot find a reason for this but I assume that SCR 3 was a more thoughtful and polished version of HCR 2.

Sen. Adams also confirmed that the resolution was being solicited by ña couple of constituentsò[423] and its purpose was to join other 38 states that introduced sovereignty bills in

[419] *Id*. at 1.30.50.
[420] *Id*. at 1.31.
[421] *Id*. at 1.30.
[422] S.Conc.Res. 2, Gen. Sess. (Utah 2010).
[423] *Senate Committee on Workforce Services and Community and Economic Development*, UTAH LEGISLATURE (Feb. 8, 2010) 4.05- 4.18, http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=14581&meta_id=507785.

2009. This resolution, he added, was mainly targeted to claim sovereignty on health care, retirement, security and social policies.[424] The discussion in the committee highlighted the desire of the legislators to claim sovereignty on health care and that their belief that health care would be better managed at state level.

The resolutions did not stop the passage of the ACA but it can be argued that state legislatures have been successful in influencing the constitutional discourse and the subsequent legal battle that weakened the ACAôs reach; Anti-Commandeering became the central issue at stake in the *Sebelius* decision. State legislatures were preparing the ground for legal challenges either by enacting legislation that would trigger the legal challenge or ð in this caseð by passing resolutions that raise the relevance of a particular legal issue.

Arizona House Concurrent Resolution 2001 and Senate Concurrent Memorial 1001 (2010)

In April 2010, the Arizona legislature adopted House Concurrent Resolution 2001 and Senate Concurrent Memorial 1001 pledging Congress to introduce and enact legislation that repealed the Affordable Care Act because it contravened the Anti-Commandeering doctrine.

House Concurrent Resolution 2001,[425] whose signatory was Representative Judy M. Burges (R-4), was intended to be a declaration of sovereignty,[426] a call for the prohibition or repeal of óall 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 fundingô. The

[424] *Id.* at 5.40- 5.52.
[425] H.Conc.Res. 2001, 49th Leg., 2nd Reg. Sess. (Ariz. 2010).
[426] The title of the Resolution recites: óResolving 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.ô

resolution called for Tenth Amendmentôs rights and made express reference to the Anti-Commandeering doctrine mentioning *New York v. United States*[427] case as principal authority:

> ñWhereas, 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.ò

On 01.19.2010, when Representative Burges presented the resolution in the House Government Committee,[428] she pointed to policies such as the Real ID Act and the No Child Left Behind programs as invasive mandates that had impact on state budget. When challenged on the validity of the resolution by Democratic Rep. Tom Chabin, who argued that the Supreme Court should be the ultimate arbiter of such controversies, she provided a vague answer which confirms my initial assumption that these resolution are meant to send a message to Washington and remind Congress of a certain interpretation of the constitutional provisions relating to separation of powers and the role of the judiciary:

> Rep. Tom Chabin: The Constitution defines our role with the federal government (the state of Arizona), and that is interpreted by the United States Supreme Court. What benefit, would passing this act, given that since the very beginning of the nation, that relation has been defined?[429]

[427] New York v. United States, 505 U.S. 144 (1992).
[428] *House Government Committee*, ARIZONA LEGISLATURE (Jan. 19, 2010), http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=6410&meta_id=105406.
[429] *Id.* at 58:30.

> Rep. Judy M. Burges: Mr. Chairman, Mr. Chaban. You know of course that when the Constitution was created the Supreme Court, the executive and the judicial branch [sic] were all created separately and that was to create a balance of power (within the constitution). So, basically, what happens is that we the states created the federal government, the federal government did not create the states and because each one of the different departments [é] are to be separate and equal powers.[430]

The wording of this resolution and the discussion held in Committee represents a good example of the use of constitutional rhetoric in state legislatures to push against the implementation of federal policies, a trend that this work has been seeking to explore and explain. The arguments put forward by the sponsor of the resolution reiterate a conception of the Constitution as a contract between sovereign states as opposed to union of people. This idea finds its roots in the compact theory as advanced by Thomas Jefferson[431] and later developed by Calhoun during the nullification crisis in South Carolina in the 1830s. The compact theory also found some traction in the Supreme Court and can be clearly recognized in the dissenting opinion of originalist Justice Thomas in *Term Limits*.[432] In this decision, Thomas argued that the source of the Constitutionôs authority resides in the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole.[433]

The strategy was further reinforced by a Tenth Amendment memorial passed by the same legislature during the 2010 eight special session: Senate Memorial, AZ SCM 1001[434] sponsored by Senator Chuck Gray, was passed. It is again a declaration of sovereignty calling for Tenth

[430] *Id.* at 59:00.
[431] Jefferson, *supra* note 50 .
[432] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) at 846 (Thomas, J., dissenting).
[433] *Id.*

[434] S. Conc.Mem.1001, 49th Leg., 8th Spec.Sess (Ari. 2010).

Amendment rights and a prayer to the Congress to repeal of the ACA.[435] On 3/30/2010 it was assigned to the Senate Judiciary Committee, chaired by the same Chuck Gray who recognized that the memorial had no legal value but constituted a strong political message. He even compared the Arizona memorial to the petition of the American colonies to the British King:

> I recognize that this is just a postcard to Congress but one of the opportunities we have is the right to petition our governmenté and if you recall a history lesson (if it has been taught properly in the schools, which many times it is not) our founding fathers petitioned the King over and over again and in the Declaration of Independence it lists all the grievances that were unanswered and they petitioned, and they petitioned and they petitioned [...] and so this is the start of that process where we petition our government.[436]

During the debate, there was also a proposal for the replacement of the memorial with a call for an Art. V convention that was rejected by Sen. Russel Pearce for the possible danger of a runaway convention, a convention where delegates do not limit themselves to the amendments originally agreed.

The memorial made express reference to *New York v. United States* and serves as notice to Congress to repeal the ACA, as an unconstitutional encroachment of statesô rights.

During the Third Reading of the memorial in the House, Rep. McComish confirmed the intention of legislators to send a message to Washington, stating that it was a duty of the states to push back:

> Today, as I hope, we will send this memorial to Congress and particularly to our congressional delegation in the hopes that they will hear our voices and our

[435] The title of the Resolution recites: ôDeclaring This State's Sovereignty Under the United States Constitution and Urging the Congress of the United States to Repeal the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010.ô

[436] *Senate Judiciary Committee*, ARIZONA LEGISLATURE, (Mar. 30, 2010) at 62.00, http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=7267&meta_id=125195.

> disappointment to the decisions that they have made. I believe, as a state, we must stand up for statesô rights and ensure that the federal government does not go unchecked in its powers, and the authority that it holds over the states. Mr. Speaker I vote Aye. [437]

My suggestion is that the Arizona legislature passed the Tenth Amendment resolution and memorial in an attempt to influence the debate around the constitutionality of the ACA and eventually shape the legal challenges that had already been started by attorney generals across the states. This is particularly evident when we consider the use of the Anti-Commandeering doctrine as a backbone to the underlying compact theory. In other words, the legislators of Arizona tried to ñlegitimizeò sovereignty claims (as in the committee hearing) with a legal doctrine that they assumed could defeat concerns around the constitutionality of their claims. In the event, the same doctrine (Anti-Commandeering) was then used to challenge the ACA in court and on arrival to the Supreme Court invalidated the expansion of Medicaid on Anti-Commandeering grounds. This is not a coincidence. As my research indicates, state legislatures have been working subtly to create a sovereignty movement that would shed light on Tenth Amendment jurisprudence and would therefore enhance the likelihood of a victory in court.[438] However, the resistance to the implementation of the ACA in Arizona continued with the approval of Proposition 122, an amendment to Article 2, Section 3 of the state constitution approved on November, 4th 2014[439] and the 2015 HB2643. These further measures provided a

[437] *Arizona House Third Reading - Special Session*, ARIZONA LEGISLATURE (Mar. 31, 2010) at 01:14:47, http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=7309&meta_id=126040.

[438] It should also be noted that the legislature of Arizona continued its Anti-Commandeering battle in 2015 with House Bill 2643, an Act that prohibits the state in various ways from ñfrom using any personnel or financial resources to enforce, administer or cooperate with the Affordable Care Act.ò.

[439] The amendment related to the rejection of unconstitutional federal actions, it read: ñto protect the people's freedom and to preserve the checks and balances of the United States Constitution, this state may 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 by doing any of the followingé ò. For full text see Arizona Constitution

mechanism for refusing the use of state resources to purposes inconsistent with the constitution and recalled the Anti-Commandeering doctrine.

Virginia House Resolution 46 (2011): State sovereignty; Congress urged to honor Tenth Amendment to U.S. Constitution

Alabama, Utah and Arizona were joined by the Virginiaôs House on 01/31/2011 with the adoption of Virginia House Resolution 46 (2011). The resolution, introduced on 01/12/2011, 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*: ñthe 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 statesò.[440] The purpose, as specified in the resolution, is specifically to serve notice to the federal government to ñcease and desist, effective immediately, mandates that are beyond the scope of these constitutionally delegated powersò. Further, just like in the other resolutions, there is a request to prohibit or repeal ñall 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 fundingò.[441] The latter provision had been strongly opposed during the House debate by Democratic Delegate Joe Morrissey who pointed to several federal compulsory

[440] H.Res. 46, 2011 Leg., (Va 2011).
[441] *Id.*

legislations (Civil Rights Act 1964, Voting Rights Act 1965, Federal Water Pollution Control Act 1948, Consumer Product Safety Act 1972) that would be put at risk by this resolution. [442] If those acts were passed under constitutional authority ð responded sponsor Peaceð then this act does not address them.[443] The reference to the alleged unconstitutionality of the ACA is clear. The Virginia resolution, however, is different to the other resolutions because of its timing. I have argued before that the Tenth Amendment resolutions in Alabama, Utah and Arizona were meant to shape the constitutional discourse around the ACA and prepare the ground to legal challenges. When the Virginia resolution was passed, Attorney General Cuccinelli had already started the challenge to the ACA in the case *Virginia ex rel. Cuccinelli v. Sebelius*[444] and district judge Hudson had ruled that the individual mandate provision exceeded Congressional authority under the Commerce Clause and the Tax Clause. At the time of the passage of the resolution (January 2011) the case was pending in the Appeal Court. What was the aim of this resolution? 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 Peace repeatedly pointed to the Anti-Commandeering doctrine as elaborated in *New York* and when asked whether the resolution promoted a narrow interpretation of the Tenth Amendment, namely that if a power is not enumerated in the Constitution it is a power on which Congress could not act, he responded: ñgenerally speaking yes, but the resolution also contemplates constitutional law provisionsò.[445] Delegate Peace seems to use the expression ñconstitutional provisionsò to refer to the *New York* case and to explain that the

[442] *Virginia House of Delegates*, RICHMOND SUNLIGHT (Jan. 31, 2011), https://www.richmondsunlight.com/bill/2011/hr46/ between 1:53:16 - 1:56:01.
[443] *Id.* between 1:56:01 to 1:56:23.
[444] Virginia ex rel. Cuccinelli v. Sebelius, 656 F.3d 253, 268 (4th Cir. 2011).
[445] *Senate Judiciary Committee,* ARIZONA LEGISLATURE*, (Mar. 30, 2010)* between 1:57:20 to 1:58:40*, http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=7267&meta_id=125195.*

case had been included in the resolution to legitimize the claim of state sovereignty. It might be argued, therefore, 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. The strategy was unsuccessful in the Court of Appeal where Circuit Judge Diana Gribbon Motz held that Virginia could not challenge ñindividual mandateò provision in Affordable Care Act for lack of Article III standing.[446] However, on the long run, we know that the Anti-Commandeering doctrine became the core of the *Sebelius* decision on the expansion of Medicaid and have reason to believe that state resolutions played a part in raising the profile of the doctrine.

III. Post-Sebelius Anti-Commandeering

Arizona's Constitutional Amendment: Proposition 122 (2014)

The legislature of Arizona did not limit itself to the passage of Anti-Commandeering resolutions but also held a referendum to propose an Anti-Commandeering amendment to the state constitution. The amendment, approved at the general election ballot on November 4, 2014, permits the state to refuse the implementation of federal law deemed unconstitutional by the voters and to restrict personnel and the use of financial resources for the implementation of an unconstitutional federal action or program. According to the proposed amendment, the state could exercise its authority by passing an initiative or referendum, passing legislation or pursuing any other legal remedy.[447]

[446] Virginia ex rel. Cuccinelli v. Sebelius, 656 F.3d 253 (4th Cir. 2011).
[447] AZ CONST. art 2, §3.

The constitutional amendment, also referred to as Proposition 122, is still part of the Arizona Constitution. The measure was introduced in the senate as Senate Concurrent Resolution 1016 by Sen. Chester Crandell (R-6) and Sen. Judy Burges (R-22). Sen. Chester Crandell, explained in the Public Safety Committee that this bill was brought to him by a group (he did not specify any details) and that he decided to sponsor it because it was not a nullification bill but only allowed the people of Arizona to determine if they considered the federal legislation unconstitutional and then reject cooperation with the enforcement of such legislation in the state.[448] His statement confirms that Tenth Amendment resolutions are the result of the lobbying of a certain, unspecified organization and, more importantly, that the states were claiming for themselves the capacity to determine the constitutionality of federal law.

The question must be: why would Arizona pass this kind of resolution after *Sebelius*, where the Supreme Court held the individual mandate constitutional? Senator Crandell responded to a similar objection made by Sen. Ableser, a Democratic member of the Committee of the Whole on the constitutionality of the resolution. He used a quote from the *Sebelius* decision and recalled a passage where Chief Justice Roberts talked about statesôprerogatives and statesô sovereignty:

> In the typical case we look to the States to defend their prerogatives by adopting ñthe simple expedient of not yieldingò to federal blandishments when they do not want to embrace the federal policies as their own. Massachusetts v. Mellon, 262 U.S. 447, 482, 43 S.Ct. 597, 67 L.Ed. 1078 (1923). The States are separate and independent sovereigns. Sometimes they have to act like it.[449]

[448] *Senate Public Safety Committee*, ARIZONA LEGISLATURE (Feb. 13, 2013) at 34:00, http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=11739&meta_id=233595.
[449] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 132 (2012).

He declared that the *Sebelius* decision would justify SCR 1016 and the consequent constitutional amendment: ñThis simply puts another tool in the tool box for us to stand up for a state sovereignty and the right of the people of the state of Arizona. Therefore I support putting this on the ballot. ò[450] The same argument in support of the bill was confirmed during the hearing in the House Rules Committee by Rep. Eddie Farnsworth who stated that the legislature of Arizona in fact could refuse to use state resources to implement a federal law because it could disagree with the constitutionality of federal law:

> The bill -if you read the beginning- is to maintain the check and the balances of the sovereign states against the federal government that might pass laws that we believe (as sovereign states) are unconstitutional. There are laws out there that I clearly believe are unconstitutional even though the courts may decide otherwise. So, what we are doing here is saying: even though the courts may say it is unconstitutional we may disagree with that and that is the check on the federal government. We are not overturning as a matter of the law, we are simply saying because we disagree with the constitutionality we canôt use Arizona resources of what we believe is unconstitutional law. [451]

The resolution had been widely discussed in the House Federalism and Fiscal Responsibility Committee[452] where it was distinguished from a nullification bill and its constitutionality again backed by the Anti-Commandeering doctrine. In the eyes of some Arizona legislators, the Anti-Commandeering doctrine in *Printz* and presumably its expansion in *Sebelius* allowed a broader

[450] *Senate Floor Session Part 6 - Committee of the Whole,* ARIZONA LEGISLATURE, (Feb. 28, 2012) at 23:50, http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=11972&meta_id=240111.
[451] *05/02/2013 - House Rules,* ARIZONA LEGISLATURE, (May 02, 2013) between 06:45- 07: 25, http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=12627&meta_id=252217. .
[452] *03/12/2013 -House Federalism and Fiscal Responsibility Committee,* ARIZONA LEGISLATURE, (Mar. 12, 2013). http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=12124&meta_id=244111.

capacity of the states to refuse cooperation with the federal government. This is extra-judicial constitutional construction in action. In passing the resolution, and consequently amending the state constitution, the state of Arizona stepped on the soapbox and called for a change in the constitutional culture around Tenth Amendment on the basis of the Supreme Court decision in *Sebelius*. We do not know the outcome of the construction but we know that the process started in the state legislatures, passed by the Supreme Court and returned to the legislatures for a further meaning manipulation. Why did the legislature of Arizona go as far as amending the state constitution? Prof. John Dinan noted that the early twenty-first century has seen a flurry of state constitutional amendments intended to advance state interests in the federal system[453] and theorized four ways that state amendment processes can play a role in safeguarding federalism interests, i.e.:

- as a vehicle for protecting rights that have gone unrecognized by the United States Supreme Court.

- as a vehicle for adopting policies that proved unattainable in Congress

- for the purpose of seeking the reversal or relaxation of United States Supreme Court rulings seen as limiting state discretion

- with the intent of helping to bring about the repeal or modification of congressional statutes seen as encroaching on state prerogatives. [454]

In the case of the Proposition 122 none of the above categories would be appropriate. This work argues instead that the intent of the amendment was to consolidate the broader meaning attributed by the Court to the Anti-Commandeering doctrine, to crystallize and therefore enhance the ongoing constitutional change around Tenth Amendmentôs jurisprudence. In a

[453] John Dinan, *State Constitutional Amendment Processes and the Safeguards of American Federalism*, 115 PENN ST. L. REV. 1007, 1010 (2011).
[454] *Id.* at 1011.

way, the legislature of Arizona wanted to equip itself with legal devices to formally push back against Obamacare.

Arizona House Bill 2643 (2015)

Following the passage of the constitutional amendment, in 2015 the Arizona legislature passed an Anti-Commandeering bill in the form of House Bill 2643 sponsored by Sen. Olson and signed by Gov. Doug Ducey. The purpose of the bill was to use the authority provided by Proposition 122 to create roadblocks and refuse cooperation with Washington for the implementation of the ACA in the state of Arizona. The idea behind it, as expressed on the Tenth Amendmentôs website,[455] was that the federal government could not possibly manage the full implementation of the Act (including managing the health care exchange and IRS collection of the Obamacare tax) and an expectation that without the state cooperation the system would collapse. HB 2643 prohibited the state and its political subdivisions from using any personnel or financial resources to enforce, administer or cooperate with the Affordable Care Act.[456] In particular, the bill expressly prohibited the funding or implementing of a state-based health care exchange or marketplace; and prevented the state from taking actions to limit the availability of self-funded health insurance programs. The House Federalism and Statesô Rights Committee strongly supported the bill and the video of the meeting reveals criticism of the decision of the Supreme Court on the constitutionality of the ACA. By watching the video of the Committee discussion, it is clear that the bill was being proposed to create a roadblock to the ACA: ñSen. Olsen: States are setting themselves under the constitution and under the rights that are reserved to the states, making sure that we do stand up for those rights [é] making sure that we maintain that balance of power that was in the

[455] *Signed by the Governor: New Arizona Law Blocks Crucial Obamacare Enforcement Mechanism,* TENTH AMENDMENT CENTER, http://blog.tenthamendmentcenter.com/2015/04/signed-by-the-governor-new-arizona-law-blocks-crucial-obamacare-enforcement-mechanism/ (last visited Jan. 29, 2018).
[456] H.R. 2643, 52nd Leg., 1st Spec. Sess. (Ariz. 2015).

original intent of the constitution.ò[457] The non-cooperation spirit in Arizona was identified by the Rockefeller Institute of Government that expressed concern that the state agencies had not cooperated with the federal government: ñrelations between the federally managed Arizona exchange and other governmental entities vary greatly. There are relatively weak ties between state agencies and the exchangeé We are aware of significant working relationships to solve problems, particularly those of IT, and eligibility.ò[458] The position of the state of Arizona is representative of the phenomenon of uncooperative federalism, as theorized by Jessica Bulman-Pozen and Heather K. Gerken in 2009[459] and it is also explicative of the phenomenon of constitutional politics that this work has examined; the legislature proposed an amendment to the state constitution with the ultimate objective of providing the state with authority to push back on the basis of a narrow interpretation of the Tenth Amendment. This work has been seeking to examine precisely this use of constitutional arguments by the state legislatures and the polarized constitutional culture that the uncooperative federalism produces.

Conclusion: The Gravitational Effect of Anti-Commandeering Resolutions on Health Care Constitutional Discourse

Writing in the Indiana Law Journal, Austin Raynor argued that state opposition may influence adjudication by shaping the content of substantive doctrine and provided the example of political movements that allegedly had an impact on Supreme Courtôs jurisprudence such as the Equal Rights Amendment movement and the Gun Rights movement. [460] When discussing contemporary nullification bills, however, Raynor only speculated on the influence of these

[457] *House Federalism and States' Rights Committee*, ARIZONA LEGISLATURE (Feb. 18, 2015) between 01:42:40 ï 01:43:00, http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=15143&meta_id=297730.
[458] Hall & Eden, *supra* note 288 at 12.
[459] Jessica Bulman-Pozen, Heather K. Gerken, *Uncooperative Federalism*, 118 Yale L.J. 1256 (2009).
[460] Raynor, *supra* note 33 at 641.

on the constitutional debate[461] without providing factual evidence for his claim. In particular, he argued that the majority of the bills are fairly recent, and thus their impact in this sphere is not yet fully discernible.[462] I must agree on the difficulty of tracking ñinfluenceò as this has been a major methodological challenge of the present research as well. However, the main reason why Raynor could not provide evidence of his claim is that he examined state bills that attempted to nullify the individual mandate and the influence of these on the Supreme Courtôs debate on the constitutionality of the individual mandate. Certainly the debate around the constitutionality of the individual mandate did not ignore the argument put forward by the statesô rights movement (as described by Raynor) but we know that ultimately the Supreme Court upheld the individual mandate as constitutional under the Taxing Clause. Even if the movement had been successful in raising the profile of the legal issues around the constitutionality of the individual mandate, it is inappropriate to say that state legislatures were successful in their battle and therefore it is challenging for a scholar to demonstrate a direct influence of nullification bills on the judicial process. Keeping in mind these difficulties, I investigated a different set of data. Instead of focusing on nullification bills, the present chapter analysed Tenth Amendment resolutions and provided a more convincing argument to support the claim that state opposition shapes (successfully) the constitutional debate. In particular, it has been demonstrated that the Anti-Commandeering doctrine (utilized by the Court to curtail the expansion of Medicaid) was first brought to light by some state legislatures that issued Tenth Amendment resolutions containing Anti-Commandeering claims. In this sense, the present chapter contributes to the literature on statesô rights rhetoric by demonstrating that legislatures have dictated the tone of the following constitutional debate in

[461] *Id.* at 642.
[462] *Id.*

court or ð as Raynor would sayð exerted a gravitational effect on the legal reasoning utilized by courts engaged in constitutional adjudication[463].

This confirms the initial assumption that states are laboratories of constitutional meaning and that the analysis of the state legislation may help to predict constitutional change.

The paucity of scholarship on the topic is due to the lack of scientific method to assess the link between state opposition and legal challenges and only a few scholars have speculated on the possibility of an interconnection. This chapter has demonstrated, at the very least, the need for a wider enquiry on the link between the two.

[463] *Id.* at 617.

Chapter Four: Interstate Health Care Compact Bills

Introduction

The fourth category of bills introduced to opt out of federal health care requirements provides for the creation of the so-called Health Care Compact (HCC), a compact of states joining efforts to develop their own health care regulations in opposition to federal law. Interstate compacts are authorized by the Compact Clause of the U.S. Constitution[464] and the HCC is therefore considered by its proponents to be a fully constitutional expedient. This chapter looks at the HCC as an attempt to block the implementation of the ACA at state level and therefore as another expression of the statesô rights battle. By promoting interstate cooperation in health care policies, states are in fact claiming the responsibility and authority for regulating health care. The interstate compact project is a strategy that Rachel Tabachnick has also defined as ña way to circumvent presidential veto power.ò[465]

This chapter explores the idea of Health Care Compact (HCC), outlines the history of this constitutional device, analyzes the influence of interest groups in the introduction of HCC bills in the state legislatures and examines the legal issues surrounding the enactment of an interstate compact.

I. Definition of Interstate Compact

Interstate compacts have recently been defined as ñone of a limited number of processes provided in the Constitution for adjusting and regulating formal state relations, be they

[464] U.S. CONST. art. I, §10, cl. 3: ñNo State shall, without the Consent of Congress é enter into any Agreement or Compact with another State.ò.
[465] Rachel Tabachnick, *Ted Cruz & ALEC: Seceding from the Union One Law at a Time,* POLITICAL RESEARCH ASSOCIATES (Feb. 5, 2014), http://www.politicalresearch.org/2014/02/05/ted-cruz-alec-seceding-from-the-union-one-law-at-a-time/#sthash.VjRldOJF.xmcczPR6.dpuf.

boundaries, substantive law or even economic relationships.ò[466] There are numerous types of compacts that have traditionally been established for regional issues requiring intergovernmental cooperation in a variety of areas, such as ñlaw enforcement and crime control, education, driver licensing and enforcement, nuclear waste control, transportation, insurance regulation, and disaster assistance.ò[467]. The leading authority on interstate relationships, Joseph Zimmerman, recently investigated the compacts as devices of horizontal federalism and described them as ña tool for defining, approaching, and solving interstate problems without congressional intervention.ò[468]

A revolution in the concept of interstate compacts was initiated in December 2010 by Ted Cruz, at the time Senior Fellow at the Center for Tenth Amendment Studies, with his article ñShield of Federalism: Interstate Compacts in Our Constitutionò.[469] He suggested that interstate compacts could be used as a powerful vehicle for the states to confront Obamacare directly and as shield against federal overreach: ñWith congressional consent, federalized interstate compacts could shield entire areas of state regulation from the power of the federal government.ò[470] This new conception of interstate compact was echoed in the state legislaturesô debates about the implementation of the Affordable Care Act and provided the theoretical basis for the enactment of the Health Care Compact in nine states. Interstate compacts were defined ð for instanceð ña uniform law enacted by multiple states that wish to have uniform governance over a particular area of lawò [471] by Jason B. Long, Senior Assistant Revisor of Statutes of the Kansas Legislature. The explicit reference to

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[466] CAROLINE N. BROUN, ET AL., THE EVOLVING USE AND THE CHANGING ROLE OF INTERSTATE COMPACTS: A PRACTITIONERôS GUIDE 2 (2006).
[467] KATHLEEN S. SWENDIMAN, CONS. RESEARCH SERV., HEALTH CARE: CONSTITUTIONAL RIGHTS AND LEGISLATIVE POWERS 15 (2012) (unpublished report on file with the author).
[468] JOSEPH ZIMMERMAN, HORIZONTAL FEDERALISM 35 (2011).
[469] Ted Cruz, *Shield of Federalism: Interstate Compacts in Our Constitution*, POLICY PERSPECTIVE (December 2010), http://www.texaspolicy.com/content/detail/shield-of-federalism-interstate-compacts.
[470] *Id.*
[471] STAFF OF THE HOUSE FEDERAL AND STATE COMMITTEE, SUMMARY OF HB 2553 (Feb. 18 2014) http://kslegislature.org/li_2014/b2013_14/committees/ctte_h_fed_st_1/documents/testimony/20140218_01.pdf.

ñgovernanceò is a meaningful development in the definition of compact that ð as discussed belowð is presently interpreted as a constitutional device to oppose federal regulations rather than a means to promoting interstate cooperation in regional policies not regulated by federal law.

II. Brief History of Interstate Compacts

The interstate compact is a very old mechanism for interstate cooperation whose roots can be found in the colonial era. Felix Frankfurter and James Landis suggested that Art. 3 and Art 1 sec. 10 of the Constitution incorporated the two original modes of intercolonial settlement prior to the revolution: litigation on appeal to the Privy Council and royal consent on agreements between the colonies. They argued that the interstate compact clause is a descendant of the latter and that the royal prerogative was replaced by Congressional consent:

> The framers were familiar with the modes of settlement prior to the Revolutionð that controversies were determined partly through agreements confirmed by the Crown, and partly by litigation on appeal to the Privy Council. The Philadelphia Convention wrote both methods practiced by the colonies into the Constitution. Controversies between the colonies which came before the Privy Council were, in effect, precursors of the types of litigation over which the Supreme Court assumed jurisdiction under Article III extending the ñjudicial powerò to ñcontroversies between two or more states.ò The power to negotiate settlements between the colonies, subject to the sanction of the royal prerogative, was written into Article I, Section 10.[472]

[472] Felix Frankfurter & James Landis, *The Commerce Clause of the Constitution. A Study in Interstate Adjustments,* 34 Yale L. J. 694, (May 1925).

A similar provision - prohibiting association of states without the consent of Congress - was also included in art. VI of the Articles of Confederation: ñNo two or more States shall enter into any treaty, confederation, or alliance without the consent of the United States in Congress assembled, specifying accurately the purpose for which the same is to be entered into, and how long it shall continueò.[473] This provision was a precursor of what would became the Treaty Clause[474] and the Compact Clause.[475] Was this provision intended to restrain the ability of the states to form associations or was it meant to promote interstate collaboration under the supervision of the Congress? According to Broun, ñit was intended to continue the principle that through its consent powers, the Congress would be a counterweight against potentially harmful collective state action that could erode the viability and sovereignty of the national governmentò.[476] The restrictive nature of the clause would be confirmed by the negative formulation of its wording ñNo two or more states shall enteré ò but in the event, the Compact Clause allowed settlement of regional disputes and promoted interstate cooperation on a regional basis. A number of compacts were established under the articles with the consent of the unicameral Congress, including a 1785 compact entered into by Maryland and Virginia establishing rules for navigation and fishing on the Chesapeake Bay and the Potomac River.[477]

Between 1789 and 1920 Congress established thirty-six compacts to deal with state boundaries with the exception of the Virginia-West Virginia Compact of 1862 providing for the separation of West Virginia from Virginia. Initially, interstate compacts were mainly created to settle boundary disputes but their function slowly evolved into a regulatory one. ñTraditionally, states have employed compacts to settle land disputes, but in the twentieth century states have

[473] Articles of Confederation, art. VI (U.S. 1781).
[474] U.S. CONST. art. 1, § 10, cl. 1. ñNo State shall enter into Any Treaty, Alliance or Confederation.ò.
[475] U.S. CONST. art. 1, § 10, cl. 3. ñNo State shall, without the Consent of Congress é enter into any Agreement or Compact with another Stateò.
[476] BROUN ET AL, *supra* note 466, at 6.
[477] ZIMMERMAN, *supra* note 468, at 33.

expanded such agreements to function as regulatory, administrative, and management tools.ò[478] An early attempt to create a joint state management was the Interstate Palisades Park agreement[479] of 1900 between New York and New Jersey which established identical state commissions. Two fisheries compacts between New Jersey and Delaware in 1905[480] and between Oregon and Washington in 1915[481] were established to ensure uniformity in boundary water fishery regulations but never created an interstate agency. A turning point in the use of interstate compacts is represented by the Colorado River compact[482] which addressed a regional issue and ñdevised a mechanism for regional handling of a common problem in that it established basic principles for the allocation of the waters of the Colorado river to be used in irrigationò[483] and involved more than two states. Also, a demonstration of the value of interstate compacts for solution of regional problems was the first joint planning and administrative agency, created by the New York Port Authority Compact, [484] which dealt with major transportation problems in a metropolitan area and included a 1919 agreement called the New York-New Jersey Tunnel Compact.

Between 1920 and 1969 the states entered into approximately 125 compacts, and this trend reflected the need for common or joint administration of interstate issues. Noteworthy are the Compact for the Supervision of Parolees and Probationers[485] providing arrangements for interstate control of crime and extra-state parole administration and the Compact to Conserve Oil and Gas[486] establishing measures for the cooperative protection of oil and gas resources.

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[478] BROUN ET AL, *supra* note 466, at 9, 12.
[479] 50 Stat. 719 (1937).
[480] 34 Stat. 858 (1905).
[481] 40 Stat. 515 (1918).
[482] 45 Stat. 1027(1918).
[483] FREDERICK L. ZIMMERMANN & MITCHELL WENDELL, THE INTERSTATE COMPACT INTERSTATE COMPACT SINCE 1925 5 (1951).
[484] 42 Stat. 174 (1921).
[485] UNIFORM ACT FOR OUT-OF-STATE PAROLEE SUPERVISION; *see* 4 U.S.C. § 111 (1952) for congressional authorization of this compact.
[486] 49 Stat. 939 (1935).

The 1930s saw a renewed interest for compacts mainly due to the aversion of the Supreme Court to governmental action.[487]

Regulatory compacts emerged in the field of pollution abatement: for example New York and New Jersey ratified the Interstate Sanitation Compact[488] and Ohio River Valley Sanitation Compact.[489]

Frederick L. Zimmermann and Mitchell Wendell reported a huge increase in the number of interstate compacts between 1941 and 1975: ñbetween 1921 and 1940, about 20 more compacts were adopted. However, between 1941 and 1975, over 100 additional compacts were negotiated.ò[490] This trend was confirmed by Patricia Florestano who, drawing on a study conducted by Susan Welch and Cal Clark,[491] observed that the growth of compacts was impressive between 1941 and 1969.

> During that period, in terms of scope, border compacts declined from 94 percent to 20 percent of the total; regional compacts increased from 2 percent to 22 percent of the total; and nationwide compacts increased from 0 percent to 33 percent of the total. In terms of organizational form, compacts creating commissions went from 0 percent to 49 percent of the total. In terms of function, boundary compacts went from 71 percent to 9 percent; metropolitan, from 0 percent to 0 percent; rivers, from 23 percent to 16 percent; industrial, from 0 percent to 0 percent; and service, from 3 percent to 58 percent.[492]

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[487] *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). The U.S. Supreme Court unanimously declared that the NRA law was unconstitutional, ruling that it infringed the separation of powers under the United States Constitution.
[488] 49 Stat. 932 (1935).
[489] 54 Stat. 752 (1940).
[490] ZIMMERMANN & WENDELL, *supra* note 483 at IX.
[491] Susan Welch & Cal Clark, *Interstate Compacts and National Integration*, 26 W. POL. Q. 475-484 (1973).
[492] Patricia S. Florestano, *Past and Present Utilization of Interstate Compacts in the U.S.,* 24 PUBLIUS: THE JOURNAL OF FEDERALISM 13,18 (1994).

By 1951, the evolution in the use of interstate compacts was also noticed by Zimmermann and Wendellôs study: ñafter a century and more of narrowly restricted use, the interstate compact has begun to show an unsuspected versatility. New and expanded applications of the device to problems ranging from conservation to education have been largely spontaneousé ò.[493]

A further evolution is observed by Patricia Florestano: ñSince 1970 the nature of compacts changed from boundary compacts to river waters management, environmental and transportation compacts.ò[494] The use of compacts continued in the period 1970-1992 with nineteen new compacts between 1970-79 and twenty-two compacts between 1980 and 1992. Joseph Zimmerman noted that ñthere had been a decline in the number of compacts entered into in the 90s as the result of Congress utilizing its pre-emption powers with more frequency.ò[495]

At present, there are over 200 active interstate compacts covering such diverse areas as water rights, transportation of criminals, education of minor dependents of active military, driver licenses, and life insurance.[496] The oldest and largest interstate compact is the Interstate Compact to Conserve Oil and Gas and was established in 1935.

The role of interstate compacts has evolved profoundly over time from boundary agreement to regulatory instrument and ð presentlyð a device of federalism. Patricia S. Florestano[497] has also observed a change in the perception of compacts in the literature noting that compacts were seen in 1965 as way for the states to protect their power in the federal system,[498] as a counterbalance to federal activity in 1972[499] and finally as having ñunusual promise for

[493] ZIMMERMANN & WENDELL, *supra* note 483 at IX.
[494] Florestano, *supra* note 492 at 23.
[495] JOSEPH F. ZIMMERMAN, FEDERAL PREEMPTION: THE SILENT REVOLUTION (1991).
[496] Zimmerman, *supra* note 468 at 46.
[497] Florestano, *supra* note 492 at 13.
[498] WELDON BARTON, INTERSTATE COMPACTS IN THE POLITICAL PROCESS (1965).
[499] DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 162 (1972).

resolving national-state and interstate conflicts and problemsé in intergovernmental relations.ò.[500]

The main objective of this section was to outline the historical development of interstate compacts and to provide a framework to explain the current developments and the project of a Health Care Compact. In conclusion, it can be argued that the HCC is the product of this evolution and its proposal falls within an increasingly expansive interpretation of the function of interstate compacts as devices of federalism. After all, as Joseph. F. Zimmermann suggested, ñregulatory compacts often are promoted by economic interest groups seeking to deter Congress from pre-empting the regulatory authority of the states relative to an interstate problem.ò[501] The rest of this chapter will investigate the phenomenon more closely and will evaluate the influence of interest groups in its advancement.

III. The Health Care Compact Phenomenon

In the context of opposition to the ACA, promoters of the HCC interpret the interstate compact clause in such a way as to allow state legislatures to join and create an alternative to Washington healthcare management. It is therefore clear that for the first time a compact would be used to circumvent existing federal regulations. Instead of a device for interstate cooperation in regional issues, the HCC is mainly conceived as a vehicle to advance state sovereignty claims on healthcare policies, seen by its creators as desirable and constitutional but that would arguably fall outside the traditional purpose of an interstate compact.

As of January 2016, a total of 26 states have considered 59 Interstate Health Care Compact bills, and nine states have enacted and signed statutes (Oklahoma, Alabama, Georgia, Indiana,

[500] Richard C. Kearney & John J. Stucker, *Interstate Compacts and the Management of Low-Level Radioactive Wastes*, 45 PUB. ADMIN. REV. 210-220 (1985).
[501] JOSEPH F. ZIMMERMAN, INTERSTATE RELATIONS 44 (2011).

Missouri, South Carolina, Texas, Utah and Kansas).[502] The table below shows the number of bills considered in each legislative year, the number of state legislatures that considered bills and the number of successful bills that have established membership of the HCC.

Year	Number of compact bills	State legislatures that considered compact bills	States that joined the compact
2011	23	14	4
2012	23	13	3
2013	4	4	1
2014	8	6	1
2015	1	1	0
Tot.	**59**	26	**9**
			9-1=8 **Utah repealed the HHC with effect on July 1, 2014 with the passage of 2015 HB 414**

Just as happened with the nullification phenomenon, the number of bills considered in 2011 declined considerably in 2013, 2014 and 2015. The decline, I suggest, is due to the fact that the states interested in joining the Compact had already done so in the first two years and the project was not appealing to other states. With nine member states, the project appeared feasible to its proponents and was presented to Congress in 2014 with the introduction of House Joint Resolution 110 and again in 2015 with House Joint Resolution 50.

Chronology of Health Care Compact bills: The first state to establish membership of the Compact was **Georgia** on Apr. 2011**.** The HCC bill - GA H 46 - passed the House with 108

[502] The National Conference of State Legislaturesô website also provides an overview of HCC bills that integrates my analysis. Note that, in classifying the bills, NCSL considers the year in which legislation has been filed while I refer to the date of last action on the bill. *States Consider Health Compacts to Challenge Federal Ppaca,* NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/health/states-pursue-health-compacts.aspx (last visited Feb. 18, 2018).

Yeas, 63 Nays, 2 Exc,[503]7 Nv,[504] and the Senate with 35 Yea /18 Nay/2 Exc/ 1 Nv. and was finally signed by Gov. Nathan Deal.[505] The HCC suffered two setbacks in Arizona and Montana where AZ S 1592 and MT H 526 were vetoed respectively by Gov. Jan Brewer (R) and Gov. Brian Schweitzer (D). The second success for the HCC came on May 18th 2011, when Governor Mary Fallin signed the OK S 722 as Act n. 267, the **Oklahoma** House passed the bill with 54 Yeas, 25 Nays and 22 Exc.[506] On July 14th 2011 **Missouri** House and Senate passed MO H 423 and Gov. Jay Nixon (D) allowed the legislation to become law without his signature. The last state joining the HCC in 2011 was **Texas** with the enactment of TX SB 7 which passed the House with 96 Yeas, 48 Nays, 5 Exc., 1 Nv. and the Senate with 21 Yeas, 9 Nays and 1 Exc. and was signed by Gov. Rick Perry (R). The establishment of the Interstate Health Care Compact was this time included in a broader bill relating to the administration, quality, and efficiency of health care.

2012 saw the success of two bills on March 20th in Indiana and Utah. In **Indiana** IN H 1269 was passed by the House and the Senate and signed by Gov. Mitch Daniels (R). In **Utah** UT S 208[507] was passed by the House and the Senate and signed by Gov. Gary Herbert (R) but the Act was then repealed with effect on July 1, 2014 with the passage of 2015 HB 414. Another setback for the HCC occurred on Apr. 30th, 2012 in Minnesota when Gov. Mark Dayton (D) vetoed MN S 1933. The third state to join the HCC in 2012 was **South Carolina** on June 7,

[503] Excused absence.
[504] No vote.
[505] Details on the Georgia State Legislature Website:
2011-2012 Regular Session - HB 461 Health Care Compact; adopt, GEORGIA GENERAL ASSEMBLY, http://www.legis.ga.gov/Legislation/en-US/display/20112012/HB/461 (last visited Feb. 01,2018).

[506] House (Yeas:54, Nays:25 , Exc:22) and Senate (Yeas:25, Nays:20, Exc :3) For history of the bills see Oklahoma Legislature Bill Tracking http://www.oklegislature.gov/BillInfo.aspx?Bill=SB722&Session=1100.
[507] Legislative history on the Utah State Legislature website. *S.B. 208 Healthcare Compact*, UTAH STATE LEGISLATURE, http://le.utah.gov/~2012/bills/static/SB0208.html (last visited Feb. 3, 2018).

Gov. Nikki Haley (R) signed SC S 836 after it passed the House with 81Yeas, 31Nays and the Senate with 36 Ayes 0 Nays. [508]

Alabama joined in 2013 passing AL HB 109 with 25 Yeas, 5 Nays and 5 Exc.. The Act was signed by Gov. Robert J. Bentley. The last state to join the HCC was **Kansas** on April 23rd 2014. The bill was passed by the House with 74 Yeas, 48 Nays and the Senate with 29 Yeas, 11 Nay. Kansas Governor Sam Brownback (R) signed HB 2533[509] and included his personal statement in the final version of the Act, pointing out that the Compact was mainly aimed at preserving ñindividual liberty and personal control over health care decisionsò[510] and added:

> I would support reversal of the unfortunate Medicare cuts initiated by the federal Affordable Care Act. Furthermore, I would strongly oppose any effort at the state level to reduce Medicare benefits or coverage for Kansas seniors. I have signed House Bill 2553 with this understanding, and I will work to make it a reality when the Compact becomes effective.[511]

The Ohio legislature considered a Health Care Compact bill in April 2015 (OH HB 34)[512] that was passed by the House but never went beyond consideration in the Ohioôs Senate Committee on ñGovernment Oversight and Reformò.

The HCC is primarily seen as a constitutional mechanism that would allow the transfer of responsibility for the regulation of health care goods and services from Washington to the states. This is explicitly declared in the preamble of state bills that enacted the HCC such as

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[508] Legislative history on the South Carolina Legislature website. *S0836*, SOUTH CAROLINA LEGISLATURE, http://www.scstatehouse.gov/billsearch.php (last visited Feb. 3, 2018). In order to access the billôs page, select the 2011-2012 legislature and type 0836 in the bill search bar.
[509] Legislative history on the Kansas Legislature website. *HB 2553,* KANSAS LEGISLATURE, http://kslegislature.org/li_2014/b2013_14/measures/hb2553/ (last visited Feb. 3, 2018).
[510] *Statement of the Governor upon Signing of House Bill2553,* KANSAS LEGISLATURE, http://kslegislature.org/li_2014/b2013_14/measures/documents/hb2553_enrolled.pdf (last visited Feb. 3, 2018).
[511] *Id.*
[512] Legislative History on the Ohio Legislature website. *House Bill 34,* OHIO LEGISLATURE, https://www.legislature.ohio.gov/legislation/legislation-status?id=GA131-HB-34 (last visited Feb. 3, 2018).

2013 AL HB 109: ñWhereas, the member states seek to protect individual liberty and personal control over health care decisions, and believe the best method to achieve these ends is by vesting regulatory authority over health care in the statesò [é][513]

IV. The Health Care Compact introduced in Congress, House Joint Resolution 110 (2014) & House Joint Resolution 50 (2015)

According to the Constitution, a compact must be approved by the Congress.[514] In an attempt to obtain that consent, on February 11, 2014 James Lankford (Republican Representative for Oklahomaôs 5th congressional district) introduced H.J.Res.110 ñGranting the consent of Congress to the Health Care Compactò but the resolution failed after being referred to the Subcommittee on Regulatory Reform, Commercial and Antitrust Law. The following year, on Dec. 5th 2015 Rep. Doug Collins (Republican Representative for Georgiaôs 9th congressional district) introduced H.J.Res.50, which is identical to previous H.J.Res.110. The Resolution was referred to the Committee on the Judiciary but never went beyond that stage.[515] In terms of support, the resolution was introduced with 3 co-sponsors (Rep. Farenthold, Blake [R-TX-27], Rep. Scott, Austin [R-GA-8], Rep. Long, Billy [R-MO-7]) and has seen more sponsors joining in July 2015 (Rep. Jordan, Jim [R-OH-4], Rep. Buck, Ken [R-CO-4], Rep. Pompeo, Mike [R-KS-4]), September (Rep. Westmoreland, Lynn A. [R-GA-3], Rep. Graves, Tom [R-GA-14], Rep. Olson, Pete [R-TX-22], Rep. Duncan, Jeff [R-SC-3]) and October 2015 (Rep. Stutzman, Marlin [R-IN-3], and Rep. Mulvaney, Mick [R- SC-5]) for a total of 12 co-sponsors.[516] The resolution is composed of nine sections that regulate the operation of the Compact. Sec. 1 contains key definitions and defines healthcare broadly, including in the definition medical

[513] H.R. 109, 2013 Leg., Reg. Sess. (Ala. 2013). Text is publicly available online at http://alisondb.legislature.state.al.us/ALISON/SearchableInstruments/2013RS/PrintFiles/HB109-int.pdf.
[514] Art. I, Section 10 of the United States Constitution provides that ñno state shall enter into an agreement or compact with another stateò without the consent of Congress. The biggest obstacle to the effective creation of the HCC is the approval by Congress.
[515] H.R.J.Res. 50, 114th Congress (2015-2016).
[516] Eight of the co-sponsors also sponsored previous H.J.Res.110.

treatment and services, the sale and dispensing of drugs and medical devices, and individual and group health insurance plans. Sec. 2 clarifies that the main objective of the HCC is ñto return the authority to regulate Health Care to the Member States consistent with the goals and principles articulated in this Compactò and the concept is reiterated in Sec. 3 ñThe legislatures of the Member States have the primary responsibility to regulate Health Care in their respective States.ò Sec.4 establishes primacy of the HCC over federal law and provides that a member state may enact laws that suspend the operation of federal laws, rules, regulations and orders that are inconsistent with state laws enacted pursuant to the Compact: ñEach Member State, within its State, may suspend by legislation the operation of all federal laws, rules, regulations, and orders regarding Health Care that are inconsistent with the laws and regulations adopted by the Member State pursuant to this Compact.ò This assertion of supremacy, that somehow recalls nullification language, was explained in December 2010 by Ted Cruz:

> the problem confronted by most state efforts against federal health care legislation is that, under the Supremacy Clause, federal law preempts state law. However, with congressional consent, an interstate compact is federal law. Hence, it can supersede all prior federal lawð including ObamaCare. Critically, once Congress consents to an interstate compact, the compact carries the force of federal law, trumping all prior federal and state law.ò[517]

Sec. 5 provides that members of the Compact receive economic support from Washington for health care administration: ñEach Member State shall have the right to Federal monies up to an amount equal to its Member State Current Year Funding Level for that Federal fiscal yearò. Sec. 6 establishes the Interstate Advisory Health Care Commission, an organ composed of no more than two members appointed by each Member State that shall meet at least once a year.

[517] Cruz, *supra* note 469.

The Commission is tasked with assisting the states in their regulation of Health Care, with making non-binding recommendations, studying regulations and recommending courses of action for member states. Sec. 7 confirms that the HCC will seek Congressional approval and that the Compact ñshall be effective [é] unless the United States Congress, in consenting to this Compact, alters the fundamental purposes of this Compact.ò The wording of this section is particularly relevant because it encapsulates the essence of the Compact in two main objectives:

> ñ(1) to secure the right of the Member States to regulate Health Care in their respective States pursuant to this Compact and to suspend the operation of any conflicting Federal laws, rules, regulations, and orders within their States; (2) to secure Federal funding for Member States that choose to invoke their authority under this Compact, as prescribed by Section 5 above.ò

This section confirms that the HCC is not only an agreement aimed at establishing intergovernmental cooperation across the states but that it is mainly a means to suspend the operation of federal law in the signatory states while maintaining the level of federal funds. This is a crucial characteristic of the HCC that distinguishes it from other compacts. Sec. 8 regulates amendments to the HCC and establishes that ñany amendment shall be effective unless, within one year, the Congress disapproves that amendment.ò This provision affirms, I suggest, the contractual nature of the Compact and the rights of the member states to change the terms of their contract without prior consent of the Congress. The last section of the resolution establishes six monthsônotice for withdrawal of a member state and dissolution upon the withdrawal of all but one of the Member States.

V. The Interest Groups Involved in the Promotion of the Health Care Compact

The comparison of the texts of the House Joint Resolutions presented to Congress and of the wording of state bills introduced across the fifty states reveals a common drafting hand: the language used is ð in most casesð identical and also the structure of the HCC bills coincides; most of the bills have the same preamble (with the exception of the House Joint Resolutions where a preamble is absent) and the same nine sections. The uniformity of language would suggest that the HCC is a project piloted by an individual mind or organization and supported by specific interest groups. My research of organizations involved in the promotion of the HCC across the states led to the identification of two main organizations: the Health Care Compact Alliance[518] and the American Legislative Exchange (ALEC).

The Health Care Compact Alliance

The Health Care Compact Alliance is an organization that promotes state model legislation and encourages activists to contact members of the U.S. House of Representatives and persuade them to co-sponsor H.J. Res 50, the Health Care Compact Resolution. The Alliance website hosts a blog with updates on the movement and invites visitors to donate for the cause, join the movement and register on a mailing list with weekly updates on the progress and accomplishments of the project. When prompted to the ñAbout usò page, the visitor is informed of the fact that the Health Care Compact Alliance is, in turn, a project of **Competitive**

[518] *See* website of the organization: HEALTH CARE COMPACT, http://www.healthcarecompact.org/ (last visited Feb. 4, 2018).

Governance Action.[519] The latter is an organization chaired by Leo Linbeck III, a Texas businessman co-founder and top donor of the Campaign for Primary Accountability (CPA), a Super PAC that campaigns against House incumbents from both parties. Leo Linbeck III is also lecturer in the MBA programs at Stanford and Rice universities[520] and serves as president and CEO of Aquinas Companies, LLC[521] and as executive chairman of the Linbeck Group.[522] The link between Leo Linbeckôs business and politics is apparent as Rachel Tabachnick noted that Competitive Governance Action shares the address of the Linbeck Group, LLC, in Houston.[523] Competitive Governance Action is also engaged in a ñPrimary Pledgeò to encourage citizens to vote in primary elections and in the attempt to build a coalition for the repeal of the 16th Amendment. The organizationôs mission statement reads:

> Competitive Governance Action is a 501(C)(4) organization committed to education and advocacy to manifest the concept that problems should be solved by the smallest, least centralized, most local authority that may effectively address the matter. Central to the concept is the devolution of political power from the federal government to state and local governments, to individuals and to non-government community and religious institutions.

Leo Linbeck III has explained the nature of the HCC phenomenon in an interview to the Texas Tribune where he argued:

> The focus of this group is governance reform ð our ultimate goal is to restore self-governance. It is not nullification, it is not secession. What itôs an attempt to do is

[519] *See* website of the organization: COMPETITIVE GOVERNANCE ACTION, https://www.guidestar.org/profile/20-5792365 (last visited Feb. 4, 2018).
[520] *See* academic profile: *Leo Edward Linbeck III*, GRADUATE SCHOOL OF STANFORD, at https://www.gsb.stanford.edu/faculty-research/faculty/leo-edward-linbeck (last visited Feb. 4, 2018).
[521] The companies of Aquinas operate in the fields of commercial construction and real estate acquisition and development.
[522] Linbeck is a Texas-based, technology-driven building construction firm offering construction management at-risk, design/build, and integrated project delivery services.
[523] *See* Tabachnick, *supra* note 465.

> to organize the states in a way that is constitutional, to use an interstate compact to devolve power over health care away from a centralized federal government. [é]And the fundamental problem is that decisions are being made too far away from the people. The Health Care Compact is an attempt to reverse that.[524]

The Health Care Compact alliance is very similar to the Tenth Amendment Center in terms of structure and communication strategies. The organization relies on its subscribers to publicize the movement and persuade their state or congressional representatives to sponsor the compact bill; they use the mailing list extensively to engage members in the conversation and organize virtual meetings. On Oct. 28th, 2015, for example, I attended a Google Hang Out debate hosted by actress and radio host Janine Turner and Health Care Compact founder Leo Linbeck III; the meeting aimed at explaining to potential activists the nature and operation of the Compact, participants were given the opportunity to join the conversation and pose questions. Leo Linbeck III was very firm in defining the Compact as a powerful constitutional means to ñreturn authority and dollars for healthcare to the statesò[525] and confirmed that the Compact is seeking both congressional and presidential approval in order to ensure that the states will continue to receive federal funds under the new scheme:

> we are not only clarifying responsibilities, we are transferring tens of billions of dollars to states and this require really appropriation, and appropriation- is clearly unambiguous- needs presidential signature. The HCC needs the presidential signature in order to make sure the states get the money to run their health care system.[526]

[524] See Emily Ramshaw, *Leo Linbeck III: The TT Interview,* THE TEXAS TRIBUNE, (March 24, 2011), http://www.texastribune.org/2011/03/24/leo-linbeck-iii-the-tt-interview/.
[525] Leo Linbeck III, Video of the Google Hangout can be found at https://plus.google.com/events/c1or9np0ibou6ne096o5th3c458 (last visited Feb. 4, 2018).
[526] *Id.*

Leo Linbeck III is also the author of the model draft of the HCC bill that can be downloaded from the Health Care Compact Alliance website.[527] The text of this draft has been used as the basis of state bills that have established the HCC and for both the House Joint Resolutions currently pending in the House Committee. It is composed of a preamble and nine articles. The preamble, which has not been included in the House Joint Resolutions, states the importance of the separation of powers, including between federal and state authority, and the preservation of individual liberty and personal control over health care decisions.

An issue with the investigation of how the HCC would practically operate is that, apart from the state bills to authorize the HCC and the resolutions- that are all identical- I could not find any official document detailing the proposal of a Health Care Compact. Leo Linbeck explained the vagueness of the proposal during the October Google Hangout that I attended when he said: ñThe reality is that there is nothing in the HCC that specifies policies, so it is really up to the statesò.[528] It would therefore seem that the practical operation of the Compact and policy decisions have been purposely left to the individual states that would fully manage their federal funds and develop their own health care system.

The explicit involvement of corporations and the declarations of Leo Linbeck confirm that the real *raison d'être* of the HCC movement is deregulation and decentralization. Even if he clearly takes care to distance himself from the nullification movement, I believe that the aims of the two movements coincide and that the HHC project incorporates the contradictions of the nullification movement as it advances a conservative view of the Constitution together with a ñlibertarianò promotion of decentralization and deregulation. This is also confirmed by the fact that Leo Linbeck defined himself as a ñconservative communitarianò, an oxymoron that recalls

[527] The sample bill can be downloaded at http://www.healthcarecompact.org/HCC_Final.pdf (last visited Feb. 4, 2018).
[528] Linbeck III, *supra* note 525.

the ideological schizophrenia at the core of the nullification movement and the consequent struggle to find a political identity.

The American Legislative Exchange Council (ALEC)

The Health Care Compact Alliance is the principal organization that promotes the HCC and related legislation. However, my research suggests that one determinant ally for the advancement of state legislation is the American Legislative Exchange Council which has adopted the compact as model legislation[529] and presumably reached nearly 2,000 state legislators. In order to measure the impact of ALEC on the proposal of HCC bills, I have compared the authors of my 59 HCC bills against the Center for Media and Democracyôs list of ALECôs members. [530] I assumed that if the same name appeared on both lists that would be a sufficient evidence to presume that the author had proposed the bill under the influence of ALEC.

The comparison of the list of authors of HCC bills and the list of ALEC politicians shows that, overall, 54% of the compact bills have been introduced in state legislatures by ALEC members. The table below presents the number of HCC bills introduced by ALEC members for each year and compares that figure with the total of HCC bills introduced across state legislatures. The third column provides the result of that comparison as a percentage.

[529] *See Health Freedom Compact Act*, AMERICAN LEGISLATIVE EXCHANGE COUNCIL, https://www.alec.org/model-policy/health-freedom-compact-act/ (last visited Feb. 4, 2018).
[530] The organization describes itself as a ñnonpartisan, grassroots organization dedicated to restoring the core values of American democracy, reinventing an open, honest and accountable government that serves the public interest, and empowering ordinary people to make their voices heard in the political process.ò *See* more at http://www.commoncause.org/about/.

Year	Number of HCC bills introduced by ALEC Members in state legislatures	Total of HCC bills introduced in state legislatures	Percentage of nullification bills introduced by ALEC Members
2011	**15**	**23**	**65%**
2012	**14**	**23**	**60%**
2013	**0**	**4**	**0%**
2014	**3**	**8**	**37%**
2015	**0**	**1**	**0**
Tot.			**54%**

The influence of ALEC was remarkable in 2011, when 65% of the bills were proposed by state representatives linked to the organization. Four bills were enacted in total and three of the authors of those bill proved to have ties with ALEC. In particular, Rep. Burlison (R) of Missouri (author of MO H 423) and Rep. Nelson (R) of Texas (author of TX S 7) are mentioned in the Center for Media and Democracyôs Directory of the ALEC Health and Human Services Task Force Membership Directory, dated August 2011;[531] and Rep. Bingman (R) of Oklahoma (author of OK S 722) appears on the ALEC Directory of Energy, Environment and Agriculture Task Force Membership. [532]

In 2012 ALECôs influence was still high: 60%. However, out of three enacted bills, only one was authored by a legislator with ALEC ties. I am referring to UT H 175, authored by Rep. Seelig (D) who used to be member of ALEC's Public Safety and Elections Task Force but who

[531] Their names appear in the list of members of the Health and Human Services Taskforce provided by the Center for Media and Democracy. *ALEC Health and Human Services Task Force*, CENTER FOR MEDIA AND DEMOCRACY, https://www.sourcewatch.org/index.php/ALEC_Health_and_Human_Services_Task_Force (last visited Jan. 24, 2018).

[532] His name appears in the list of members of the Energy, Environment and Agriculture Task Force provided by the Center for Media and Democracy. *ALEC Energy, Environment and Agriculture Task Force*, CENTER FOR MEDIA & DEMOCRACY, https://www.sourcewatch.org/index.php/ALEC_Energy,_Environment_and_Agriculture_Task_Force (last visited Jan. 24, 2018).

contacted ALEC to confirm that her membership would not be renewed 7 days after the introduction of the bill on April 9th 2012.[533]

The HCC movement suffered a considerable setback in 2013 with only 4 bills proposed and even ALEC had no impact. ALEC returned on the scene in 2014 with three bills, one of which (KS H 2553) approved Kansasômembership of the HCC. The influence of ALEC is particularly evident in the introduction of KS H 2553, which was officially proposed by the House Federal and State Affairs Committee whose 9 members (out of 22 total members) had ties with the organization. Specifically, Chair Rep. Steve Brunk is believed to be member of the ALEC Commerce, Insurance and Economic Development Task Force;[534] Vice-Chair Lovelady, Rep. J. R. Claeys, and Rep. Keith Esau are on the Center for Media and Democracyôs list[535] and Rep. Susan Concannon, Rep Erin Davis, Rep. Willie Dove, Rep. Bud Estes, and Rep. Troy Waymaster are reported[536] to have attended an ALEC meeting in Washington, DC. Hence, it is possible to argue that ALEC played a major role in 2011/2012 in promoting the HCC across the 50 states but that it backed out in 2013/2014 when the majority of states interested in the HCC had already joined. However, the influence of ALEC on the enactment of KS H 2553 was remarkable in 2014 and should be considered evidence of the influence of this organization in the Kansas legislature.

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[533] This is reported by the Centre for Media and Democracy that cites to an email by Chaz Cirame, Senior Director of Membership and Meetings, American Legislative Exchange Council to Utah. Rep. Seelig, email to Rep. Jennifer Seelig, April 16, 2012.
http://www.sourcewatch.org/index.php/Utah_ALEC_Politicians#cite_note-15.

[534] His name appears in the list of members of the Commerce, Insurance and Economic Development Task Force provided by the Center for Media and Democracy. *ALEC Commerce, Insurance and Economic Development Task Force*, CENTER FOR MEDIA AND DEMOCRACY, https://www.sourcewatch.org/index.php/ALEC_Commerce,_Insurance_and_Economic_Development_Task_Force (last visited Jan. 24, 2018).

[535] *Kansas ALEC Politicians,* CENTER FOR MEDIA AND DEMOCRACY, https://www.sourcewatch.org/index.php/Kansas_ALEC_Politicians (last visited Jan. 24, 2018).

[536] Peter Hancock, *Kansas Lawmakers Attend ALEC Meeting in DC*, LAWRENCE JOURNAL WORLD (Dec. 4, 2014), http://www2.ljworld.com/news/2014/dec/04/kansas-lawmakers-attend-alec-meeting-dc/.

VI. Case Study: The Reasons for the Enactment of Kansas House Bill 2553 (2014)

Having speculated on the influence of Health Care Compact Alliance and ALEC in the promotion of HCC bills across the states, the question must be: what are the reasons why nine state legislatures have authorized participation to the HCC? In an attempt to identify the motivations of statesô legislatures joining the HCC, I have analysed the legislative history and the record of committee debates and minutes for KS H 2553. I have opted for an analysis of the debate of the Kansas legislature because it was the last state to approve the HCC and the debate that took place in that legislature arguably encapsulated the debates held in the other legislatures.

In April 2014 Kansas became the ninth and last state to approve the Health Care Compact. As mentioned above, the bill was passed by the House with 74 Yeas, 48 Nays and the Senate with 29 Yeas, 11 Nays. Kansas Governor Sam Brownback (R) signed KS H 2553 and included his personal statement in the final version of the Act, saying that suspending federal health care legislation would have preserved ñindividual liberty and personal controlò.[537] The HCC bill was first introduced on Jan. 31 and referred to the **House Committee on Federal and State Affairs.** The text of the introduced bill was identical to the text introduced in other state legislatures and the text introduced in Congress, H.J.Res.110 and H.J.Res.50. At the hearings, held on Feb. 14, Rep. Hildabrand and Sen. Pilcher-Cook appeared in support of the bill, along with Secretary of State Kobach.

[537] H.R. 2553, 2013-2014 Leg., Reg. Sess. (Kan. 2014). The final version of the bill can be retrieved on the Kansas Legislature website: http://kslegislature.org/li_2014/b2013_14/measures/documents/hb2553_enrolled.pdf.

Rep. Brett Hildabrand, a Republican member of the Kansas House of Representatives, emphasized the need to establish healthcare policies that were independent of the federal government; he alleged that since the implementation of the ACA, health care costs had risen for small firms and individuals and that the only solution would be to provide states with the ñfreedom and flexibility to address their individual needs.ò[538] Sen. Mary Pilcher-Cook also presented testimony in favor of the bill and pointed out the potential reduction of bureaucracy resulting from an independent administration of healthcare. She stressed the importance of liberty from federal mandates and the convenience of a block grant for Medicaid to Kansas:

> When Kansas has the direct authority and responsibility for meeting its citizensô health care needs through this compact, the state would have a tremendous reduction in bureaucracy it has to contend with that comes from compliance with the federal government telling the state what it can or cannot do in a large and complex health care system.[539]

Secretary of State Kris Kobach also presented testimony in favour of the bill. He allegedly played an important role in supporting the bill because of his influential position as chief election officer and head of the Business Filing Center.[540] Secretary of State Kobach called for the enactment of the HCC as a means to push back against the federal governmentôs ñillegitimate expansion of its powersò and, citing relevant case law, emphasized that the HCC might have been an opportunity to suspend the operation of the Affordable Care Act in the state:

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[538] *Health Care Compact: Hearing on HB 2553 Before the H. Comm. on Federal and State Affairs*, 2013-2014 Leg., Reg. Sess. (Kan. 2014) (statement of Rep. Brett Hildabrand). The testimony is available on the Kansas Legislature website http://kslegislature.org/li_2014/b2013_14/committees/ctte_h_fed_st_1/documents/?date_choice=2014-02-18.

[539] *Id.* (statement of Sen. Mary Pilcher-Cook)).

[540] The different functions of the Kansas Secretary of State are presented on the Secretary of State website: STATE OF KANSAS, OFFICE OF THE SECRETARY OF STATE, http://www.sos.ks.gov/main.html (last visited Feb. 4, 2018).

> The compact speaks for itself regarding the specific structure and scope of that authority. Importantly, once Congress has approved the compact, the member states may suspend the operation of Obamacare within their jurisdiction. é This compact is more than a way for Kansas to protect its citizens from the high costs, regulatory burdens, and loss of coverage caused by Obamacare. It is a means to restore the constitutional framework designed by the Founding Fathers and to return the regulation of health care to the sovereign states. If it is approved by Congress, it will restore authority that the Kansas Legislature has not exercised for more than fifty years.[541]

Written testimony in support of the bill was provided by Eric Stafford, Senior Director of Government Affairs for the Kansas Chamber, who reported the concern of the Chamberôs members about ñcompliance with an ever changing lawò and stressed the right of employers ñto choose which health plans are the right fit for their company, if they choose to offer that added benefit to their employees.ò[542] His testimony, for the first time, explicitly mentioned businessesô concerns and did not make reference to the ideological opposition carried out by politicians. I should here remind the reader that the HCC is promoted by a businessman and that therefore businesses are the most obvious audience.

The House Committee on Federal and State Affairs also heard two testimonies in opposition to the HCC bill; one presented by David Wilson, a health care volunteer and former president of AARP Kansas,[543] the other presented by Sean Gatewood, at the time Interim Executive

[541] *Health Care Compact: Hearing on HB 2553 Before the H. Comm. on Federal and State Affairs*, *supra* note 538. (statement of Secretary of State Kris Kobach).
[542] *Id.* (statement of Eric Stafford, Senior Director of Government Affairs for the Kansas Chamber).
[543] AARP is a nonprofit, nonpartisan organization, with a membership of more than 37 million, that provides support and advocacy to families with issues in healthcare, employment security and retirement planning. *See* webpage at http://www.aarp.org/about-aarp/.

Director of the Kansas Health Consumer Coalition (KHCC).[544] David Wilson pointed out the benefits of the Medicare program and warned against the dangers for seniors and people with disabilities who rely on the program for their health coverage:

> It would be a serious mistake to turn this program over to the state. Since 1965, Medicare beneficiaries have received guaranteed benefits, protections, and have never once had to worry about their Medicare [é] By joining a health care compact seniors could find themselves thrown into a whole new health care system with different benefits, fewer choices, and less access to care.

Sean Gatewood also called for the expansion of the Medicare and Medicaid federal programs, saying that the HCC would have potentially negative effects on those programs: ñIf expanding the program through the ACA is not the answer, then what is for the approximately 80,000 Kansans that are currently uninsured and fall in the gap between Medicaid eligibility and Marketplace subsidy?ò[545]

Mitzi E. McFatrich, Executive Director of Kansas Advocates for Better Care,[546] sent written testimony to oppose the HCC bill; the main argument was again the protection of elderly and Medicare benefits: ñIf Kansas opts out of the federal Medicare and Medicaid programs and oversight, Kansas will also have to opt out of reasonable health care standards and protections that benefit older Kansans, now and in the future.ò[547]

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[544] The Kansas Health Consumer Coalition is a non-profit organization that advocates for affordable, accessible, and quality health care for all Kansans. *See* Kansas Health Consumer Coalition website http://kshealthconsumer.com/.

[545] *Health Care Compact: Hearing on HB 2553 Before the H. Comm. on Federal and State Affairs, supra* note 538. (statement of Sean Gatewood, Interim Executive Director, Kansas Health Consumer Coalition).

[546] Kansas for Better Care is a no-profit organization working on behalf of elders for better long-term care. *See* Kansas for better care website http://www.kabc.org/.

[547] *Health Care Compact: Hearing on HB 2553 Before the H. Comm. on Federal and State Affairs, supra* note 538. (statement of Mitzi E. McFatrich, Executive Director of Kansas Advocates for Better Care).

There was no neutral testimony and on Feb. 20th Rep. Brett Hildabrand made a motion to pass HB2553 out favourably. On the same day, the Committee recommended the bill for approval to the House. The bill ï in its original version- was approved by the House with 74 Yea and 48 Nay. I could not find any record of the floor debates held in the Committees of the Whole of the Kansas House because they are not recorded or summarized in any publication. However, I could access the explanation of the vote submitted during final action on the bill, recorded in the 2014 House Journal.[548] Most of the comments recorded in the House Journal are comments from legislators that opposed the bill and only one comment is recorded in support of HCC. The examination of that comment reveals that Kansas legislators voted in favour of the HCC not because they believed it was a valid option but simply because they considered it a means to repeal Obamacare. Rep. Don Hineman, Tom Phillips, Sue Boldra, Steven C. Johnson, J. Russel Jennings, Stephen Alford, Diana Dierks asserted:

> I vote yes on HB 2553 because I believe the Affordable Care Act, otherwise known as Obamacare, is a seriously flawed federal policy. It harms hardworking Kansans and does not properly deliver healthcare reform. While HB 2553 would create serious implementation issues if it should ever be endorsed by Congress, I consider that to be an unlikely outcome. My vote in the affirmative is intended to send a message to Congress: Obamacare is an ill-conceived and unworkable program. I implore congress to work diligently toward effective healthcare reform.[549]

It is therefore clear that the HCC project was approved only to ñsend a messageò, to raise a voice against a reform that was repudiated from the very beginning.

[548] H. JOURNAL, 2013-2014 Leg., Reg. Sess. at 2011 (Kan. 2014).
The 2014 Kansas House Journal can be consulted at http://li.kliss.loc/li_2014/b2013_14/chamber/journals/.
[549] *Id.*

The bill was then referred to the **Senate Federal and State Affairs Committee** that heard evidence on April 1st. The testimonies in favor of the bill were presented by Rep. Lance Kinzer, who appeared before the committee on behalf of Secretary of State Kris Kobach who could not attend the meeting because of conflicting commitments, by Sen. Mary Pilcher-Cook, Rep. Brett Hildabrand and Daniel Tripp, on behalf of Competitive Governance Action. The first three testimonies reiterated the same arguments expressed before the House Federal and State Affairs Committee[550] and new testimony was presented on behalf of Competitive Governance Action, the organization behind the Health Care Compact Alliance. Daniel Dripp, in line with the other witnesses, emphasized the opportunity provided by this compact to ñmove the authority and funding for regulating healthcare from the federal government to the statesò and highlighted that the compact was not aimed at ñsetting health care policyò but was only a ñfirst stepò before Congress had to pass enabling legislation.[551]

The Committee also heard four witnesses in opposition to the bill, presented by George Lippencott, a senior citizen living in Lawrence, Judy Bellome, a Lieutenant Commander in the Nurse Corps, David Wilson for AARP and Sean Gatewood, Interim Executive Director of the Kansas Health Consumer Coalition. Written testimony was presented by Mitzi E. McFatrich, Executive Director of Kansas Advocates for Better Care. The opposition raised concern for the impact of the HHC on the Medicare program.

George Lippencott expressed his concern for the lack of details on how the HCC would have worked and for the transfer of management of Medicare program to the state:

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[550] *Health Care Compact: Hearing on HB 2553 Before the S. Comm. on Federal and State Affairs*, 2013-2014 Leg., Reg. Sess. (Kan. 2014) (statement of Rep. Lance Kinzer, Sen. Mary Pilcher Cook and Rep.Brett Hildabrand).
The testimonies are available at http://kslegislature.org/li_2014/b2013_14/committees/ctte_s_fed_st_1/documents/?date_choice=2014-04-01.

[551] *Id.* (statement of Daniel Dripp).

> I am here because I do not understand what we are trying to accomplish with this legislation that proposes to make Medicare a state program. é I read the Compact, the bill and associated comments and I find lifting words but no details on how this would work. é Is this another case of ôWeôll Have to Pass the Bill In Order To Find What Is In Itò? Many critiques were critical of that notion (real or imagined) when the Affordable Care Act (ACA) was passed. Why would we buy into such a notion here in Kansas?

Ms. Bellome shared her concerns as a nurse that if Medicare was to be administrated by the state of Kansas, the complicated reimbursement of physicians, hospitals, nursing homes, and hospice would affect seniorsô health coverage. David Wilson, Sean Gatewood and Mitzi E. McFatrich reiterated the same comments presented before the House Committee.

The Committee recommended the bill be passed and referred it to the Committee of the Whole. The Senate passed the bill with 29 Yeas and 11 Nays on Apr. 4th. The reasons for the passage of the bill by the Senate could not be examined because there was no explanation of votes filed in the Senate when the bill was passed by the chamber. The bill was approved by Governor Sam Brownback on Apr. 22nd and finally enacted as Section 1. K.S.A. 2014 Supp. 65-6230. There have been two attempts in 2015 to repeal the Act but the bills introduced for that purpose never reached the Committee stage.[552]

The investigation of the enactment of the HCC in Kansas suggests one main key point for my research: the HCC was not approved because legislators believed it was a solution for better healthcare administration but because it was an allegedly powerful message to Washington, a joint response to an undesirable reform. Even though the HCC project had no chanceof of being

[552] H.R. 2046, 2015 Leg., Reg. Sess. (Kan. 2015) sponsored by Democratic Rep. Jim Ward and H.R. 2230, 2015 Leg., Reg. Sess. (Kan. 2015) sponsored by Democratic Representatives Ruiz, Burroughs, Carmichael, Curtis, Highberger, Lane, Ousley, Tietze, Victors and Wolfe Moore. 2015 KS H.B. 2230 was also sponsored by Republican Rep. Rooker.

approved by Congress it was a clear declaration of resistance to the Affordable Care Act and was enacted in the hope of influencing the ongoing debate on the repeal of the Act.

VII. Legal controversies and Theoretical Principles Behind Interstate Compacts

Article 1, Section 10 of the federal U.S. constitution prohibits states from entering into any alliance, confederation or treaty and is construed as a restriction upon the states entering into compacts with each other without the consent of Congress.[553] According to James Madison in the Federalist No. 44 this clause was self-explanatory: ñthe remaining particulars of this clause fall within reasoning which are either obvious, or have been so fully developed, that they may be passed over without remark.ò[554] The wording of this clause, however, has been subject to different interpretations that still have not been settled[555] and have promoted an evolving conception of interstate compacts: ñthe constitutional language of the Compact Clause is broad and unqualified.ò[556] A first comprehensive study on the Compact Clause was conducted in 1925 by Professor Felix Frankfurter of the Harvard Law School and James M. Landis, a member of the Securities and Exchange Commission with the publication of the Yale Law Journal article ñThe Compact Clause of the Constitutionò.[557] They argued that the nature and

[553] Article I Section 10 Clause 3. ñNo State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.ò

[554] Reported by ZIMMERMANN *supra* note 468 at 34.

[555] *See* Dana Brakman Reiser, *Charting No Man's Land: Applying Jurisdictional and Choice of Law Doctrines to Interstate Compacts*, 111 HARV. L. REV. 1991 (1998) and Michael S. Smith, *Murky Precedent Meets Hazy Air: The Compact Clause and the Regional Greenhouse Gas Initiative*, 34 B.C. ENVTL. AFF. L. REV. 390 (2007) (The ñbroad and unqualifiedò language of the clause has resulted in much ambiguity concerning its purpose and reach).

[556] Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 Mo. L. Rev. 297 (2003).

[557] Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925).

potential of the clause was little understood and this was mostly due to the position of this provision in the Constitution which had minimized the significance of what was granted,[558] especially in light of the development in the use of such provision. Patch expressed the same opinion:

> The fact that the Compact Clause was couched in negative terms and phrased as a restriction on state sovereignty probably tended to discourage conclusion of interstate agreements. Settlement of interstate controversies was sought more often by institution of suit in the Supreme Court than by resort to negotiation of mutual agreements to be approved by Congress.ò[559]

Zimmermann and Wendell argued that Frankfurter and Landis already conceived the compacts as a means to free the states from the limiting decisions of the Supreme Court under the Commerce Clause.[560] A different view has recently been expressed by Caroline Broun who has interpreted the Compact Clause as restrictive in nature: ñRather than empower, the Compact Clause restricts formal joint or collective state action and thus acts as a check against such action.ò[561]

The HCC project is the result of an expansive interpretation of the function of interstate compacts and, as explained above, of an evolution in the conception and use of this constitutional device. Is this evolution legally acceptable? Can interstate compacts legally interfere in an area of law already regulated by the Congress and therefore create a parallel system of health care that explicitly goes against the established system, challenging the

[558] *Id.* at 691.
[559] Buel W. Patch, *Interstate Compacts*, *in* EDITORIAL RESEARCH REPORTS 1935, at 473-92 (1935), *available at* http://library.cqpress.com/cqresearcher/cqresrre1935062600.
[560] ZIMMERMANN & WENDELL, *supra* note 483 at 2.
[561] BROUN ET AL., *supra* note 466 at 36.

supremacy of the United States under article I, § 10, clause 3, of the Constitution. Professor Marian Ridgeway expressed her concern back in 1971:

> ñInterstate compacts have traditionally been used as means to reach agreement between two or more states on troublesome matters of a narrow, intimate kind, of vital importance only to the states involved. They were never used to shape and administer complicated and intricate problems of far-reaching state social and economic policy. [é] It is certain that none foresaw any such uses for interstate compacts as are assigned today by more and more state and national legislation. It is also certain that if such uses had been foreseen, there would very likely have been extensive debate.[562]

This section will examine the legal controversies surrounding interstate compacts and will provide a legal framework to understand the claims and hopes of proponents of the HCC. Firstly, this section defines the interstate compact in its dual nature of statute and contract. Secondly, it explores the requirement of congressional consent and presidential approval. Thirdly, it analyzes the claim that interstate compacts trump federal law and can pre-empt federal intervention.

Legal Nature of Interstate Compacts: According to Prof. Zimmermann and Dr. Wendell compacts have a dual legal nature; they can be seen as statutes and as contracts. Statutes because they have the force of statutory law, contracts because they involve more than a party and the substantive law of contracts is applicable to them.[563] Justice Frankfurter clearly attributed to compacts the status of contracts in *State ex rel. Dyer v. Sims*[564] when he argued that an interstate compact could be analogized to a contract entered into by an individual or

[562] MARIAN E. RIDGEWAY, INTERSTATE COMPACTS: A QUESTION OF FEDERALISM, VII (1971).
[563] *Cfr.* ZIMMERMANN AND WENDELL 3 *supra* note 483.
[564] State ex rel. Dyer v. Sims, 341 U.S. 22 (1951).

corporation and defined the states as ñcontracting statesò. Relevant literature sees the compacts as agreements that produce statutes: ñAn interstate compact is a legally binding agreement between states, created when states pass reciprocal statutesò;[565] ñMore than mere statutes, compacts are contracts that are binding on the member states and their citizens.[566] Caroline N. Broun emphasized the contractual nature of a compact arguing that compacts trump state statutory schemes: ñThe standing of compacts, as contracts and instruments of national law applicable to the member states, generally nullifies any state action inconsistent with the terms and conditions of the agreement.ò[567]

The hybrid nature of the interstate compact has been summarized by Paul T. Hardy who argued: ñAs contracts, interstate compacts are binding on the party states in the same manner and with the same limits as any other contract entered into by an individual or corporation. Likewise, because interstate compacts are created and exist in statutory form, the entire body of legal principles associated with the interpretation of statutes appliesò.[568]

Congressional Consent: The question of congressional consent has been one of the more litigated aspects of the interstate compact clause.[569] This is because, even though the Constitution requires congressional consent, the Supreme Court in *Virginia v. Tennessee*[570] held that not all interstate agreements require congressional consent. Specifically, the Court argued that such consent was required only with respect to those joint state agreements ñwhich may tend to increase and build up the political influence of the contracting states so as to

[565] PAUL T. HARDY, INTERSTATE COMPACTS: THE TIES THAT BIND 2 (1982).
[566] Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 2 (1997).
[567] BROUN ET AL., *supra* note 466 at 23.
[568] HARDY, *supra* note 565 at 3.
[569] RIDGEWAY, *supra* note 562 at 20.
[570] Virginia v. Tennessee 148 U.S. 503 (1893).

encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control.ò[571]

For example, in the case of a compact that deals with mere state interests congressional consent would not be required: the compact will still be enforceable between the states but will not have the status of federal law. This means that federal courts will be required to interpret the agreement as state law, not federal law.[572] The court was presented in 1991 with The Interstate Compact on Placement of Children that dealt with an area of jurisdiction retained by the states and therefore did not require congressional consent. The Court noted in *Malone v. Wambaugh:* ñThe Interstate Compact on Placement of Children has not received congressional consenté Because congressional consent was neither given nor required, the Compact does not express federal law. Consequently, this Compact must be construed as state law.ò [573]

On the other hand, Broun argued that by obtaining the consent of Congress, states entering into an agreement give the contract a firmer basis and run less risk of encountering future trouble in the courts.[574] The requirement of congressional consent would appear to be a safeguard for the uniform interpretation of the Compact and its recognition at federal level:

> Perhaps the greatest benefit, therefore, of congressional consent is the vesting in federal courts of the authority to interpret a compact in a uniform manner. Absent this consistency, the interpretation of compacts is left to the whim of the states, leading to the extreme case of one state declaring their agreement a compact (and therefore enforceable as contract) and another state declaring their agreement a mere uniform law (subject to unilateral amendment and change). There is generally

[571] *Id*. at 517-518.
[572] *Cf.* BROUN ET AL., *supra* note 466 at 52.
[573] Malone v. Wambaugh, 934 F.2d 474, 479 (3d Cir. 1991).
[574] *Id.*

> no question regarding the status or enforceability of interstate compacts that appropriately receive congressional consent.[575]

In a 1978 decision, *U.S. Steel Multistate Tax Commission*, the Court adopted a standard under which only interstate compacts that increase state power at the expense of federal supremacy require congressional consent.[576]

With this premise, our question must be: does the Interstate Health Care Compact encroach upon the supremacy of the United States? The ultimate test is to assess whether or not Congress possesses specific legislative authority in healthcare. *Sebelius* resolved the issue arguing - by a vote of 5 to 4 - that the individual mandate to buy health insurance constituted a valid exercise of congressional power under the Taxing Clause. It would therefore appear that a Health Care Compact - aimed at transferring the authority on healthcare from federal control to the member states and to create an independent healthcare system - may be deemed an invalid encroachment upon the congressional power to tax and would therefore require congressional consent. This is mainly because, in its current configuration, the HCC would stand as oppositional to the federal system and would create intentional conflict with federal law: ñOne obvious candidate is the actual Compact Clause: no state agreement or compact without congressional consent, period.[577]

Another disputed aspect is the form and timing of the consent. Is the consent to be explicit or can it be implied? Is it to be given before or after the states sign an agreement? The following sections will analyze the two issues in turn.

Form of the consent: According to *State v. Cunningham* (1912) 578 consent may be granted by Congress by either a formal legislative act or by a resolution. As seen in section 4, the

[575] BROUN ET AL., *supra* note 466 at 53.
[576] United States Steel Corp. v. Multistate Tax Comm'n., 434 U.S. 452, 459, 471 (1978).
[577] *See* Greve, *supra* note 556 at 294.
[578] 102 Miss. 237 (1912).

proponents of the HCC have introduced House Res. 150 for this purpose. Caroline Broun also pointed out that explicit consent has an advantage over other forms of consent: ñBy obtaining explicit consent after state legislatures have adopted a compact instrument, Congress has the opportunity to review the purpose of the instrument and the opportunity to express its agreement or disagreement in clear and unambiguous terms.ò[579] However, when certain circumstances are satisfied, consent can be implied. In *Virginia v. Tennessee* (1893)[580] it was held that Congressional consent to a compact may be inferred when the Congress demonstrates acquiescence to the compacts with its acts such as ñsubsequent legislation consistent with the terms of the compact or ratification of actions by state authorities and Congress that are harmonious with the purposes of the compact.ò[581] In particular, the case involved a boundary compact agreed by the two states 90 years earlier, which had not obtained the consent of the Congress. The Court held that since the Congress had already relied upon the compactôs terms for revenue and judicial purposes, that constituted recognition of the Virginia-Tennessee boundary established by compact, and therefore there was no need for direct action for that purpose: ñThe approval by Congress of the compact entered into between the States upon their ratification of the action of their commissioners is fairly implied from its subsequent legislation and proceedings.ò[582] On the basis of this decision the Court in 1914 upheld an 1821 boundary agreement between North Carolina and Tennessee.[583]Another example is the Uniform Act for Out-of-State Parolee Supervision, a compact for the reciprocal return of parolees that was held constitutional[584] even without specific congressional consent because the Compact was wholly in accord with federal legislation promoting it.[585] Broun has discouraged the states from

[579] BROUN ET AL., *supra* note 466 at 36.
[580] Virginia v. Tennessee,148 U.S. 503 (1893).
[581] BROUN ET AL., *supra* note 466 at 38.
[582] Virginia v. Tennessee, 148 U.S. 503, 522 (1893).
[583] Patch, *supra* note 559.
[584] Ex Parte Tenner 20 Cal.2d 670, 128 P.2d 338 (1942).
[585] Congress enacted a statute which reads as follows: ôThe consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies,

assuming implied consent in administrative compacts: ñSuch method of consent can contribute to misunderstanding and misinterpretation of Congressôs intent, or lead to an assumption of consent that does not exist. Therefore, as a general proposition, states seeking to adopt interstate compacts should not presume congressional consent but rather obtain either explicit consent or rest on some form of advanced consent.ò[586]

Timing of the Consent: *State v. Joslin* (1924)[587] established that consent may be given after the enactment of the agreement by two or more states. In the case of the HCC, nine states have signed the agreement and then submitted the proposal to Congress. History has also seen the formation of compacts with consent-in-advance, defined by Joseph Zimmerman as ña blanket approval.ò[588] This occurs when Congress adopts legislation that encourages states to enter into interstate compacts to deal with a specified subject; for example the Weeks Act of 1911 provided advance consent to states to form compacts ñfor the purpose of conserving the forests and water supplyò and the more recent statute 333 provides consent in advance[589] to form interstate compacts aimed at developing and operating airport facilities. More recently, in 1996 Congress granted blanket consent to the Emergency Management Assistance Compact that authorizes member states to enter into supplementary agreements with other states and renewed its consent in 2007 with a congressional act that authorized the International Emergency Assistance Memorandum of Understanding Entered between the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island and Connecticut, and the Provinces of

joint or otherwise, as they may deem desirable for making effective such agreements and compacts.ô 48 Stats. 909, 18 U.S.C.A. § 420.

[586] BROUN ET AL., *supra* note 466 at 39.

[587] State v. Joslin, 116 Kans. 615 (1924).

[588] *See* JOSEPH F. ZIMMERMAN, INTERSTATE WATER COMPACTS: INTERGOVERNMENTAL EFFORTS TO MANAGE AMERICAôS WATER RESOURCES 36 (2012).

[589] 73 Stat. 333.

Quebec, New Brunswick, Prince Edward Island, Nova Scotia and Newfoundland.[590] Broun is critical of the use of advance consent:

> While such consent is legally effective, its broad and advanced nature can deprive Congress of the opportunity to review the specific purposes of the compact and express its explicit approval of the agreement. This lack of specificity can lead to questions regarding the need for congressional consent or the intent of Congress in encouraging the use of a compact.[591]

Presidential Approval: if Congress grants its consent to a compact by an act or a joint resolution, should that legislation be subject to presidential veto? The question is particularly relevant for the HCC because President Obama would presumably have opposed such a bill. The Supreme Court has never ruled in this matter and the Compact Clause only requires congressional consent. Historically, President Franklin D. Roosevelt refused to approve a joint resolution granting consent in advance to states to enter into compacts pertaining to fishing in the Atlantic Ocean and wrote ñit would be unwiseò to grant such consent ñin connection with subjects described only in broad outline.ò[592] Scholars have therefore argued that presentment to the President is in fact required. Frederick L. Zimmermann and Mitchell Wendell affirmed ñThe Compact Clause itself requires only the consent of Congress, but ósettled usageô has granted the President veto power over consent.ò[593] The same view was expressed by Joseph Zimmerman: ñWhen Congress grants its consent to a compact by an act or a joint resolution, it is subject to a presidential vetoò[594]

[590] *See* Zimmerman *supra* note 588 at 37.
[591] BROUN ET AL., *supra* note 466 at 37.
[592] *See* JOSEPH F. ZIMMERMAN, INTERSTATE RELATIONS, *supra* note 501 at 38.
[593] ZIMMERMANN AND WENDELL, *supra* note 483 at 94.
[594] ZIMMERMAN, *supra* note 468 at 42.

Preemption of Federal Law: When introducing the HCC bill, legislators have used a powerful argument to persuade their peers of the benefit of enacting the compact. They have alleged that once the compact was approved by Congress, it would become federal law and therefore pre-empt the implementation of the ACA in the state. Ted Cruz stated in his article: ñThe fact that congressional consent gives the interstate compact the status of federal law means that, in effect, the federal government would be consenting to carve out - from the scope of its own ever-expanding powers - an area within which the States can retain substantial authority.ò[595] This statement finds its legal basis in a consolidated Supreme Court jurisprudence that considered compacts sanctioned by Congress equivalent to federal law. The relevant decisions are *Pennsylvania v. Wheeling & Belmont Bridge Company*596 and *Cuyler v. Adams:*

> ñ[W]here Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the Statesôagreement into federal law under the Compact Clause.[597]

By contrast, the Supreme Court in 1938 ruled in *People v. Central Railroad*[598] and *Hinderlider v. La Plata River and Cherry Creek Ditch Company* that congressional consent to a compact does not make it equivalent to a United States treaty or statute: ña compact itself is not federal law even where an act of Congress consenting thereto sets forth the text of the compact being approved. This means that the sources of compact law are predominantly state sources.ò[599]

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[595] Cruz, *supra* note 469.
[596] Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. 421 (1856). Once a compact is approved by the Congress, it becomes ñlaw of the Unionò.
[597] Cuyler v. Adams, 449 U.S. 433,440 (1981).
[598] People v. Cent. R.R., 79 U.S. 455 (1872).
[599] Hinderlider v. La Plata River and Cherry Creek Ditch Co , 204 U.S. 92 (1938).

However, Broun pointed out that the latter decisions have been overruled by *Delaware River Commission v. Colburn*[600] and that consent has a transformational effect on the statesô agreement.[601] With this premise, Joseph Zimmerman concluded that in case an approved compact contains conflicting provisions with an existent congressional statute, the congressional consent could be interpreted as repealing the conflicting provisions. If we apply this logic to the HCC, it is clear that it could have been a potential threat to the ACA.

Conclusion

This chapter has investigated the HCC as a clear sign of a contemporary crisis in federal relations and has demonstrated that interest groups have had a considerable influence in the creation, development and enactment of the compact. Having examined the HCC project, it is now paramount to put it in the context of todayôs American statesôrights battle.

The idea of a Health Care Compact offers interest groups an opportunity to pursue their objectives outside of federal lobbying and legal suits. It is an alternative way to fight back where political opposition and legal battles have failed. From an academic point of view, it is a formidable strategy elaborated by the states to resist the federal intervention and declare their sovereignty over health care policies. Because of its equivocal success, the HCC is excellent evidence of the present status of American federalism: a fragmented system victim of the political polarization.

The main fallacies of this project, however, lie in its feasibility from two points of view:

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[600] Delaware River Commôn. v. Colburn, 310 U.S. 419,439 (1940). ñWe now conclude that the construction of such a compact sanctioned by Congress by virtue of Article I, § 10, Clause 3 of the Constitution, involves a federal ótitle, right, privilege or immunityôwhich when óspecially set up and claimedôin a state court may be reviewed here on certiorariò.

[601] BROUN ET AL., *supra* note 466 at 54. ñThrough congressional consent, where appropriate, the statesô agreement is changed from solely being an agreement between the states into a law of the nationò.

1. Legality of the use of the compact as means to circumvent federal law;
2. Likelihood of congressional consent.

With regard to the first point, the possibility of such expansion in the role of compacts had been contemplated in 1991 by Marlissa S. Briggett who proposed a Pacific States environmental regulatory compact after the Exxon Valdez spill in 1989:[602]

> Yet, the states have never used an interstate compact explicitly to circumvent existing federal regulations. There does not seem to be any obstacle, however, to using the interstate compact in this manner. When the compact becomes federal law upon congressional consent, the new federal law supersedes prior federal law just as any other new federal law would.[603]

According to Briggett, the most significant aspect of an interstate compact is that congressional consent transforms the compact into federal law that could therefore circumvent previous legislation. Briggett also acknowledged that subsequent legislation may repeal the consent and void the compact[604] and to avoid this problem, she suggested that the federal government should participate in the compact and be represented in the agency: ñWith federal participation and representation in the regional agency, Congress might believe that the federal interests are served adequately so as to allow Congress to adopt a more cooperative approach to the compactò[605]

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[602] Marlissa S. Briggett, *State Supremacy in the Federal Realm: The Interstate Compact*, 18 B.C. ENVTL. AFF. L. REV. 751 (1991).
[603] *Id*. at 766.
[604] Riverside Irrigation Dist. v. Andrews, 568 F. Supp. 583, 589-90 (D. Colo. 1983) (congressional approval of interstate compact relating to certain navigable waterways did not limit congressional authority thereafter to enact the Clean Water Act, even though the Act was inconsistent with the compact).
[605] *See* Brigett *supra* note 602 at 766.

Another possibility for the compact to circumvent federal law has been explored by politician Ted Cruz who suggested that Congress could delegate administrative rulemaking authority to the HCC:

> One interesting possibility is that, because Congress may consent in advance to a compact, it may perhaps delegate the equivalent of administrative rulemaking authority to any regulatory body established by the compact. Thus, in the abstract, the interstate compact has as much potential as a ñpolicymakingò device as the regulatory agencies of the federal government.[606]

As to the likelihood of congressional consent, it is clear that present circumstances do not allow the enactment of the compact. This view is shared by Crady deGolian, director of the National Center for Interstate Compacts, an organization that manages numerous compacts for the Council of State Governments. DeGolian said to *The Kansas City Star* that the Health Compact ñwould be a very tough ask in terms of congressional consentò and, even if consented ñit would take years to implement, given all of the specific state legislation and administrative details that would need to be put in place.ò[607].

As to the general explanation of the reasons that push interest groups to seek to fulfil their policy objectives through interstate compacts, Ann Oô Bowman has identified two main reasons:

1. Once a compact is in place, policy is insulated from the vagaries of single-state politics and becomes the subject of multistate negotiation.

[606] Cruz, *supra* note 469.
[607] Diane Stafford, *Some states propose compact to give them free hand in running health care programs*, THE KANSAS CITY STAR, (Aug. 26, 2014), http://www.kansascity.com/news/business/health-care/article1305382.html#storylink=cpy.

2. Interest groups may seek interstate compacts in cases where they find it difficult to achieve policy success through state institutions.[608]

In the health care context, it can be argued that interest groups promoted the HCC because it could offer a multistate (interstate) approach to a policy issue that was in essence multistate as it involved the whole nation. The ultimate objective of the Heath Care Compact Alliance and ALEC was to strike down the Affordable Care Act and the HCC represented a constitutional option to join efforts in that direction, an option beyond single-state nullification or legal action.

To conclude, the interstate compact is another strategy devised by state rights proponents to push back and raise their voice. Unlike nullification bills and Anti-Commandeering resolutions, the Health Care Compact bills did not influence the ongoing constitutional dispute in court but served as a political strategy to raise the voice of the states.

What remains to be established is whether it ñ[I]s [é] a tool to subvert established government or is it a constitutional doorway to the modern federalism of an adaptable kind which so many have been seeking?ò[609]

[608] See Anne OôBowman, *Expanding the Scope of Conflict: Interest Groups and Interstate Compacts*, 91 SOC. SCI. Q. 669-688 (Sep. 2010).
[609] RIDGEWAY, *supra* note 562 at X.

Chapter Five: State Applications for an Art. V Convention

Introduction

The legislature of Colorado did not pass nullification legislation or Health Care Freedom acts, and did not join the Health Care compact. Instead, it used a very ambitious push-back strategy and adopted a House Resolution to call for an Art. V Convention to propose an *ad-hoc* amendment to repeal the Obamaôs Affordable Care Act in full.

The phenomenon is of interest to this research project not only because the Colorado House passed an Art. V resolution to repeal the ACA, but because other legislatures contemporaneously passed numerous similar resolutions calling for a general convention[610] or proposing specific amendments that range from balanced budget[611] to the limitation of the power and jurisdiction of the federal government.[612] Hence, the case study of the Colorado resolution provides an opportunity to reflect on Art. V Convention as a broader strategy of push back that has become increasingly popular in state legislatures and represents another way that state legislatures carried out ñconstitutional politicsò, in this case not aiming at influencing the interpretation of the Constitution but at changing the Constitution itself. The rationale for the selection of the Colorado resolution is that it is the only resolution that explicitly calls for an anti-ACA amendment where others propose a balanced budget amendment that would cut the Medicaid funding.

[610] *See* for instance 2014 GA SR 371.
[611] *See* OH 2013 SJR 5, 2014 LA HCR 70, 2014 MI JR V, 2014 FL S 658, 2014 H 794 (adopts the Compact for a Balanced Budget and promote the proposal and ratification of a balanced budget amendment), 2015 UT HJR 7 (balanced budget amendment), 2014 TN HJR 548, 2015 MS S 2389 (Adopts the compact for a balanced budget), 2015 ND H 1138 (Adopts the compact for a balanced budget).
[612] *See* 2014 AK HJR 22, 2014 FL S 476.

After a brief review of the literature on Constitutional Convention and the analysis of the recent Coloradoôs call for a Convention to repeal the ACA, this chapter explores contemporary legal issues surrounding the procedure.

I. Context

Art. V of the Constitution reads:

> ñThe Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, *on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments*, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.ò (Italics added.)

Art. V thus provides two ways to amend the Constitution, respectively by a resolution adopted by both the House of Representatives and the Senate with a two-thirds vote or by a Convention of states, called for by the Congress upon application of two thirds of the state legislatures (currently 34/50). In both cases, the proposed amendments must be referred to the states for ratification. The ratification process can take place in the legislatures or in *ad hoc* Conventions called by each state and the requirement for approval is three fourths of the states (currently 38/50). The first methodð the congressional proposalð has been used for all 27 constitutional amendments but the latterð the state application and convention processð has never been carried out to completion, mainly because the two thirds threshold (corresponding to 34/50 legislatures) has never been reached. For this reason, the clause has often been belittled as the

one of the best-known 'dead letter' clauses in the federal Constitution[613] or ña constitutional curiosityò.[614]

The origins of the of the Convention Clause can be found, according to Prof. Robert Natelson,[615] in ñcomparable provisions in state constitutions that predated the U.S. Constitutionò[616] such as Article 63 of the 1777 Georgia Constitution which provided for an amendment convention called by a majority of counties.[617] He argues that the records of the Constitutional Convention show that initially delegates considered the amendment convention as the only mechanism to propose and ratify amendments but Alexander Hamilton convinced the delegates that Congress should be empowered to propose amendments. The Convention was, according to Natelson, a safety valve for the protection of statesô rights, the idea being that Congress should not interfere in the process but rather limit itself to summoning a Convention.[618]

In addition to Natelsonôs findings, Thomas Neale ï writing for the Congressional Research Servicesï notes that the Framers intended to craft the clause ñvery much in the spirit of checks and balances, and separations of powers, that permeates the Constitutionò[619] and that the two options are a result of this effort to balance Congress and the states. From this perspective, Art. V is a clear manifestation of the contrast between federalist and anti-federalist position and ultimately, a representation of the compromise that they found in Philadelphia. The two options

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[613] Robert G. Jr Dixon, *Article I, The Comatose Article of Our Living Constitution*, 66 MICH. L. REV. 931- 943 (1968).
[614] Michael A. Almond, *Amendment by Convention. Our Next Constitutional Crisis?,* 53 N.C.L. REV. 491 (1975).
[615] ROBERT G. NATELSON, AMENDING THE CONSTITUTION BY CONVENTION: A COMPLETE VIEW OF THE FOUNDERSôPLAN, 20-22 (Goldwater Institute, Policy Report No. 241, September 16, 2010). Robert Natelson is a conservative scholar who has published widely on Constitutionôs amendment procedure, including a handbook for legislators published by ALEC. He is currently Senior Fellow in constitutional jurisprudence at the Independence Institute in Denver, CO.
[616] Robert G. Natelson, Proposing Constitutional Amendments by a Convention of States: a Handbook for State Lawmakers 9 (American Legislative Exchange Council 2011).
[617] ñThe assembly [legislature] shall order a convention to be called for that purpose, specifying the alterations to be made, according to the petitions preferred to the assembly by the majority of the countries as aforesaidò.
[618] NATELSON, supra note 616 at 10.
[619] Thomas Neale, THE ARTICLE V CONVENTION: HISTORICAL PERSPECTIVES FOR CONGRESS, CONGRESSIONAL RESEARCH SERVICE 8 (2012) (unpublished report on file with the author).

to amend the Constitution represent the two conceptions of the United States as a Union of people (amendments proposed by Congress) and as a Union of States (amendments proposed by the state legislatures).

This is further confirmed by Alexander Hamilton who argued in the Federalist n. 85 that the option of a Convention was included in the Constitution to provide an alternative amendment mechanism for the states in case of encroachment of the national power:

> In opposition to the probability of subsequent amendments, it has been urged that the persons delegated to the administration of the national government will always be disinclined to yield up any portion of the authority of which they were once possessed. [é] But there is yet a further consideration, which proves beyond the possibility of a doubt, that the observation is futile. It is this that the national rulers, whenever nine States concur, will have no option upon the subject. By the fifth article of the plan, the Congress will be obliged ñon the application of the legislatures of two thirds of the States which at present amount to nine, to call a convention for proposing amendments, which shall be valid, to all intents and purposes, as part of the Constitution, when ratified by the legislatures of three fourths of the States, or by conventions in three fourths thereof.'ò The words of this article are peremptory. The Congress ñshall call a convention.ò Nothing in this particular is left to the discretion of that body. [é] We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority.[620]

[620] Alexander Hamilton, in The Federalist, Number 85, ñConclusionò.

Hamiltonôs remarks are today used by promoters of Art. V. They argue that the Framers purposely included a mechanism to safeguard the states from a tyrannical Congress and that a Constitutional Convention would return power in the hands of the states. This rhetoric is intended to legitimize the practice and to persuade legislators that the Constitution contains all the possible safeguards for statesô rights, if they are used appropriately. In this regard, Philip Kurland called the method ñboth its virtue and its viceò[621] because it is a powerful weapon but the super-majority requirement (34 states threshold) is difficult to attain.

II. The Literature on Art. V Constitutional Convention

The scholarship on Art. V Constitutional Convention mainly revolves around commentary on constitutional change and the need for constitutional reform. The champion of a call for an Art. V Convention is Prof. Sanford Levinson who believes that ñthere is a connection between the perceived deficiencies of contemporary government and formal constitutionsò[622] and that the dysfunctional aspects of the American constitutional system should be reformed. The premise of his work is that the Constitution is undemocratic and that the only way to fix it is ñsending the Constitution to a new convention for repairò.[623] Prof. Levinson explained his proposal for amendments both in his book[624] and in an article published in Constitutional Commentary:[625] His suggestions for amendments include:

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[621] Philip B. Kurlan, *Article V and the Amending Process, in* AN AMERICAN PRIMER 148,152 (D. Boorstin ed., 1968).
[622] SANFORD LEVINSON, FRAMED: AMERICAôS 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE 5 (2012).
[623] SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 11 (2006).
[624] *Id.* .
[625] Sanford Levinson, *So Much to Rewrite, So Little Time* . . .., 27 Const. Comment. 515, 519 (2011).

- the abolition of life tenure for Supreme Court justices to be replaced by 18-year terms, with no possibility of reappointment. With a court of 9 justices ð Levinson arguesð the 18-year term would create vacancies every two years and make it impossible for even a two-term president to name a majority of its membership;[626]
- a review of the electoral system for the Senate with a view to implement a proportional representation instead of the fixed two senators per state; [627]
- a parliamentary system or a presidential system with a procedure for a solemn vote of ñno confidenceò[628]
- the abolition of the electoral college or, if it is retained, a change to the provision that in case of deadlock the House of Representatives makes the choice from the top three candidates on a one state/one vote basis;[629]
- the elimination of the office of Vice-President or a reform of the appointment procedure that would include a vote of confirmation by both houses of Congress;[630]
- a ñsignificantly easierò amendment process and a procedure for a new convention whose delegates will be chosen by a national lottery among the voting-eligible citizenry. Levinson adds that delegates ñwill be paid for up to two years, the salaries received by senators, with guaranteed sufficient funding to hold hearings literally all over the world, as well as all over the United States, of course, on the issues they would necessarily confront.ò[631]

[626] *Id.* at 519.
[627] *Id.* at 521.
[628] *Id.* at 522. Prof Levinson does not explain in detail how the parliamentary system would work but leaved the matter open to discussion: ñOne of the reasons I support a convention is that I would very much want to hear what people have to say, since there are obvious strengths and weaknesses in both presidential and parliamentary systemsò.
[629] *Id.* at 523.
[630] *Id*. at 524.
[631] *Id.* at 525.

On the other hand, Prof. Balkin (a frequent co-author with Prof. Levinson) believes that a Constitutional Convention would be a useful means of mobilizing politics and engaging citizens, but does not agree that it is necessary.[632] To explain his position, he recalled Levinsonôs distinction between ñConstitution of Conversationò and the ñConstitution of Settlementò, the first being those aspects of the Constitution subject to conversation and litigation about their meaning such as the Equal Protection Clause[633] and the second being the features of the constitutional system ñthat are not normally litigated in courts and do not produce judicial decisions and judicially created doctrinesò[634] such as the number of members of the Houses of Congress, the scope of presidential and gubernatorial votes.[635] This distinction, added Prof. Balkin, is sometimes confused with Levinsonôs other distinction between the Hard-Wired Constitution and the Constitution of Construction. The Hard Wired elements of the Constitution are those that cannot be changed without a constitutional amendment[636] whereas the construction elements are those that can be changed via constitutional construction, a process that takes place in many different forms.

In Balkinôs opinion, the dysfunction of the American constitutional system actually lies in aspects of the Constitution of Settlement (polarized political parties, the undue influence of money in politics, the malapportionment of political power, and the proliferation of veto points in the political system)[637] and can therefore be changed through the ordinary processes of constitutional construction with no need for amendments or a new constitutional convention.[638]

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[632] Jack M. Balkin, *The Last Days of Disco: Why the American Political System Is Dysfunctional*, 94 B.U. L. Rev. 1159, 1167 (2014).
[633] Sanford Levinson, *"Reflection and Choice": A One-Time Experience?*, 92 Neb. L. Rev. 239, 255 (2013)
[634] Definition by Jack M. Balkin, *supra* note 632 at 1162 (2014).
[635] *See* LEVINSON, *supra* note 622.
[636] *Sanford Levinson, So Much to Rewrite, So Little Time . . . .,* 27 CONST. COMMENT. 515, 516 (2011) (Prof. Levinson also explains that the hard-wiredò features are those elements of the Constitution that ñmost professors never bother discussing with their students because they are never subject to litigationò such as bicameralism, the fixed presidential term and the amendment procedure).
[637] Balkin *supra* note 632 at 1165.
[638] *Id.*

A call for ña twenty-first century Conventionò[639] was put forward by Prof. Larry J. Sabato in his book óA More Perfect Constitution: Ideas to Inspire a New Generationô (2007) arguing for a new Constitution and proposing a series of amendments, ranging from the expansion of Congressôsize (so that it is more representative) to the elimination of lifetime tenure for federal judges and Universal National Service. The premise of his work is ï as with Levinsonôs- a criticism of the Constitution that he defines as ñthe root of our current political dysfunctionò.

On the other side of the discussion are scholars that argue against an Art. V Convention and the possible dangers of a revision of the Constitution. An eminent commentator in this regard is Prof. Laurence Tribe who argued against the call for a Constitutional Convention to propose a balanced budget in 1979.[640] His main criticism was that the Constitution embodies fundamental law and should not be amended to include provisions around social policies such as a balanced budget.[641] At the basis of the argument against an Art. V Convention is the assumption that Congress is the most appropriate body to stimulate and implement constitutional change and that the amendment process should remain within the sole competence of the Congress. Professor Robert Dixon has argued that ñpiecemeal constitutional revision . . . is more expeditiously handled by congressional initiation.ò[642] Eminent Professor Charles Black also believed that a Constitutional Convention would be an anachronistic device: ñIn the very earliest days, before it was known that the new government would be so successful, it may have seemed ñdesirable and practicalò for the States, unused to union and uncertain of its benefits, to have some means of compelling a thorough reconsideration of the new planò[643]and that Congress should retain predominance over the amendment process: ñI would

[639] Larry J. Sabato, A MORE PERFECT CONSTITUTION: IDEAS TO INSPIRE A NEW GENERATION 198 (2007).
[640] Laurence Tribe, *Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment*, 10 Pac. L. J. 627 1979. He reports that as of Apr.1978 the application had been signed by 29 legislatures.
[641] *Id*. at 630.
[642] Robert G. Dixon, *Article V: The Comatose Article of our Living Constitution?* 66 MICH. L. REV. 943-46 (1968).
[643] Charles L. Black, Jr., *Amending the Constitution: A Letter to A Congressman*, 82 Yale L.J. 189, 201 (1972).

strongly contend that there is nothing either desirable or practical about building up the power of state legislatures with respect to the initiation of particular amendments to the Constitution, and that there is therefore no validity in attributing such ñintentò to the Framers on grounds of desirability and wisdom.ò[644] Another strong opponent to the Constitutional Convention was Prof. Swindler[645] who considered the Convention Clause as a ñtransitional safeguardò[646] and - as such- recommended its repeal: ñthe general convention provision of article V is in truth no longer of any effect.ò[647] Some scholars oppose an Art. V Convention because they fear a potential ñrunawayò convention, a convention that would exceed its scope and make radical changes to the Constitution. For example, Stanford Professor Gerald Gunther warned against political radicals from both the left and right[648] and Ralph Carson argued that a general and unlimited federal constitutional convention might be a disaster[649] because once convened, attempts by Congress to impose limitations on subject matter would be of no avail.[650]

The scholarly discussion around Art. V convention is very rich and it is tied to the political debate around constitutional amendments. The call for a convention is, like other types of measures explored in this work, a legal strategy used for political ends. The next section focuses on the recent Colorado application for an Art. V Convention to repeal the ACA where the revision of the Constitution was proposed to resolve the political controversies related to the health reform.

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[644] *Id.* at 200 (1972).
[645] William F. Swindler, *The Current Challenge to Federalism*: *the Confederating Proposals*, 52 GEO. L.J. 1 (1963).
[646] *Id.* at 15-16.
[647] *Id.* at 23.
[648] Gerald Gunther, *Constitutional Brinkmanship; Stumbling Towards a Convention,* 65A.B.A. J. 1046 (1979).
[649] Ralph M. Carson, *Disadvantages of a Federal Constitutional Convention*, 66 MICH. L. REV. 921-922 (1968).
[650] *Id.* at 924.

III. Colorado House Resolution 1003 (2012)

On 01/19/2012, the Colorado House passed a resolution to call a convention for proposing an amendment to the United States Constitution to repeal the ACA. The resolution was sponsored by Rep. David Balmer and passed with a 33-31 vote.[651] The vote resulted in a partisan split with Republicans in favor and Democrats against. The exception was Rep. Wes McKinley, D-Cokedale who voted for the passage and Rep. Laura Bradford, R-Colbran, who voted against it.

The legislative history of the resolution[652] shows that Democrat representatives attempted to amend the resolution and to include warnings that a full repeal of the ACA would trigger an increase in the federal budget deficit by billions of dollars[653] and that the state of Colorado would lose the benefits of almost $30 million[654] but those amendments were not passed.

This resolution represents a good example of the ñconstitutional politicsò strategies that this work has investigated because it manifestly uses constitutional means (call of an Art. V Convention) and ideological claims (liberty of the individual and statesôrights) to achieve state preferred policy. The policy motivations of the legislators are clear from the text of the resolution that expresses concerns that the Affordable Care Act ñwill likely lead to increased health care spending and rationing of health care,ò[655] that the Act ñwill likely increase taxes, limit economic growth, increase unemployment, and reduce incentives to innovateò[656] and ñthe Act will likely increase the federal deficit while simultaneously requiring unsustainable

[651] 2012 HR 1003, Title: Concerning an Application under Article V of the United States Constitution to the Congress of the United States to Call a Convention for Proposing an Amendment to the United States Constitution to Repeal the "Patient Protection and Affordable Care Act".
[652] COLORADO GENERAL ASSEMBLY, http://www.leg.state.co.us/CLICS/CLICS2012A/csl.nsf/BillFoldersAll?OpenFrameSet (last visited Feb. 4, 2018)
[653] Proposed amendment by Representative Ferrandino, line 35 p. 49.
[654] Proposed amendment by Representative Ferrandino, line 22 p. 50.
[655] 2012 HR 1003, point 3.
[656] *Id.* at point 4.

spending by the states, which will likely lead to catastrophic deficits at the state level, forcing unprecedented cutbacks in other state programs and servicesò.[657] The Colorado House legislators that passed this resolution were arguably trying to enhance the strength of their policy objections by using a constitutional device that would attract attention and was constitutionally unassailable. This is the common characteristic-if any- of all the bills/resolution that this work has examined.

The reasons for the passage of the resolution were further explained by House Majority Leader Amy Stephens: ñColorado must be a leader in advancing statesô rights against bloated federal government bureaucracies. House Resolution 1003 sends a crystal clear message we will do everything we can to protect our citizens and state from disastrous effects of federally mandated health care.ò[658]

The Colorado resolution failed to result in the actual calling of a constitutional convention because no other state legislature joined Colorado in a specific resolution to repeal the ACA. Nonetheless, the examination of the debate surrounding the Colorado resolution contributes to the understanding of the bigger phenomenon of statesô calls for Art. V Convention which is investigated in more details in the next paragraph.

IV. The Phenomenon

Art. V applications are not a new phenomenon and indeed have materially shaped U.S. Constitutional history. The very first campaign for an Art. V Convention was carried out at the beginning of the 20th century, when 25 states joined Pennsylvania in an application to call a

[657] *Id.* at point 5.
[658] *House Calls for Constitutional Amendment to Repeal Federal Health Care Law*, COLORADO HOUSE REPUBLICANS BLOG, http://www.cohousegop.com/house-calls-for-constitutional-amendment-to-repeal-federal-health-care-law/ (last visited Feb. 4, 2018).

Convention that would consider an amendment to provide popular election of U.S. Senators. At the time, senators were elected by state legislatures that in some cases could not agree on a candidate and in other cases elected candidates who were close to corporate and monopoly interests.[659] To resolve the impasse, 25 legislatures proposed direct popular election of senators as a possible remedy. Even though the necessary threshold to compel Congress to call a Convention was not reached, the literature emphasizes the ñproddingò effect of the applications that -we know- pushed the Senate to join the House of Representatives in proposing what became the 17th Amendment in 1912.[660]

The second wave of applications for an Art. V Convention happened between 1963 and 1970 in reaction to the Supreme Courtôs state legislative apportionment decision *Reynolds v. Sims* (1964)[661] which established that state legislaturesô electoral districts must be roughly equal in terms of size of population. Conservative state legislatures feared that the new ñone person-one voteò regime would favor urban interests at the expense of rural populations and mounted a protest based on statesô rights claims. By 1970, the protest had produced 33 applications for an Art. V Convention to consider amendments on legislative apportionment. However, the fears of a runaway convention and the campaign for equal representation induced four legislatures to rescind their applications and the movement lost its vitality.

The third wave of Art. V applications involved 32 state legislatures that between 1975 - 1983 called for an Art. V Convention to consider a balanced budget amendment. These applications were due to concerns regarding the budget deficit and, drawing on a rhetoric of statesô rights and limited government, aimed to limit the power of the federal government to incur budget deficits. Again, the 32 states threshold was not met.

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[659] Thomas H. Neale, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress*, CRS Report for Congress, 9 (2012) (unpublished report on file with the author).
[660] Thomas H. Neale, *The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress*, Congressional Research Service Report 3 (2016) (unpublished report on file with the author).
[661] Reynolds v. Sims, 377 U.S. 533 (1964).

Remarkably, in the last seven years, state legislatures have started a new movement to call an Art. V Constitutional Convention that this work interprets in the context of a broader push back strategy against federal policies. Activists and advocacy groups come from a broad range of the political spectrum and range from grass root organizations to bigger lobbies. A big name in the list is ALEC which in 2011 published a Handbook[662] detailing procedures and sample legislation to advance Art. V calls.[663] The handbook was authored by Prof. Natelson and was intended to promote an amendment for balanced budget. Other activist groups are the Balanced Budget Amendment Task Force[664] and the Convention of States organization[665] which respectively advocate for a balanced budget amendment and for a General Convention that would ñreturn the country to its original vision of a limited federal governmentò. Furthermore, an Art. V convention is on the agenda of conservative think tanks such as the Federalist Society which regularly hosts events focused on the issue. One regular speaker in such events is U.S. Senator Tom Coburn who discussed the opportunity to hold an Art. V Convention with Andy Oldham, Deputy General Counsel to Texas Governor Greg Abbott at the Texas A&M University School of Law on Oct. 4th, 2017.[666] Another event was organized by the Ohio Chapter on March 31, 2017 to discuss whether Ohio would benefit from an Art. V Convention. The event was broadcasted and is available to the public online.[667]

[662] *Article V Handbook,* AMERICAN LEGISLATIVE EXCHANGE, https://www.alec.org/publication/article-v-handbook/ (last visited Feb. 5, 2018).
[663] *Article V Convention of States Commissioner Oath, Instructions and Recall American Legislative Exchange,* AMERICAN LEGISLATIVE EXCHANGE, http://www.alec.org/model-legislation/resolution-for-limitations-on-authority-of-state-delegates-to-a-convention-for-proposing-amendments-under-article-v-of-the-us-constitution/(last visited Feb. 5, 2018).
[664] BALANCED BUDGET AMENDMENT TASK FORCE, http://bba4usa.org/ (last visited Feb. 5, 2018).
[665] CONVENTION OF STATES ACTION, http://conventionofstates.com/ (last visited Feb. 5, 2018).
[666] Events listing is available online. *Hon. Tom A. Coburn*, THE FEDERALIST SOCIETY, https://fedsoc.org/contributors/tom-coburn (last visited Feb. 5, 2018).
[667] The Federalist Society, *Inaugural Ohio Chapters Conference 2017 Panel I: Convention of the States,* YOUTUBE (Apr.21,2017), https://www.youtube.com/watch?v=D3v025I2i6s.

At this point the questions must be: how widespread is the phenomenon? How many states have called an Art. V Convention so far?

Until January 2015 it was virtually impossible to answer this question because there was no official report on the number of requests for an Art. V Constitutional Convention and Congress did not keep a record of petitions for a convention. However, on Jan. 6th 2015, the House of Representatives adopted H.Res. 5 that required the Committee on the Judiciary to make publicly available any application or rescission of application for an Art. V Convention received by Congress. The procedure, regulated by H.Res. 5, Section 3 (c), requires the Chair of the House Judiciary Committee to ñdesignate any such memorial for public availability by the Clerkò and that the Clerk should make them publicly available in electronic form.

At present, the Office of the Clerk website[668] hosts a comprehensive database of 156 Art. V applications/rescissions presented to Congress since 1960.

Unofficial information is also available in two databases respectively hosted by the association óFriends of the Article V Convention (FOAVC)ô[669] and the website óThe Article V Libraryô.[670] The FOAVC database reports a total of 743 applications/rescissions since 1789 and provides numerous tables that sort the application according to state, subject and contemporaneity (applications made in a 7 years period). The óArticle V Libraryô website reports instead a total of 434 applications and 31 rescissions since 1789 and sorts them according to state, subject and the óPaulsen criteriaô, the criteria devised by Prof. Paulsen in 1993 to distinguish between a valid and invalid application.[671] The next section provides a broader discussion of the

[668] *House Documents- Selected Memorials*, OFFICE OF THE CLERK- U.S. HOUSE OF REPRESENTATIVES, http://clerk.house.gov/legislative/memorials.aspx (last visited Feb. 5, 2018). For the purpose of this investigation, I used the data published by the Office of Clerk website.

[669] *Article V Amendment Applications Tables,* FRIENDS OF THE ARTICLE V CONVENTION, http://foa5c.org/01page/Articles/AmendmentsTables.htm (last visited Feb. 5, 2018).

[670] *The Article V Library,* STATE ARTICLE V CONVENTION APPLICATIONS, http://article5library.org/applications.htm (last visited Feb. 5, 2018).

[671] *See infra.* Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 Yale L.J. 677 (1993). Prof. Paulsen believes that a valid Art. V application should not

controversies around the validity of an Art. V application and covers Prof. Paulsenôs theorization.

This work is mainly concerned with the Art. V applications submitted in the last seven years and uses the Office of the Clerkôs database.

Between 2010 and 2017 state legislatures submitted **36 applications** that I classified in the table below according to the type of amendment requested.

Amendment	**States**	**Total: 36**
Balanced Budget	2010 Florida 2014 Alabama 2014 Florida 2014 Georgia 2014 Louisiana 2014 Michigan 2014 Ohio 2015 Tennessee 2015 South Dakota 2015 Utah 2015 North Dakota 2016 Kansas 2016 New Hampshire 2016 West Virginia 2017 Wyoming	15

limit the purpose of the Convention and that if an application contained exclusivity provisions it would be invalid. Furthermore, he believes that application are only valid until rescission.

Fiscal restraints, power of federal government, terms of office	2014 Alaska 2014 Florida 2014 Georgia 2015 Alabama 2016 Indiana 2016 Oklahoma 2017 Missouri 2017 North Dakota 2017 Texas	9
Overturning *Citizens United* and limiting corporate personhood for elections	2014 Vermont 2014 California 2015 New Jersey 2015 Illinois 2016 Rhode Island 2016 Rhode Island	6
Approval from majority of state legislatures for debt increase	2012 Louisiana 2012 North Dakota	2
Amendment for a limited convention	2012 North Dakota	1
Amendment that would establish that law enacted by Congress can embrace only one subject	2014 Florida	1
Term limits for Congress	2016 Florida	1

Countermand amendment to nullify federal law	2016 Alaska	1

The table shows that much of the debate surrounding a constitutional convention is about government spending. The majority of applications (**15**) between 2010-2017 have been put forward by state legislatures (namely Florida, Alabama, Georgia, Louisiana, Michigan, Ohio, Tennessee, South Dakota, Utah, North Dakota, Kansas, New Hampshire, West Virginia and Wyoming) calling for an Art. V Convention that would consider the inclusion of a balanced budget amendment in the U.S. Constitution. A balanced budget amendment would impose limits on Congressôspending powers and would therefore strip Congress of the ability to fully fund relevant social programs such as Medicaid and Medicare, together with other federal programs. The text of Art. V applications suggests that the main reason for applications is that some state legislatures were concerned about a growing federal budget deficit (estimated in 2010 at 13 trillion dollars)[672] and believe that federal programs are unfunded or underfunded[673] at the point of constituting a danger to future generations.[674] This work has considered only recent applications; however, the call for a balanced budget amendment is not a recent phenomenon. Between 1975 and 1983, 32 state legislatures petitioned Congress to consider a balanced federal budget amendment and reserved the right to call an Art. V Convention in case Congress failed to propose the amendment.[675] Congress did consider a balanced budget amendment in 1982 but the amendment failed to meet the constitutional requirement of passage

[672] S.J. Res. 100, 2011 Leg., Reg. Sess. (Ala. 2011).
[673] *Id.*
[674] S.Conc. Res. 10, 2010 Leg., Reg. Sess. (Fla. 2010). It reads ñit is the firm conviction of the Legislature of the State of Florida that it is wrong to fund the prosperity of the present generation by robbing future Americans of their ownò.
[675] In 1957 the state of Indiana was the first to apply for a convention to propose a balanced federal budget amendment to the Constitution.

by two thirds of Members present and voting.[676] In Neale's Congressional Research Report,[677] the event is considered a high- water mark of the balanced budget campaign since the minimum threshold to summon a convention is two-thirds of the states, equivalent to 34 state legislatures. As of November 2017, the total of valid state legislaturesô applications to call an Art. V Convention for the purpose of proposing a Balanced Budget Amendment amounts to **27**. The applications are tracked by the Balanced Budget Amendment Task Force, [678] a conservative Florida based organization that promotes the introduction of Art. V balanced budget applications in the state legislatures. They work in partnership with ALEC and the National Federation of Independent Business (NFIB)[679] to promote limited interference of the federal government in social policies.

The joint action of these organizations indicates that the call for a balanced budget amendment is part of a broader opposition to the funding of federal social policies, including the Affordable Care Act and the Medicare/Medicaid programmes that have been the focus of this research project. The push back strategies that this work has examined have taken different forms but they operate within the same ideological framework and constitutional discourse. Art. V applications are part of the same ideological (and constitutional) project that has involved nullification, health care freedom acts, health care compact and Anti-Commandeering resolutions. This is further demonstrated by the other **9** applications for Art. V Convention that do not request a balanced budget amendment but instead apply for a broader Convention that would discuss limited government i.e. fiscal restraints for the federal government, limited jurisdiction of the federal government and limited terms of office for its officials. The language

[676] The Senate passed the amendment with a vote of 69-31 and the House voted 236 to 187. Data presented in Thomas Neale, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress*, Congressional Research Service (2012) (unpublished report on file with the author).
[677] *Id.*
[678] *2017 Campaign Report,* BALANCED BUDGET AMENDMENT TASK FORCE, http://bba4usa.org/report/ (last visited Feb. 5, 2018). This figure includes all those applications that have been made and not yet rescinded.
[679] The partners organizations are listed on BALANCED BUDGET AMENDMENT TASK FORCE webpage http://bba4usa.org/partnering-organizations/.

used in these applications very much resembles the language of the measures examined in the previous chapters with state legislatures advocating for their ñdutyò to ñprotect the liberty of our peopleò and to protect the people from a federal government that ñhas invaded the legitimate roles of the states through the manipulative process of federal mandatesò and ñhas ceased to live under a proper interpretation of the Constitution of the United Statesò.[680] The applications for a Constitutional Convention that would consider limited government amendments are inspired by the same conservative ideologues that mounted the legal opposition to the ACA on a narrow interpretation of the Commerce Clause/Tenth Amendment grounds and that believe that Congress should not regulate health care and should have limited spending power. Texas Public Policy Foundation[681] President and CEO Brooke Rollins and Director of the Center for Tenth Amendment Action Dr. Thomas Lindsay, for example, expressed support for the 2016 Indianaôs call for an Article V Convention of States and pointed out that the applications were all part of a broader movement: ñThe action taken this week by Indianaôs legislature reflects the fast-growing momentum to restore the Constitutional liberty our nation was founded uponò claims a press release issued on his behalf.[682]

The application for a Constitutional Convention therefore represents another of the push back strategies to block the operation of the ACA and, generally, to establish a new balance of power between the states and federal government.

Another battlefield that has seen applications for a constitutional convention is the repeal of corporate political contributions elements of the Supreme Courtôs *Citizens United* decision.[683]

[680] H.J.Res. 112, 2015 Leg., Reg. Sess. (Ala. 2015).
[681] The Texas Public Policy Foundation defines itself as a non-profit, non-partisan research institute with the objective to promote and defend liberty, personal responsibility, and free enterprise in Texas and the nation.
[682] *Tppf Statement on Indiana Passage of Article V Convention Call*, TEXAS PUBLIC POLICY FOUNDATION, https://www.texaspolicy.com/press_release/detail/tppf-statement-on-indiana-passage-of-article-v-convention-call (last visited Feb. 5, 2018).
[683] Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).

Between 2010 and 2017 there have been about 6 applications from ôblueô states (Vermont, California, New Jersey, Illinois and Rhode Island) that used this push back strategy to oppose the Supreme Courtôs decision in *Citizens United* and ñlimit the corrupting influence of money in our political system.ò[684] This type of application does not fall in the same category of push backs that this work has examined because these state legislatures do not aim at a smaller government. However, it is interesting to note how different political factions have made use of the same strategy to achieve different objectives. It can be argued that under the Trump presidency blue states will continue to use push back strategies and will recycle the strategies used by red states during the Obama presidency.

The remaining 6 applications are a miscellany of atypical requests. In 2012, two state legislatures (Louisiana and North Dakota) applied for an Art. V Convention to consider an amendment to the U.S. Constitution which would require that any increase in federal debt should be approved by a majority of the legislatures of states. This type of application is inspired by the same concerns that triggered requests for a balanced budget amendment but the emphasis here is on state sovereignty; state legislatures demand to be involved in the budget process and to be active decision makers in partnership with Congress.

From an examination of the applications made between 2010-2017 it is evident that they all propose a specific amendment and that there is no call for an Art. V Convention that would revise different parts of Constitution. However, one of the main concerns of state legislators was that -once called- the convention would/could go beyond the mere discussion of one specific amendment and result in a fully-fledged constitutional convention. The literature has broadly discussed whether an Art. V Convention should be limited to the consideration of the specific amendment requested by the legislatures or whether it should be an open Convention that could consider any amendments (also called ôa runaway conventionô by opponents); the

[684] S.J.Res. 27, 2014 Leg., Reg. Sess. (Vt. 2014).

relevant arguments put forward by scholars pro and against a limited convention are discussed below, under the paragraph on legal controversies surrounding a Constitutional Convention. However, to address the concerns of legislators fearing a órunaway conventionô, in 2012 North Dakota put forward an application for an Art. V Convention that would amend the Constitution to include a clarification about the scope of Art. V conventions. The amendment would provide that a Convention (called by 2/3 of states that request the same amendment) could ñsolely decide whether to propose that specific Amendment to the statesò[685] and could not therefore consider any other amendment to the U.S. Constitution. North Dakota has not been joined by any other legislatures in this effort.

Another single application was put forward by the legislature of Florida in 2014. The application requested an Art. V Convention that would consider an amendment to provide that Congress should only pass single-subject laws. This provision-the Florida legislature argued-is present in 41 of the 50 statesôconstitutions and ñwould provide the means to limit pork barrel spending, control the phenomenon of legislating through riders, limit omnibus legislation produced by logrolling, prevent public surprise and increase the institutional accountability of Congress and its members.ò[686] Florida has not been joined by other states and the application remains pending together with another 2016 application from the same state for a Convention that would consider a Congressional Term Limits amendment. The issue, settled by Supreme Court decision in the *Term Limits*[687] case, is still a major concern for legislatures that claim authority to establish term limits for their representatives in Congress.

The last atypical application for an Art. V Convention was submitted by the Alaska state legislature in 2016 and revolves around the issue of nullification. The legislature called for a Constitutional Convention to consider a Countermand Amendment, an amendment that would

[685] H.Conc. Res. 3048, 62nd Leg., Reg. Sess. (N.D. 2011).
[686] H.M. 261, 2014 Leg., Reg. Sess (Fla.2014).
[687] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

ñauthorize the states to nullify and repeal a federal statute, executive order, judicial decision, regulatory decision or government mandate that adversely affects the interests of the states.ò[688] The resolution expressly condemns the federal government for infringing state sovereignty, the Congress for exceeding its delegated powers, the President for exceeding constitutional authority and the courts for issuing decisions on public policy matters reserved to the states. It is, without doubts, a resolution inspired by the other nullification measures considered in Chapter 1 and represents another attempt to voice statesôrights concerns. Alaska has not been joined by other state legislatures.

V. The Legal Controversies Surrounding a Constitutional Convention

ñNo one should pretend that an Article V constitutional convention would not raise many difficult problems of its ownò stated Prof. Levinson in 1999.[689] In the hypothetical situation that two thirds of the states apply and an Art. V Convention is called, it would not be free of procedural/legal uncertainties. In part because of the vagueness of Art. V wording and in part because a constitutional convention has not yet taken place, there are several interpretive questions as to how a Convention would work in practice. In 1979 Professor Laurence Tribe of Harvard Law School compiled a list of ñIssues raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendmentò[690] and more recently in 2008 Prof. Sabato defined the legal framework surrounding a new convention as a

[688] H.J.Res. 14, 2016 Leg., Reg. Sess. (Alaska 2016) and H.Conc.Res. 4, 2016 Leg., Reg. Sess. (Alaska 2016).
[689] Sanford Levinson, *Constitutional Populism: is It Time For "We The People" to Demand an Article Five Convention?,* 4 WIDENER L. SYMP. J. 211-218 (1999).
[690] Lawrence Tribe, *Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment*, 10 Pac. L.J. (1979).

ñnetherworldò[691] and suggested that the definitive statutory guidance in the event of a new Constitutional Convention could only be provided by Congress.[692] Some of the fundamental questions that have arisen in the literature are summarized and discussed below, as they represent the main concern of state legislators petitioning for a Convention.

What Constitutes a Call, Application or Petition by a State Legislature?

The Constitution states that Congress shall call a Convention for proposing Amendments ñon the Application of the Legislatures of two thirds of the several Statesò[693] but does not specify the requirements for a state application to be valid. Prof. Laurence Tribe, for example, questions whether both houses of each state legislature must take part in making application for a convention to Congress or whether an application from one house would be considered valid.[694]

Tribeôs question of 1979 is still very much open and applies to our case study, the Colorado resolution (2012 HR 1003) calling a convention for proposing an amendment to the United States Constitution to repeal the ACA, that was adopted by the House only. Prof. Natelson would argue that the Colorado application is not valid because the Constitution reads ñLegislatures of two thirds of the several Statesò,[695] however the plural may refer to the 34 legislatures, not to the two houses of each legislature. Furthermore, Prof. Tribe questioned, by what vote in each house of a state legislature must application to Congress be made? Simple majority? Two-thirds? The applications that this work has considered are resolutions, generally

[691] LARRY J. SABATO, A MORE PERFECT CONSTITUTION, WHY THE CONSTITUTION MUST BE REVISED: IDEAS TO INSPIRE A NEW GENERATION 209 (2008).
[692] *Id*. at 212.
[693] Art. V, U.S. Constitution.
[694] Tribe, *supra* note 690.
[695] Email from Prof. Natelson to the author (Sep. 25, 2017) (on file with author).

adopted by simple majority; however, the criteria for a majority have not been set by the Constitution. Another question revolves around the possibility that a State Governor might veto an application to Congress. According to Prof. Natelson, ñthe application need not be signed by the Governor, and may not be vetoed, anything in the state constitution or laws notwithstandingò.[696]

Prof. Tribe, and other scholars, could not provide a definitive answer to these questions and dismissed them as ñunanswerable.ò[697] To a certain extent we must agree with Prof. Tribe because such questions have not been considered by the courts and remain open today, until such time as an Art. V Convention will be seriously considered as an option rather than a ñconstitutional curiosityò.

Is There a Timeframe Within Which the Calls Applications or Petitions Must Be Made And Ratified?

Art. V is silent on the timeframe for the proposal and ratification of amendments. The issue has been widely debated both by scholars and in the courts because it involves not only the timing for a convention application but generally the time allowed to states to ratify an amendment passed by Congress.

The Supreme Court has considered the issue of ratification time in two cases that provide the legal framework around timeliness of constitutional amendments.

Plenary Congressional Power Approach: *Dillon v. Gloss* (1921):[698] The Supreme Court considered the issue of time limits to constitutional amendments for the first time in 1921.

[696] Natelson, *supra* note 615 at 12.
[697] Tribe, *supra* note 690.
[698] Dillon v. Gloss, 256 U.S. 368 (1921).

At stake was the validity of the Eighteenth Amendment adopted in 1919; its constitutionality was challenged because the congressional resolution proposing the amendment fixed a 7 yearsô timeframe for its ratification. The question before the Court was whether or not Congress had the power to fix time limits to constitutional amendments. The Supreme Court, in an opinion authored by Justice Van Devanter, established that Congress may attach an explicit time limit on ratification and that seven years was a reasonable time limit.[699]. Even though Art. V is silent on the matter, the court argued, the Constitution invested Congress with a wide power of proposing amendments and therefore Congress can fix a definitive period for ratification ñkeeping within reasonable limits.ò[700] Scholars and commentators, however, focused greater attention on the reference in *Dillon*, to a requirement that ratifications should be ñcontemporaneousò and ñreflect the will of the people in all sections at relatively the same periodò.[701] This was particularly relevant in 1992, when Michigan was the last and decisive state to ratify the Twenty-Seventh Amendment, which had been originally proposed by James Madison (hence called ñthe Madison Amendmentò) and stood pending for two hundred and two years. Some commentators[702] noted that the ratification of the Twenty-Seven Amendment did not comply with the contemporaneous consensus requirement suggested in *Dillon* However, *Dillon* remains good law and stands as guidance

[699] ñIt is not questioned that seven years, the period fixed in this instance, was reasonable, if power existed to fix a definite time; nor could it well be questioned considering the periods within which prior amendments were ratified.ò Dillon v. Gloss, 256 U.S. 368, 376 (1921)

[700] Dillon v. Gloss, 256 U.S. 368, (1921) 375ï 76. ñOf the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt. As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require; and article 5 is no exception to the rule.ò.

[701] Dillon v. Gloss, 256 U.S. 368, 375 (1921).

[702] *See* for instance Christopher M. Kennedy, Is There A Twenty-Seventh Amendment? The Unconstitutionality of A "New" 203-Year-Old Amendment, 26 J. Marshall L. Rev. 977, 1018 (1993) (arguing that the Twenty-Seventh Amendment should be declared unconstitutional according to a more certain approach to ratification procedure which is consistent with the explicit and implicit provisions of Article V.); Michael Stokes Paulsen, *A General Theory of Article v: The Constitutional Lessons of the Twenty-Seventh Amendmen*t, 103 Yale L.J. 677, 761 (1993) (arguing that Dillon wrongly asserted the additional requirement of a ñcontemporaneous consensusò) and Allison L. Held, Sheryl L. Herndon, and Danielle M. Stager, The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States, 3 Wm & Mary J Women & L 113, 121-23 (1997) (arguing that acceptance of the Madison amendment implies that there is no requirement of contemporaneous consensus)..

to Congress on Art. V procedures. The issue of timeliness was considered again by the Court in the *Coleman* case, discussed below.

The Political Question Approach: *Coleman v. Miller* (1939)

The *Coleman* case[703] involved the issue of timeliness of the ratification of a Child Labor Amendment proposed by Congress in 1924.[704] The amendment was sent for ratification to the states without a deadline; the legislature of Kansas first adopted a resolution rejecting the proposed amendment in 1925 but then ratified the amendment after 13 years, in 1937. Twenty-four Kansas state representatives and senators challenged the ratification in court contending that ñin the absence of a limitation by the Congress, the Court can and should decide what is a reasonable period within which ratification may be had.ò[705] The Kansas Supreme Court rejected the challenge and sustained the validity of the ratification. The case was appealed to the Supreme Court where it became a case on the justiciability of Article V questions. The Court decided that the issue of the timeliness of the Kansas ratification was non-justiciable because it implied political consideration and that the appropriate body to set a reasonable limit of time for ratification is the Congress.[706] The *Coleman* case constitutes the modern doctrinal framework for Art. V jurisprudence. Nonetheless, scholars have continued the debate outside the courts and still discuss the issue of timeliness. Remarkably, the *Coleman* decision has been deprecated as an ñaberrationò[707] by Prof. Walter Dellinger, a leading constitutional scholar and former United States Solicitor General. The argument put forward by Prof. Dellinger is that Congressional promulgation would not settle the issue in a definitive matter because one

[703] Coleman v. Miller, 307 U.S. 433 (1939).
[704] H.R.J. Res. 184, 68th Cong., 1st Sess., 43 Stat. 670 (1924). The proposed amendment provided that ócCongress shall have power to limit, regulate and prohibit the labor of persons under eighteen years of age.ò
[705] Coleman v. Miller, 307 U.S. 433 (1939).
[706] *Id.* at 454.
[707] Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process,* 97 Harv. L. Rev. 386, 389 (1983)

Congress cannot bind a subsequent Congress and congressional decisions would almost surely fail to produce usable precedents.[708] Of the same idea is Prof. Paulsen who termed the decision ñvery bad lawò[709] and the Supreme Court formulation of the political question doctrine ñhopelessly jumbled.ò[710] In his opinion, the *Dillon* congressional power and *Coleman* political question decision had no basis in the text of the Constitution.[711]

At the other end of the spectrum of the discussion, Professor Laurence Tribe explicitly challenged Professor Dellingerôs defense of nondeferential judicial review of the constitutional amendment power and in the Harvard Law Review argued that the courts should abstain from substantive review of constitutional amendments because it is a ñquintessentially politicalò[712] process and ñjudicial supervision would significantly undercut the independence of Article V from normal legal processes and erode its special role in the constitutional scheme.ò[713]

Should the Scope of the Convention Be Limited to a Single Subject or Should the Convention Be General?

The wording of Art. V does not specify whether the convention can be general or should be limited to a single subject. In other words, it is not clear whether a convention can amend any part of the constitution or should be limited to the amendment states have called for. A deeply controversial discussion also revolves around the validity of the state applications for general and limited conventions. The issue has been debated by leading scholars of constitutional law

[708] *Id.* at 393.
[709] Paulsen, *supra* note 671 at 713 (1993).
[710] *Id*.
[711] *Id* at. 721.
[712] Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 Harv. L. Rev. 433,445)1983.
[713] I*d.* at 444.

who in turn have provided valid arguments for both options. In a letter dated February 28, 1972 to Congressman Emanuel Celler (at the time Chairman of the House Judiciary Committee), Prof. Charles Black argued that the wording of Art. V referring to ña Convention for proposing Amendmentsò was to be interpreted as referring to a convention that would propose the amendments to be considered, not a convention limited in its scope: ñIt is my contention that Article V, properly construed, refers, in the phrase ña Convention for proposing Amendments,ò to a convention for proposing such amendments as to that convention seem suitable for being proposed.ò[714] The matter has also been discussed in an exchange of letters between Prof. Bruce Ackerman and Prof. William W. Van Alstyne in 1979.[715] Prof. Ackerman in a New Republic editorial[716] argued that an Art. V application for a Convention should be presented as an unrestricted convention for proposing amendments and that Congress should decline to call a convention restricted to a specific amendment. He then requested the opinion of Prof. Van Alstyne who disagreed with Ackermanôs conclusions and published his remarks in the Duke Law Journal. The point made by Prof. Van Alstyne was that an Art. V Convention should not be viewed as a general convention like the Constitutional Convention of 1787 but rather as an event of different nature, whose most appropriate objective would be a ñmodest changeò of certain aspects of the Constitution:

> That a general convention, itself like the one at Philadelphia, convoked deliberately to undertake (in your words) "an unconditional reappraisal of constitutional foundations" is the only kind of convention or even the typical kind of convention anticipated under Article V strikes me as decidedly untrue. To the contrary, while allowed by Article V, such a convention is the least likely to be the foreseeable object of states expected to make use of their collective authority in article V. An

[714] Charles L. Black, Jr., *Amending the Constitution: A Letter to A Congressman*, 82 Yale L.J. 189, 196 (1972)
[715] William W. Van Alstyne, *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague*, 1978 DUKE L.J. 1295, 1304 (1979).
[716] Bruce Ackerman, *Unconstitutional Convention*, NEW REPUBLIC, Mar. 3, 1979, at 8.

> event most likely to provide the most expected (and legitimate) use of this power would be just that: a particular event, an untoward happening, itself seen as a departure from, or as a suddenly exposed oversight within, the Constitution.[717]

More recently, Professor Paulsen has interpreted the Constitutional Convention as a fully-fledged substitute for Congress and argued that it would have an equivalent scope of authority, i.e. could not be subject to limitation:

> there can be no such thing as a ñlimitedò constitutional convention. A constitutional convention, once called, is a free agency. Even if called for a specific purpose, and even if Congress purports to limit its mandate to proposing (or not proposing) amendments reflecting that purpose, the convention may propose what it likes-and Congress is bound to submit its proposals for ratification.[718]

In the same article, Professor Paulsen set out criteria to identify valid applications, the same criteria used by the Article V Library website[719] to classify the applications. He argued that since Article V did not permit Congress to call a convention limited to specific subject matter, applications that contained exclusivity provisions i.e. provisions that limited the convention's agenda would not be valid applications and should not count towards the 34-application threshold: ñIf an application is thus conditioned on limiting the conventionôs agenda, and if Article V prohibits limited conventions, then the condition is invalid and with it the entire application.ò[720] He clarified, however, that applications are invalid only if they conditioned the work of the convention to a certain subject matter or text, not if they specify a purpose of the

[717] Van Alstyne, *supra* note 715 at 1035.
[718] Paulsen, *supra* note 671.
[719] *Paulsen Criteria Analysis,* THE ART. V LIBRARY, http://article5library.org/paulsen.php (last visited Feb. 5, 2018).
[720] Paulsen, *supra* note 671 at 744.

application and ask for a constitutional convention ñto considerò or ñfor the purpose of proposingò a particular amendment. In other words, specifying the purpose of an application is different to specifying a condition of the application. This distinction is particularly relevant if we consider that recent applications mainly call for a limited convention and would be considered invalid according to Paulsenôs criteria. The reason why state legislatures have recently drafted their applications as conditional to the amendment specified in the text of the resolution is the fear of a runaway convention, a convention that would go beyond the consideration of a single amendment and would consider amendments that states calling for a convention oppose.[721]

The Congressional Research Services Report considered 3 kinds of conventions:

- A general convention, which would be free to consider any and all additions to the Constitution, as well as alterations to existing constitutional provisions;
- A limited convention, which would be restricted by its ñcall,ò or authorizing legislation, to consideration of a single issue or group of issues, as specified by the states in their applications;
- A runaway convention, frequently identified by convention opponents as one of the dangers inherent in the process, is essentially a limited convention that departs from its prescribed mandate and proceeds to consider proposals in a range of issues that were not included in the original ñcall.ò[722]

Some of the resolutions calling for a constitutional convention that I have collected are indeed open applications for an Art. V convention and do not define any particular scope. Open

[721] See Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 VA. L. REV. 1509, 1533 n.47 (2010).
[722] Neale, *supra* note 660.

applications are also better welcomed by the courts that have ruled that a state application should not attempt to restrict the conventionôs deliberative freedom.[723] Furthermore, former Solicitor General Dellinger has argued that a convention, once summoned, possesses deliberative power and could potentially set its own agenda, i.e. propose amendments that fall beyond the scope of the original call: a convention ñshould be influenced in its agenda by the grievances that led the states to apply for its convocation, the authority to determine the agenda and draft the amendments to be proposed should rest with the convention, rather than with Congress or the state legislatures.ò[724]

On the other hand, Prof. Sabato considers that from a practical point of view it would be very unlikely for a Convention to ignore statesô mandates because the amendments will eventually need to be ratified by thirty four state legislatures.[725] This view, reports Prof. Sabato,[726] is also supported by the American Bar Association, which in a study conducted in 1974 concluded that Congress has the power to establish procedures limiting a convention to the subject matter which is stated in the applications received from the state legislatures. [727] The fear of a runaway convention, Prof. Sabato seems to suggest, is unjustified because any amendment passed by the convention would ultimately have to be approved by ¾ of the legislatures and it is unlikely that the legislatures would approve unreasonable amendments.

Conclusion

[723] State v. American Sugar Refining Company, 137 La. 407, 415, 68 So. 742, 745 (1915).
[724] *See* Walter E. Dellinger, *The Recurring Question of the 'Limited' Constitutional Convention*, 88 Yale L.J. 1623, 1625 (1979).
[725] Larry Sabato, *supra* note 639 at 213.
[726] *Id*. at 214.
[727] ABA SPECIAL CONSTITUTIONAL CONVENTION STUDY COMM., AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V 7 (1974).

In response to the big wave of applications (32) between 1975 and 1983 for a Constitutional Convention to propose a constitutional amendment requiring a balanced federal budget, scholars have investigated the nature of the discontent and the role of those requests in the debate about public debt. Russell Caplan, writing in 1988, believed that a Convention was imminent and argued that the calls for an Art. V Convention are part of broader strategy that he calls ñconstitutional brinksmanshipò. His book was aimed at dissipating fears about a constitutional convention and to convince legislators of the unlikelihood of a runaway convention. In particular he concluded that Article V permits limited-purpose conventions and that Congress or, in some situations, individual plaintiffs can nullify as ultra vires any nonconforming amendment proposed by the convention. [728] He was obviously wrong in predicting an imminent convention but did find a suitable interpretive key for the phenomenon in his definition of the overall strategy as ôbrinksmanshipô. This is further confirmed by Thomas Nealeôs analysis of the movement for a balanced budget identifying that the National Taxpayersô Union, during the 1980s campaign, expressly stated that the convention movement was designed to force Congress to propose an amendment, that the call for a convention was ñjust a way of getting attentionò something akin to batting a mule with a boardò[729] and the statement of the House Judiciary Committee in its 1993 print, *Is There a Constitutional Convention in America's Future?* noting that during the 1980s a number of states had forwarded conditional applications that specifically stated their petitions would be canceled in the event Congress proposed a balanced budget amendment that incorporated the general principles embodied in their proposals.[730]

This work assimilates the contemporary calls for art. V Convention to the events taking place between 1975 and 1983 and interprets them as brinkmanship strategies. In other words, just as

[728] RUSSEL CAPLAN, CONSTITUTIONAL BRINKSMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION 150 (1988).
[729] Neale, *supra* note 660 at 9.
[730] *Id.* at 8.

per nullification and health care compacts, Art. V Convention applications are a strategy to foster political interest; their significance -as concluded by Donna Eleanor Childers- lies in the power to put issues on the public agenda, to communicate policy preferences to public officials, and to encourage more responsive government.[731]

Whether this strategy can be translated into a successful call for a convention remains an open question. In the CRS report, Neale observed that the progress in technology would favor Art. V campaigners and the spread of the phenomenon: ñAn important issue in the contemporary context is the fact that advances in communications technology could facilitate the emergence of technology-driven issue advocacy groups favorable to this phenomenon.ò[732] However, to date, the 34 states threshold still remains a big obstacle and even if it will never be reached, we should expect legal challenges on the validity of the call and on the timeframe of the calls, as seen in the previous paragraphs.

[731] Donna Eleanor Childers, The Article V Constitutional Convention: A Serious Alternative, PhD dissertation in Political Science, UNIVERSITY OF CALIFORNIA Santa Barbara (1989).
[732] Neale, *supra* note 619.

Conclusions

I. Towards a Constitutional Moment? The Political Value and Legal Implications of State Legislative Dissent

This multi-case study has sought to identify and classify strategies of state legislative dissent to the implementation of federal law. In particular, the focus has been on five types of legislative measures considered between 2010 and 2016 in states that opposed the implementation of certain provisions of the ACA. The overarching aim of the analysis of bills and legislative measures was to provide an interpretative framework for the understanding of state resistance to the ACA that would ultimately provide insights about the broader dynamics of federal and intergovernmental relations in the U.S.

The study was based on the following core research questions:

1. How have state legislatures opposed the implementation of the ACA?
2. Is it possible to find patterns of opposition across the states?
3. Which constitutional doctrines/devices have state legislatures used to legitimate their opposition to the ACA?
4. What is the role of state opposition in the dynamics of federal and intergovernmental relations in the U.S.?
5. To what extent could it be argued that the introduction of opposition bills constituted an attempt to influence constitutional adjudication?

The first and the second research questions have been largely satisfied by the data presented in chapters 1-5. I have collected anti-ACA bills and resolutions introduced across the 50 states

between 2010-2016 and identified ópatterns of resistanceô in the constitutional arguments put forwards by the legislatures. The data provided convincing evidence of a link between political opposition and constitutional discourse; state legislatures translated their policy concerns into constitutional arguments put forward via legislative measures. The language used by the state legislature was the language of state sovereignty, a language that reflected polarization in Washington, and that James Read has called ópolarized constitutional interpretationô.[733]

As I have argued, state legislatures phrased their political opposition to federal health care regulation in terms of constitutional safeguards of statesô rights and revisited constitutional doctrines and the interpretation of constitutional provisions in order to oppose the ACA on constitutional grounds. Chapters 1-5 have examined the way in which the political opposition had been transformed into legal opposition to the ACA and found that some state legislatures have used legislative measures to promote an alternative understanding of certain constitutional provisions at their advantage. The analysis of state legislative measures in this project represents a means to discuss the diversity of state legislative opposition to the ACA but at the same time an attempt to identify patterns of resistance across the 50 states. The classification of legislative measures which has provided the structure of this dissertation is the result of the attempt to develop a theory of legislative resistance to the ACA and represents the central contribution of this research project to new knowledge.

The third and the fourth research questions are interpretative and revolve around the significance of the opposition to the ACA and its role. As discussed earlier, some political science scholars have considered those assertions of state sovereignty as political strategies,

[733] James Read, *Constitutionalizing the Dispute: Federalism in Hyper-Partisan Times,* 46 PUBLIUS: THE JOURNAL OF FEDERALISM 337 (2016). In this paper, Prof. Read argued that political polarization in Congress reflects in a polarization of constitutional understanding. This understanding grounds the present research on state legislative measures that use constitutional arguments to push back on federal policies.

opportunities for states to wield influence in the U.S. federal system and ñcapable of contributing under certain conditions to safeguarding federalismò.[734] Other scholars, instead, mainly considered their legal value and pointed out that state nullification of federal law has been repeatedly rejected throughout U.S. history as an unconstitutional exercise of state power and that -as a consequence- current attempts by states to nullify federal health care reform are equally invalid and will likewise be rejected.[735]

This work considered both the political value and the legal implications of the ACA opposition measures. In particular, the aim of the case studies on the legislative history of oppositional measures was to explore the reasons for the opposition, the ultimate objective of legislators and the role of state resistance in the federal dynamic; I examined why state legislatures were focused on considering bills and resolutions that had no value from a legal point of view and what the consequences of these legislative actions could be. I argued that state legislators wanted to create momentum and that they were willing to use any strategy to make their voice heard in Washington and to be able to negotiate implementation of the ACA. Remarkably, this dissertation has demonstrated that state legislative activity has played a crucial role in determining the terms of constitutional bargaining and more importantly that policies are determined by means of a delicate equilibrium between three actors: Congress, the federal judiciary and state legislatures. The case studies on the legislative history of opposition bills demonstrate that the terms of the interaction between Congress and judiciary are often discussed first in the state legislatures, the laboratories of democracy[736] or in this case ñlaboratories of constitutional interpretationò. Some scholars have argued that the Courts and Congress engage each other on constitutional meaning and have theorized constitutional debate

[734] Dinan, *supra* note 2. *See* also Elizabeth Weeks Leonard, *Rhetorical Federalism: The Value of State-Based Dissent to Federal Health Reform*, 39 HOFSTRA L. REV. 111 (2010).
[735] Ryan Card, *Can States "Just Say No" to Federal Health Care Reform? The Constitutional and Political Implications of State Attempts to Nullify Federal Law*, 2010 B.Y.U. L. REV. 1795, 1800 (2010).
[736] The phrase was coined by U.S. Supreme Court Justice Louis Brandeis in New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) *supra* note 26.

as bilateral[737] or as an interbranch exercise.[738] As I have argued, constitutional interpretation is also an intergovernmental matter (rather than exclusively interbranch) that involves states legislatures in the very first instance. The main contribution of this work is to reveal the strong ties between state legislative measures and legal challenges; the examination of some of the anti-ACA measures revealed that they were preparatory strategies to the lawsuits shedding light on the dynamics of American federalism. The evidence in the case studies indicates that the constitutionality of the ACA was first debated (and challenged) in state legislatures before coming to the courts. I argue that legislatures are the protagonists in the very first stages of a constitutional interpretive issue. This study rediscovers the role of state legislatures:

- as first port of call for interest groups and lobbies, the same organizations that then proceed to make their voices heard in court.
- As valuable floors for preliminary discussion of constitutional issues before they arrive in court.
- As protagonists of the process that leads to constitutional adjudication.

More specifically, the case studies conducted in this work provide evidence to suggest that sovereignty bills were preparatory actions of state legislators in response to pressure from grassroots organizations and lobbies that ultimately aimed at influencing constitutional adjudication. Chapter One demonstrated that nullification bills were pushed in the legislatures by the Tenth Amendment Centre, a grassroots organization that promotes libertarian principles and an originalist interpretation of the Constitution. Chapter Two concerned ALEC and demonstrates that Health Care Freedom Acts were promoted by this organization with the express purpose of influencing incoming litigation. In particular, the case studies demonstrated the close link between the enactment of Health Care Freedom acts and the following lawsuits

[737] *See* Fisher, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS A POLITICAL PROCESS (1988).
[738] Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1336 (2001).

in Virginia. As to Anti-Commandeering bills, chapter three of this work demonstrated the remarkable influence of Anti-Commandeering doctrine on the *Sebelius* decision; the measures examined in the same chapter had also been promoted by ALEC and the Tenth Amendment Center on their respective websites. Both Health Care Freedom acts and Anti-Commandeering bills had arguably prepared the ground for the Roberts decision in *Sebelius*. Respectively, nullification and Health Care Freedom acts paved the way for the legal challenge on the constitutionality of the individual mandate, and Anti-Commandeering bills anticipated the decision of the court on Medicaid expansion. The same influence on constitutional discourse and litigation could not be demonstrated for Interstate Compact and Constitutional Convention resolutions that did not reach the courts. Instead, those measures aimed at promoting the use of the compact and the convention provisions as pure political tactics for retaining power over health care with the states. The organizations behind the introduction in state legislatures of the resolutions are the Health Care Compact Alliance and the Convention of States organization. The Health Care Compact Alliance was joined by ALEC in the effort to promote compact bills and it can be argued that they did so in the hope of reinforcing state claims over health care powers and using them as a source of leverage in intergovernmental bargaining.[739] The effect of this strategy has been to produce what Alex Waddan and others term the ñsubstance of dissentò.[740] The *ObamaCare Wars* authors believe that ñthe substance of dissent ranges from litigation and legislation, to quasilegal nullification manoeuvres, to political rhetoric and stagecraftò and that these strategies share the goal of allowing political battles to continue with the possibility of a larger political victory.

The fourth research question focused on the alleged influence of the opposition on constitutional adjudication. The question was grounded in the extensive literature on extra-

[739] John Dinan, *Intergovernmental Bargaining and Implementation of the Affordable Care Act: The Sources and Extent of State and Federal Government Leverage* (2013), APSA 2013 Annual Meeting Paper.
[740] Beland, Rocco and Waddan, *supra* note 231 at 26 (2016).

judicial constitutional interpretation[741] which has examined how political actors can influence constitutional adjudication. The literature on extra-judicial interpretation, however, focussed on the means by which the Congress, the President[742] and the citizens[743] can influence constitutional interpretation but neglected to examine the role of state legislatures as protagonist of the same process.

By better understanding the role of state legislatures in influencing the constitutional discourse, this work addressed a gap in the literature and refined the normative theories of how the states ought to protect their interests *vis a vis* the central government. This study has argued that theories of intergovernmental relations should reflect the important role state legislatures play in promoting a certain interpretation on the Constitution and are able to prepare the ground for constitutional adjudication. While the courts are ultimately responsible for constitutional interpretation, states can promote and shape the debate on certain constitutional issues before they arrive to court. To some extent, in introducing opposition measures state legislatures were hoping to create that constitutional conflict that Prof. Siegel believe is the crucial engine in constitutional development.[744] The ultimate contribution of this work resides, above all, in shedding light on the legislative activity of states as a starting point for constitutional change in the United States. State legislatures, it has been argued, can influence constitutional adjudication and contribute to constitutional evolution and change.

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[741] *See* Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773 (2002); DEVINS, NEAL, SHAPING CONSTITUTIONAL VALUES (1996); Mark E. Herrmann, *Looking Down from the Hill: Factors Determining the Success of Congressional Efforts to Reverse Supreme Court Interpretations of the Constitution*, 33 WM. & MARY L. REV. 543 (1992) (He examines several specific occasions in which Congress has attempted to make a role for itself as an interpreter of the Constitution by intentionally enacting legislation contrary to existing Supreme Court precedents); Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 Duke L.J. 1335, 1336 (2001) (theory of interbranch interpretation, Congress is better situated than courts to adapt the Constitution); Walter F. Murphy, *Who Shall Interpret: The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 401, 417 (1981) (Constitutional decision-making is a never-ending process involving all branches and all levels of government).

[742] *See* Fisher, *supra* note 22.

[743] See Kramer, *supra* note 24.

[744] Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era 2005-06*, 94 CAL. L. REV. 1323, 1329 (2006).

If constitutional change may seem too ambitious an inspiration, we should remember Prof. Whittingtonôs comments: ñFew political movements achieve ñovernight success,ò and a low-level conflict over constitutional meaning may persist for years before culminating in a decisive constructioné Time is necessary to demonstrate whether these conflicts are significant enough to be considered major battles or whether they are merely continued skirmishes, though even short-lived constructions may be significant.[745]

This dissertation began with the question ôTowards a constitutional moment?ôand explored the way in which states attempted to create a constitutional moment by opposing federal law on constitutional grounds. What this work suggests is that the dynamics of a ôconstitutional momentô for amending the constitutional balance may not be as far away as some commentators have argued. At the heart of the federalism debate is the question of whether state oppositional strategies are legitimate tools of a vibrant but dynamic federalism (Dinan) or symptoms of a fundamental malaise with the potential to strike at the heart of the relationship between states and federal government and thus represents a major shifting of constitutional tectonic plates (Natelson).

This work concludes that the dynamics for a constitutional shifting are in place, state legislatures put forward strong state rights claims that, at the very least, have caused a tremor in the American constitutional mantle. Whether major constitutional tectonic plates yet begun to shift remains to be seen.

[745] Keith E. Whittington, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 15 (1999).

II. Directions for Future Research

By tracking the legislation considered by the state legislatures to oppose the ACA, this study has explained how conservative states have used traditional constitutional controversies to push back on the policies of a democratic partyôs president that they oppose. The constitutional arguments used by the red states typify the usual positions of conservatives on major federal social programs. Since this research began, the political landscape in the United States has shifted and we now have a Republican President and a Republican Congress. The possibility now arises for a reversal of the ACA dynamic, i.e. can we now expect to see liberal states use the tactics of óObamacare warsô to push back on unpopular conservative policies?

An appropriate area for research is the Trump immigration policy and recent executive order[746] directing that federal funds be withheld from so called ñsanctuary citiesò. The term ñsanctuary citiesò is commonly used to describe jurisdictions that decline to cooperate with the federal government in enforcing immigration laws. For example, sanctuary cities like San Francisco block their jails from turning over criminal aliens to federal authorities for deportation. The Washington Post reports that there are 165 to 608 local and state governments with ñsanctuaryò policies.[747]

In response to the executive order, a number of sanctuary cities have brought actions against the President, challenging the constitutionality of the provision on Anti-Commandeering grounds. On Nov. 20th 2017, Circuit Judge William Orrick permanently blocked the provision, ruling it was ñunduly coerciveò and violated the separation of powers, the Tenth Amendmentôs

[746] ñEnhancing Public Safety in the Interior of the United States.ò Exec. Order No. 137768, 82 Fed. Reg. 8799, 2017 WL 388889 (Jan. 25, 2017). The order explains that ñthose who overstay or otherwise violate the terms of their visas present a significant threat to national security and public safety,ò and that ñ[t]his is particularly so for aliens who engage in criminal conduct in the United States,ò For that reason, the order provides that ñthe Secretary of Homeland Security ... shall prioritize for removal ... aliens who: ... (b) have been charged with any criminal offense, where such charge has not been resolved.ò The order further provides that ñjurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary.ò.

[747] Michelle Ye Hee Lee, *Trump's claim that sanctuary cities 'breed crime'*, WASH. POST, Feb. 8, 2017.

prohibition against commandeering local jurisdictions and the Fifth Amendmentôs 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 the battle against the ACA but this time the battle is spearheaded by state Attorneys-General and has yet to reach state legislatures. I believe that there is ample scope for research on the strategies used by the states to push back and a future research project on the topic will certainly benefit from the findings of this dissertation.

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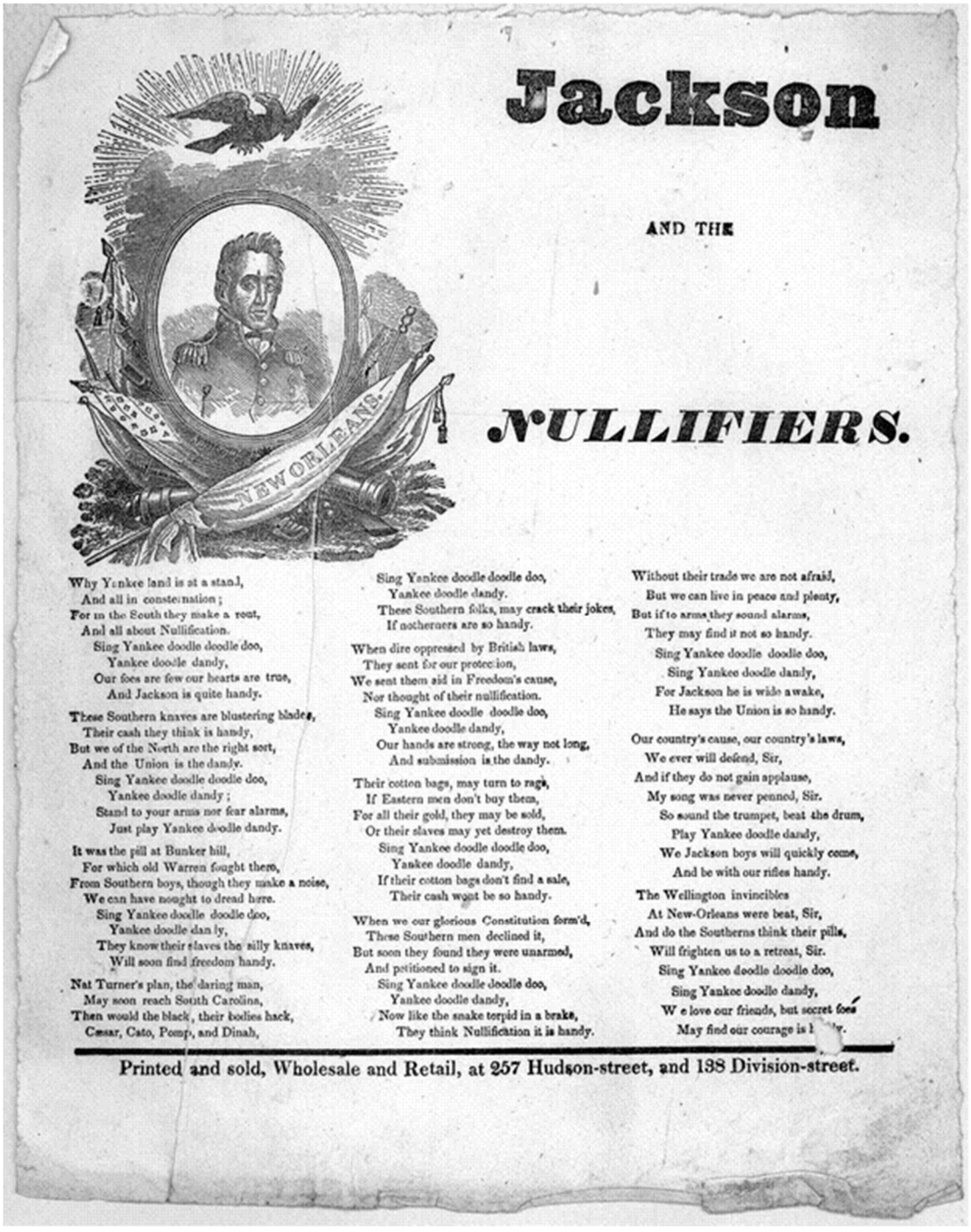
Appendix

I. Song “Jackson and the nullifiers”



Why Yankee land is at a stand,
And all in consternation;
For in the South they make a rout,
And all about Nullification.
Sing Yankee doodle doodle doo,
Yankee doodle dandy,
Our foes are few our hearts are true,
And Jackson is quite handy.

These Southern knaves are blustering blades,
Their cash they think is handy,
But we of the North are the right sort,
And the Union is the dandy.
Sing Yankee doodle doodle doo,
Yankee doodle dandy;
Stand to your arms nor fear alarms,
Just play Yankee doodle dandy.

It was the pill at Bunker hill,
For which old Warren fought there,
From Southern boys, though they make a noise,
We can have nought to dread here.
Sing Yankee doodle doodle doo,
Yankee doodle dandy,
They know their slaves the silly knaves,
Will soon find freedom handy.

Nat Turner's plan, the daring man,
May soon reach South Carolina,
Then would the black, their bodies hack,
Cæsar, Cato, Pomp, and Dinah,
Sing Yankee doodle doodle doo,
Yankee doodle dandy.
These Southern folks, may crack their jokes,
If northerners are so handy.

When dire oppressed by British laws,
They sent for our protection,
We sent them aid in Freedom's cause,
Nor thought of their nullification.
Sing Yankee doodle doodle doo,
Yankee doodle dandy,
Our hands are strong, the way not long,
And submission is the dandy.

Their cotton bags, may turn to rags,
If Eastern men don't buy them,
For all their gold, they may be sold,
Or their slaves may yet destroy them.
Sing Yankee doodle doodle doo,
Yankee doodle dandy,
If their cotton bags don't find a sale,
Their cash wont be so handy.

When we our glorious Constitution form'd,
These Southern men declined it,
But soon they found they were unarmed,
And petitioned to sign it.
Sing Yankee doodle doodle doo,
Yankee doodle dandy,
Now like the snake torpid in a brake,
They think Nullification it is handy.

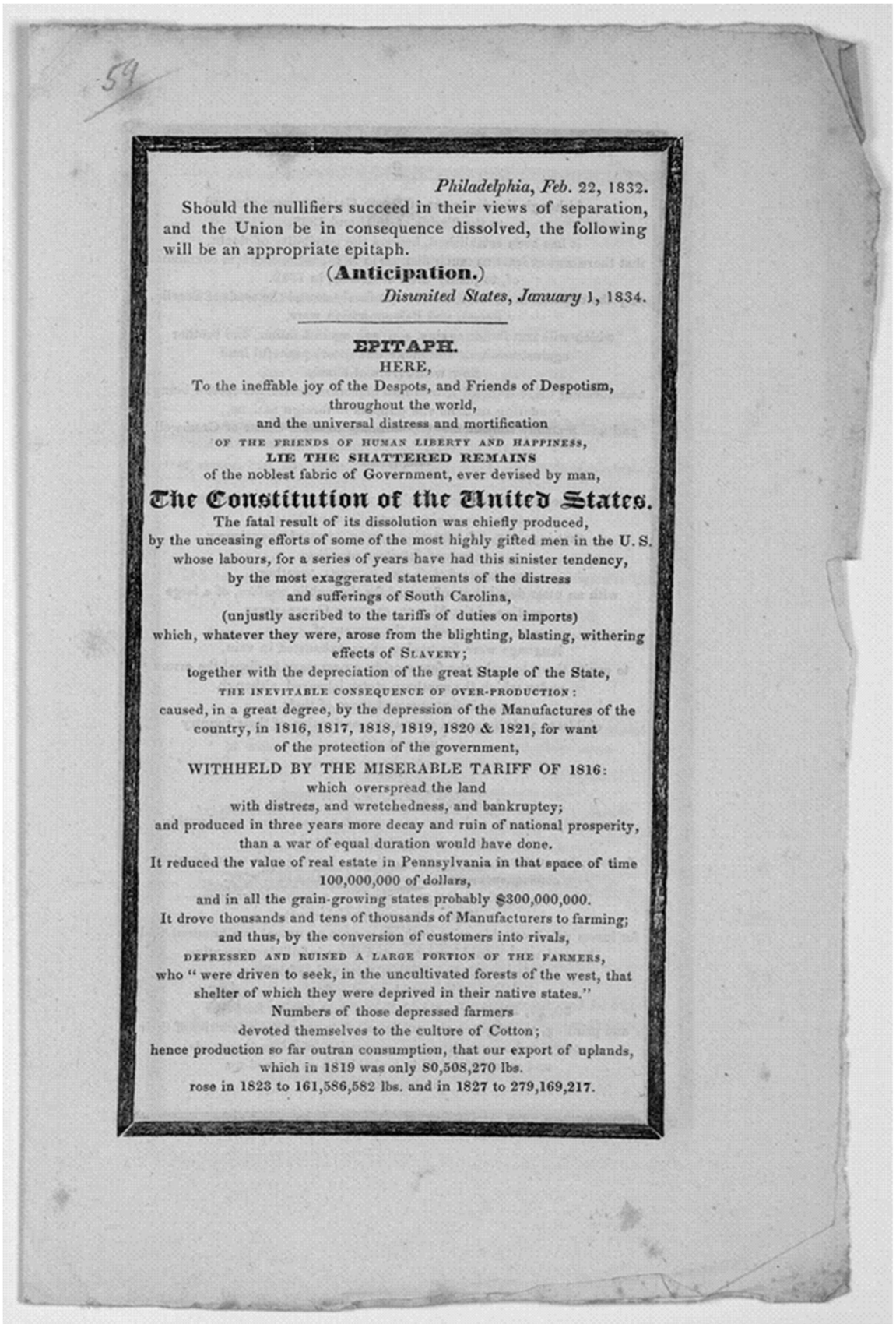
Without their trade we are not afraid,
But we can live in peace and plenty,
But if to arms they sound alarms,
They may find it not so handy.
Sing Yankee doodle doodle doo,
Sing Yankee doodle dandy,
For Jackson he is wide awake,
He says the Union is so handy.

Our country's cause, our country's laws,
We ever will defend, Sir,
And if they do not gain applause,
My song was never penned, Sir.
So sound the trumpet, beat the drum,
Play Yankee doodle dandy,
We Jackson boys will quickly come,
And be with our rifles handy.

The Wellington invincibles
At New-Orleans were beat, Sir,
And do the Southerns think their pills,
Will frighten us to a retreat, Sir.
Sing Yankee doodle doodle doo,
Sing Yankee doodle dandy,
We love our friends, but secret foes
May find our courage is handy.

Printed and sold, Wholesale and Retail, at 257 Hudson-street, and 138 Division-street.

II. Epitaph of the Constitution



54

Philadelphia, Feb. 22, 1832.

Should the nullifiers succeed in their views of separation, and the Union be in consequence dissolved, the following will be an appropriate epitaph.

(Anticipation.)

Disunited States, January 1, 1834.

EPITAPH.

HERE,
To the ineffable joy of the Despots, and Friends of Despotism,
throughout the world,
and the universal distress and mortification
OF THE FRIENDS OF HUMAN LIBERTY AND HAPPINESS,
LIE THE SHATTERED REMAINS
of the noblest fabric of Government, ever devised by man,

The Constitution of the United States.

The fatal result of its dissolution was chiefly produced,
by the unceasing efforts of some of the most highly gifted men in the U. S.
whose labours, for a series of years have had this sinister tendency,
by the most exaggerated statements of the distress
and sufferings of South Carolina,
(unjustly ascribed to the tariffs of duties on imports)
which, whatever they were, arose from the blighting, blasting, withering
effects of SLAVERY;
together with the depreciation of the great Staple of the State,
THE INEVITABLE CONSEQUENCE OF OVER-PRODUCTION:
caused, in a great degree, by the depression of the Manufactures of the
country, in 1816, 1817, 1818, 1819, 1820 & 1821, for want
of the protection of the government,
WITHHELD BY THE MISERABLE TARIFF OF 1816:
which overspread the land
with distress, and wretchedness, and bankruptcy;
and produced in three years more decay and ruin of national prosperity,
than a war of equal duration would have done.
It reduced the value of real estate in Pennsylvania in that space of time
100,000,000 of dollars,
and in all the grain-growing states probably $300,000,000.
It drove thousands and tens of thousands of Manufacturers to farming;
and thus, by the conversion of customers into rivals,
DEPRESSED AND RUINED A LARGE PORTION OF THE FARMERS,
who "were driven to seek, in the uncultivated forests of the west, that
shelter of which they were deprived in their native states."
Numbers of those depressed farmers
devoted themselves to the culture of Cotton;
hence production so far outran consumption, that our export of uplands,
which in 1819 was only 80,508,270 lbs.
rose in 1823 to 161,586,582 lbs. and in 1827 to 279,169,217.

Here, then, at length, is the problem solved,
WHETHER MAN BE FIT FOR SELF-GOVERNMENT;
And, alas!
DETERMINED IN THE NEGATIVE.
For no country ever had,
and it is utterly improbable any country ever will have, equal advantages
with those we enjoyed.
We started in our career a comparatively pure people,
with free and liberal forms of government;
have been blessed with boundless prosperity;
Our citizens were more enlightened than those of the nations
of the old world.
We have had before our eyes most powerful admonitions:
the tremendous examples of anarchy,
of rapine, lust, and slaughter, in France, where hundreds of thousands
have been immolated to satanic revenge—infuriate hatred—
devouring cupidity—and wild ambition;
and where the nation,
in the vain search after liberty, exhausted
and weared out by the rapine, and cruelty, and ambition
of a succession of monsters, finally sunk into torpid submission to the
uncontrolled domination of a single DESPOT;
and after a succession of sanguinary wars, in which
human blood flowed like water, recalled their ancient, expelled
dynasty.
Our WESTERN HEMISPHERE held out equal warnings.
Here, the various REPUBLICS,
as they are ludicrously styled, after a series of most
sanguinary struggles, marked with all the horrors and abominations
of which man in his most depraved state is capable, have
been the prey of a succession of
military usurpers,
whose career has been almost uniformly and
ingloriously closed, by the dagger, by poison, or by the musket.
To have shut our eyes and our ears
against such warnings, required a stupendous degree
of stupid blindness,
rarely equalled in the dark annals of the miserable animal, MAN.
SIC TRANSIT GLORIA MUNDI.

THIS EPITAPH
Has been drawn by a man who, for thirteen years,
with short occasional intermissions,
(in one of which years, only, at the commencement, had he any
effectual support; for six—not consecutive—he was wholly without the
least co-operation on the part of those whose
interests he was advocating;
and the co-operation in the other six was feeble,

extorted by unceasing importunity, reluctantly given, and utterly incommensurate with the magnitude of the object at stake,)
devoted the energies of his body and mind,
and his pecuniary means,
to an extravagant extent; sacrificed his business,
his pleasures, his friendships;
excited the most virulent vituperation, and interminable hostility,
in the defence of this cause,
although he never had in it the least personal interest;
and never expected nor would accept the slightest pecuniary remuneration.
His toils and labours, early and late, his waste
of the midnight oil, his services and enormous sacrifices,
he cheerfully devoted to the defence of the system of protecting the industry of the country.
He left nothing undone to arouse the friends of the cause to exertions in its support: BUT IN VAIN.
(The idea was acted upon, that he would write, and print, and publish whether they contributed or not,
and therefore it was not worth while to throw away their money.)
The importance of the support of national industry influenced him to submit to contumely, slight, and injustice,
which no other earthly consideration could have induced him to bear.
He met with almost every conceivable discouragement
from friends and foes of the system.
But from its friends he suffered more chagrin, mortification,
and vexation, in six months, than from its enemies
in thirteen years.*
He feels the proud consciousness, that if unabated, untiring zeal
and ardour, unwearied research, and the entire
devotion to the cause,
of the slender talents he possesses, could have averted this fatal catastrophe, it would have been averted.
And such was the excellence of the system—such the cogency of the facts, such the fairness of the deductions, that had he been properly supported, success was almost certain.
Had his temporal and eternal felicity depended on the result,
he could not have employed more zeal,
more ardour, or more perseverance.
His most ardent wish for the constitution, *Esto perpetua*,
is miserably disappointed.
His advanced age (72 years) renders it almost certain he will be spared the agonizing sight of the manifold calamities
with which this mighty ruin is pregnant.

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* This refers chiefly to the conduct of a few overgrown capitalists in Philadelphia, by whom, as a return for his services, and enormous sacrifices, he has been treated as no gentleman would treat a hireling scribbler.

Although the distresses of South Carolina were charged
to the Tariffs of 1824 and 1828,
it has been established, beyond the possibility of doubt,
that there was at least as much distress in 1823, as the seceders complained
of, to justify their secession, in 1832.
By the dissolution of the Union are profusely sowed the seeds of Servile,
Social, and Peloponnesian wars,
which will arm father against son, son against father, and brother
against brother; and make this (now) peaceful land
flow with rivers of blood,
transforming these tranquil scenes into objects of horror to superior beings,
rendering us tools and puppets to foreign nations,
and will probably subject the nation finally to some Cæsar or Cromwell.

To produce the calamitous result to which this STONE bears record,
other causes almost equally contributed:
that is to say, the *withering apathy, unworthy parsimony,*
dire and fatuitous impolicy
as respected their own interests, together
with an utter destitution of regard for the public welfare, of a large
portion of the MANUFACTURING CAPITALISTS,
on whom the powers of
language were for twelve years exhausted in vain,
to excite them to make the few sacrifices necessary to dispel the errors
under which the southern states laboured, although
their fortunes and those of their
children, and the peace, prosperity, and union of their country
were at stake.

A MORE GLORIOUS CAUSE
has rarely existed; and scarcely ever was a great cause so miserably
and pettifoggingly managed.
A more dire instance of infatuation, or one attended with more disastrous
consequences, is seldom to be met with in history.
The folly—perhaps the guilt would be a more proper term—
will carry its own punishment;
for losses will inevitably arise to the parties to an extent one hundred fold
beyond what would have operated as an infallible preventive.
Men worth hundreds of thousands of dollars,
who would not sacrifice
30, 20, 10, or even five dollars a year, to pay for paper
and printing, to enlighten the public mind, to avert the calamities of their
country and secure their own prosperity, will lose thousands;
and many of the body probably be swallowed up
in bankrutpcy.

III. North Dakota SB 2309

Jan. 24, 2011 (Introduced, first reading, referred to SENATE Committee on HUMAN SERVICES)

11.0742.02000

Sixty-second
Legislative Assembly
of North Dakota

SENATE BILL NO. 2309

Introduced by

Senators Sitte, Berry, Dever

Representatives Kasper, Keiser, Ruby

A BILL for an Act to create and enact a new section to chapter 54-03 of the North Dakota Century Code, relating to nullification of federal health care reform legislation; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 54-03 of the North Dakota Century Code is created and enacted as follows:

Nullification of federal health care reform law.

1. The legislative assembly declares that the federal laws known as the Patient Protection and Affordable Care Act [Pub. L. 111-148] and the Health Care and Education Reconciliation Act of 2010 [Pub. L. 111-152] are not authorized by the United States Constitution and violate its true meaning and intent as given by the founders and ratifiers and are declared to be invalid in this state, may not be recognized by this state, are specifically rejected by this state, and are considered to be null in this state.
2. The legislative assembly shall enact any measure necessary to prevent the enforcement of the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010 within this state.
3. Any official, agent, or employee of the United States government or any employee of a corporation providing services to the United States government who enforces or attempts to enforce an act, order, law, statute, rule, or regulation of the government of the United States in violation of this Act is guilty of a class C felony.
4. Any public officer or employee of this state who enforces or attempts to enforce an act, order, law, statute, rule, or regulation of the government of the United States in violation of this Act is guilty of a class A misdemeanor.

5. An aggrieved party also shall have a private action against any person violating subsection 3 or 4.

Feb. 18, 2011 (Engrossed)

11.0742.03000

Sixty-second
Legislative Assembly
of North Dakota

FIRST ENGROSSMENT

ENGROSSED SENATE BILL NO. 2309

Introduced by

Senators Sitte, Berry, Dever

Representatives Kasper, Keiser, Ruby

A BILL for an Act to create and enact a new section to chapter 54-03 of the North Dakota Century Code, relating to federal health care reform legislation.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 54-03 of the North Dakota Century Code is created and enacted as follows:

Federal health care reform law.

1. The legislative assembly declares that the federal laws known as the Patient Protection and Affordable Care Act [Pub. L. 111-148] and the Health Care and Education Reconciliation Act of 2010 [Pub. L. 111-152] are not authorized by the United States Constitution and violate its true meaning and intent as given by the founders and ratifiers.
2. The legislative assembly shall consider enacting any measure necessary to prevent the enforcement of the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010 within this state.

11.0742.05000

Sixty-second
Legislative Assembly
of North Dakota

FIRST ENGROSSMENT
with House Amendments
ENGROSSED SENATE BILL NO. 2309

Introduced by

Senators Sitte, Berry, Dever

Representatives Kasper, Keiser, Ruby

A BILL for an Act to create and enact a new section to chapter 26.1-36 and a new section to chapter 54-03 of the North Dakota Century Code, relating to accident and health insurance coverage and federal health care reform legislation.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 26.1-36 of the North Dakota Century Code is created and enacted as follows:

Freedom to choose and provide medical services.

1. Regardless of whether a resident of this state has or is eligible for health insurance coverage:
   a. That resident has the right to seek medical treatment and services from any properly licensed medical provider in this state;
   b. A person may not prevent or interfere with the right of any properly licensed medical provider in this state to provide to that resident medical treatment and services within that medical provider's scope of practice; and
   c. A medical provider in this state has the right to provide or deny medical treatment and services to that resident as provided by law.
2. This section does not apply to:
   a. An individual who voluntarily applies for coverage under a state-administered program pursuant to the medical assistance program under title XIX of the federal Social Security Act [42 U.S.C. 1396 et seq.] or the state's children's health insurance program under title XXI of the federal Social Security Act [42 U.S.C. 1397aa et seq.].
   b. A student who is required by an institution of higher education to obtain and maintain health insurance as a condition of enrollment.

c. An individual who is required by a religious institution to obtain and maintain health insurance.

d. Health care benefits provided under the federal railroad system.

e. The terms or conditions of any health insurance policy or health service contract or of any other contractual arrangement for the provision of health care services offered through a private health care system or accident and health insurance company administering accident and health insurance policies and certificates as permitted under the laws of this state, regardless of whether entered before or after the effective date of this Act.

f. The right of a person to negotiate or enter a private contract for health insurance for an individual, family, business, or employee with an insurance company, third-party administrator, or other provider of health care services or health insurance permitted under the laws of this state.

g. The application of the federal Emergency Medical Treatment and Active Labor Act [42 U.S.C. 1395dd et seq.].

SECTION 2. A new section to chapter 54-03 of the North Dakota Century Code is created and enacted as follows:

Federal health care reform law.

1. The legislative assembly declares that the federal laws known as the Patient Protection and Affordable Care Act [Pub. L. 111-148] and the Health Care and Education Reconciliation Act of 2010 [Pub. L. 111-152] likely are not authorized by the United States Constitution and may violate its true meaning and intent as given by the founders and ratifiers.

2. The legislative assembly shall consider enacting any measure necessary to prevent the enforcement of the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010 within this state.

11.0742.06000

Sixty-second
Legislative Assembly
of North Dakota

FIRST ENGROSSMENT
with Conference Committee Amendments
ENGROSSED SENATE BILL NO. 2309

Introduced by

Senators Sitte, Berry, Dever

Representatives Kasper, Keiser, Ruby

A BILL for an Act to create and enact a new section to chapter 54-03 of the North Dakota Century Code, relating to federal health care reform legislation.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 54-03 of the North Dakota Century Code is created and enacted as follows:

Federal health care reform law.

1. The legislative assembly declares that the federal laws known as the Patient Protection and Affordable Care Act [Pub. L. 111-148] and the Health Care and Education Reconciliation Act of 2010 [Pub. L. 111-152] likely are not authorized by the United States Constitution and may violate its true meaning and intent as given by the founders and ratifiers.
2. The legislative assembly shall consider enacting any measure necessary to prevent the enforcement of the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010 within this state.
3. No provision of the Patient Protection and Affordable Care Act or the Health Care and Education Reconciliation Act of 2010 may interfere with an individual's choice of a medical or insurance provider except as otherwise provided by the laws of this state.

Sixty-second Legislative Assembly of North Dakota
In Regular Session Commencing Tuesday, January 4, 2011

SENATE BILL NO. 2309
(Senators Sitte, Berry, Dever)
(Representatives Kasper, Keiser, Ruby)

AN ACT to create and enact a new section to chapter 54-03 of the North Dakota Century Code, relating to federal health care reform legislation.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 54-03 of the North Dakota Century Code is created and enacted as follows:

Federal health care reform law.

1. The legislative assembly declares that the federal laws known as the Patient Protection and Affordable Care Act [Pub. L. 111-148] and the Health Care and Education Reconciliation Act of 2010 [Pub. L. 111-152] likely are not authorized by the United States Constitution and may violate its true meaning and intent as given by the founders and ratifiers.

2. The legislative assembly shall consider enacting any measure necessary to prevent the enforcement of the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010 within this state.

3. No provision of the Patient Protection and Affordable Care Act or the Health Care and Education Reconciliation Act of 2010 may interfere with an individual's choice of a medical or insurance provider except as otherwise provided by the laws of this state.

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When Liberty subverts Federalism: Is Nullification of Federal Law Legitimate?

*Ilaria Di Gioia**

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

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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* No 14-1158 (22 July 2014).

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 Resolution[4] and defined it as "a natural right" on the part of a sovereign state to self-defence from the usurpation of 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 literature[5] 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:

[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* (2003) at 536-43.

[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.

> "every State has a natural right in cases not within the compact, (*casus non fœderis*) 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 Resolution[8] 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] Professor Levinson also described a new convention as an "opportunity for a thorough discussion about the

[6] T Jefferson, *Kentucky resolutions* (Nov 10, 1798 & Nov 14, 1799).
[7] J Madison, "Virginia resolutions against the Alien and Sedition Acts" reprinted in JN Rakove, *James Madison, writings* (1999) 589–591.
[8] 2015 Virginia Senate Joint Resolution no 269, Virginia 2015 Regular Session.
[9] Ibid. 24-27

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 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 LexisNexis 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 ten 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 Article 1 Section 8 of the US Constitution.

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[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 February 2015), available at: *http://www.ncsl.org/research/health/state-laws-and-actions-challenging-ppaca.aspx*.

[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] Article 1, 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.

- Two philosophical underpinnings: the originalist interpretation of the Commerce Clause[14] and the call for protection of state rights under the Tenth Amendment[15].
- 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

[14] Article 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.

state are prohibited from using any personnel or financial resources to enforce, administer or cooperate with the designated 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?

[17] M D Adler, "The Supreme Court's federalism: real or imagined?" in Annals of the American Academy of Political and Social Science vol 574 (Mar 2001) at 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.

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 Clause[18] which clearly establishes the pre-eminence 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 review[20] is a prerogative of the Supreme Court (*Marbury v Madison*)[21] and claiming that states can declare federal law unconstitutional would also ignore the unanimous *Cooper v Aaron's*[22] holding, 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.

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[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 January 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.

[21] *Marbury v Madison* 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] *Cooper v Aaron's* 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."

With regard to *judicial review*, relevant conservative literature[23] 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 times[25], 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 scholarship[28] 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

[23] CS Hyneman, *The Supreme Court on trial* (1963) 125; HL Boudin (1911) in 26 Polit Sc Qtly 238-248; JB McDonough, "Usurpation of Power by Federal Courts" (1912) AMLR 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, *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; JE Pfander, "Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers" (2001) 101 Colum LR 1515; WM 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 at 120.

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.

With regard to *judicial* supremacy, academic criticism[31] 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. Paulsen[32] who contends that *Marbury* has created a myth and that a proper reading of Marshall's decision would actually suggests 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 Roosevelt[35] 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

[30] I am also referring to the influence in the United States of Coke' 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.
[31] See M Tushnet, *Taking the Constitution Away from the Courts* (1999) 8-9, 14-15 and 22-23, and E Meese III, "The Law of the Constitution" (1987) 61 Tul LR 979, 986. In support of judicial supremacy arguments see L Alexander and F Schauer, "On Extrajudicial Constitutional Interpretation" (1997) 110 Harv LR 1359 at 1361.
[32] M Paulsen, "The irrepressible myth of Marbury" (2003) 101 Mich LR 2706.
[33] Ibid. at 2721.
[34] "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."
[35] K Roosevelt, "Judicial supremacy, judicial activism: Cooper v. Aaron and Parents involved" (Summer 2008) 52 St Louis U LJ 1191, 1197.

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 Kramer[36] 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 type[38] 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 pre-eminence of federal law but acknowledged that states could not be compelled to 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

[36] Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004) 221.
[37] EA 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 Tennesse Senate Bill No. 2450, 2014 Tennesse 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 fifty states via its website which publishes weekly updates, video, articles and book reviews.
[40] *Prigg v Pennsylvania* 41 US 539 (1842).
[41] *New York v United States* 505 US 144.
[42] *Printz v United States* 521 US 898 (1997).

"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 Clause[44] 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.

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[43] *National Federation of Independent Business v Sebelius* 567 US ___ (2012), 132 SCt 2566 (unreported).
[44] See KS Swendiman and EP 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).

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 1 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 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 president[49], 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

[47] *Virginia v Tennessee* 48 U.S. 503, 517-518 (1893).
[48] CN Broun, MH Mccabe, ML Buenger and RL Masters, *The evolving use and the changing role of interstate compacts* (2007) 48.
[49] W Andrews, A Parlapiano and K Yourish for The New York Times, "Who is running for president (and who's not)?" (23 March 2015).
[50] ME 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" (3 December 2013) no 744, Policy Analysis by Cato Institute.
[52] JH Read and N Allen, "Living, dead, and undead: nullification past and present" (Fall 2012) American Political Thought, vol 1, No 2, 263-297.
[53] RS Hunter, "Sound and fury, signifying nothing: nullification and the question of gubernatorial executive power in Idaho" (2013), 49 Idaho L Rev 659-692.

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 issue[55]: 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 Frank[56] 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 and constitutional

[54] Levinson (n 15) at 48.
[55] Paulsen (n 32). He pleads for a shared judicial review power between the three branches of government and the state governments.
[56] J Frank, *Constituent Moments: enacting the people in postrevolutionary America* (2010).
[57] The term popular originalism is used by JA Goldstein, "Can popular constitutionalism survive the Tea Party movement?" (2011) 105 N w U LR Colloquy 288 at 298.

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 (i.e. the idea that it is desirable for people other than judges to engage in constitutional interpretation[59]). 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 Professor 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 Core.[63] 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.

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[58] RE Zietlow, 64 Fla LR 483 (2012).
[59] See LD Kramer, *Popular constitutionalism* (n 48).
[60] Nine states have passed "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. See the Tenth Amendment Center website, available at: http://tracking.tenthamendmentcenter.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 1999).
[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).