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UNCOOPERATIVE FEDERALISM OR DINOSAUR CONSTITUTIONALISM: THE AFFORDABLE CARE ACT AND THE LANGUAGE OF STATES RIGHTS'*

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This paper is a reflection on the nature of state opposition to the Patient Protection and Affordable Care Act (PPACA) (2010) popularly known as the Affordable Care Act or simply Obamacare. The Act, signed into force by President Obama on March 23, 2010, represented the most significant regulatory overhaul of the U.S. healthcare system since the passage of Medicare and Medicaid in 1965 but a multi-state constitutional challenge to the individual mandate and the expansion of Medicaid began only minutes after the President signed the Act into force.¹ By the time the case reached the U.S. Supreme Court, twenty-six states and their Attorneys-General and/or Governors had joined two private citizens and the NFIB in a suit which, per Florida Senior District Judge Vinson was “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.”²

In the event, the decision of the U.S. Supreme Court in *NFIB v. Sebelius*³ upheld the Act’s individual mandate provision. However the Court struck down the companion provisions requiring states to expand Medicaid coverage up to 133% (effectively 138%) of the federal

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¹ See Florida ex rel. Bondi v. U.S. Dept of Health & Human Services, 780 F. Supp. 2d 1256, 1263 (2011) (filed by Florida Attorney General Bill McCollum in the Northern District of Florida, and joined initially by Idaho Attorney General Lawrence Wasden and Utah Attorney General Shurtleff plus eleven other attorneys general. On the same day Virginia Attorney General Kenneth Cuccinelli filed suit in the Eastern District of Virginia challenging the constitutionality of the individual mandate provision of the ACA: *Commonwealth v. Sebelius*, No. 3:10-CV-00188-HEH (E.D. Va. Mar. 23, 2010).

² *Id.* at 1263.

³ 567 U.S. _ (2012), 132 S. Ct. 2566; figures for between 2011 & 14 are 47 states and 458 bills

poverty level on the grounds that they were unconstitutionally coercive. The Act imposed a penalty on states that refused to comply with the expansion of Medicaid in the form of forfeiture of all existing Medicaid funding but Congress, wrote Chief Justice Roberts, “has no authority to order the States to regulate according to its instructions. Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer.”⁴

The decisions of the U.S. Supreme Court in *NFIB v. Sebelius*⁵ and the cases that have followed,⁶ have received considerable attention; less widely appreciated is the extent and nature of state legislative activity by which state legislatures have sought to push back against the Act and protect their citizens and state officials from forced compliance with its provisions. Between 2010 and early 2016, **22 state legislatures** have enacted laws and measures challenging or opting out of broad health reforms related to mandatory provisions of the Patient Protection and Affordable Care Act (ACA).⁷ Along the line considerably more measures have been considered but most have fallen by the wayside, chiefly because they used terminology associated with the states’ rights doctrines of nullification, intercession and secession, and not heard since the Massive Resistance of Southern states that followed the U.S. Supreme Court desegregation mandate of *Brown v. Board of Education*.⁸

State legislators have drawn inspiration from model bills provided by two main sources: the American Legislative Exchange Council (ALEC)⁹ and the Tenth Amendment Center (TAC). Both these organisations promote state opposition to the ACA with justificatory arguments referencing the Tenth Amendment and doctrines of states’ rights but their rhetoric and the wording of these bills are significantly different, and moreover have changed significantly over a six year period. In part this is due to the outcomes of the legal challenges to the ACA that they have helped to ground and shape. Both now advocate state non-cooperation with the federal government but TAC continues to use the language of

⁴ *Id.* at 2608. The decision was highly fractured; leaving scope to question whether Roberts’ view that states must be given the right to opt out without losing their pre-existing Medicaid funding constitutes the holding of the court; given that it only attracted three justices (Roberts, C.J., Breyer & Kagan, J.J.) An additional four justices (Scalia, Kennedy, Thomas, and Alito, J.J.) objected to the entire Medicaid provision in dissent but did not join Roberts’s opinion). For a discussion of the breakdown of the voting see Lawrence B. Solum, *How NFIB v. Sebelius Affects the Constitutional Gestalt*, 91 WASH. U. L. REV.1 (2013).

⁵ *National Fed’n Indep. Bus. (NFIB) v. Sebelius*, 567 U.S. ___, 132 S. Ct. 2566.

⁶ On June 25, 2015 the U.S. Supreme Court voted 6-3 to uphold health insurance subsidies for people who purchased their insurance through a federal health insurance exchange. The ruling in *King v. Burwell* means that 6 million to 7 million people will continue to receive insurance subsidies

⁷ MT, ID, WY, ND UT AZ KS OK TX, MO, AR. LA, IN, TN, AL, OH, VA, NC, SC, GA, FL, NH. See figures and maps available at NCSL website: http://www.ncsl.org/research/health/state-laws-and-actions-challenging-ppaca.aspx#ND_2011law.

⁸ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (*Brown 1*) held that segregation itself violated the Equal Protection Clause of the Fourteenth Amendment; the desegregation mandate came a year later in *Brown v. Bd. of Educ.*, 349 U.S. 294(1955) (*Brown II*).

⁹ ALEC is a not for profit with funding largely from corporations like Exxon Mobil, corporate foundations such as the Charles G. Koch Charitable Foundation, or trade associations like the pharmaceutical industry’s PhRMA. See <http://www.prwatch.org/news/2011/07/10887/cmd-special-report-alecs-funding-and-spending>.

“Since the TAC is not registered as a nonprofit, little information is available about its finances, but it appears to function primarily as an internet-based organization with affiliates in most states”- See Rachel Tabachnick, *Nullification, Neo-Confederates, and the Revenge of the Old Right* <http://www.politicalresearch.org/tag/tenth-amendment-center/#sthash.vqbYH2bs.dpuf>, Nov.22, 2013.

nullification and it is the nuances of the underlying philosophy that this paper now seeks to pick up.¹⁰

Academic commentary on the phenomenon has been divided. Some scholars describe a revival of constitutional arguments thought to be long dead as ‘zombie’ or ‘dinosaur’ constitutionalism, in effect dead in the water before they are made.¹¹ Others, notably respected constitutional commentator Sanford Levinson, take a more pragmatic or, as Levinson terms it, functionalist view; the language used may be old but the political problems they confront relate directly to twenty-first century workings of U.S. federalism and to that extent they are contemporary and new.¹² The question remains however: can political arguments couched in terms of states’ rights, particularly those which invoke the rhetoric of Calhoun and the history of Massive Resistance, shake off the connection with the history of race in the United States?

Interviewed in fall 2014 by journalist and political commentator David Remnick, President Obama made just this point. Some conservatives, he conceded, might genuinely consider that the federal government was too powerful, too distant and too bureaucratic and that as a consequence, there should be a rebalancing of power in favour of the states. Nevertheless, he observed, there is a “philosophy wrapped up in the history of states’ rights in the context of the civil-rights movement and the Civil War and Calhoun”:

There’s a pretty long history there. I think it’s important for conservatives to recognize and answer some of the problems that are posed by that history...¹³

Taking this observation as a starting point, this paper compares the language of PPACA oppositional bills with that of the Massive Resistance resolutions to consider first the extent to which states have learned from the lessons of the past to develop more successful strategies for challenging the unwanted reach of federal regulation and secondly how we might evaluate these strategies in terms of their contribution to the dynamics of contemporary U.S. federalism.

We begin with a brief overview of state legislative oppositional measures. According to the NCSL Affordable Care Act Legislative Database, the 22 state laws and measures related to challenging or opting out of broad health reform including the PPACA follow a number of general approaches but the legal language varies from state to state and includes statutes

¹⁰ <http://tenthamendmentcenter.com/>.

¹¹ See Sean Wilentz, *States of Anarchy: America’s Long, Sordid Affair with Nullification*, NEW REPUBLIC, Mar. 30, 2010, available at <http://www.tnr.com/article/politics/the-essence-anarchy>. See also Timothy S. Jost, *Can the States Nullify Health Care Reform?*, 362 NEW ENG. J. MEDICINE 869, 869 (2010) (asserting that recent state measures challenging federal health-care legislation “are pure political theater” in pursuit of a goal that “is constitutionally impossible.”).

¹² Sanford Levinson, *The 21st Century Rediscovery of Nullification and Secession* in NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT (Sandford Levinson ed., 2016). See also John Dinan, *Contemporary Assertions of State Sovereignty and the Safeguards of American Federalism*, 74 ALB. L. REV. 1637 (2011).

¹³ Barack Obama, cited by David Remnick *Going the Distance: On and Off the Road with Barack Obama*, NEW YORKER, Jan 27, 2014, available at <http://www.newyorker.com/magazine/2014/01/27/going-the-distance-david-remnick>.

and constitutional amendments, as well as binding and non-binding state resolutions.¹⁴ The site identifies broad approaches with individual state measures typically incorporating at least three. Thus, nine state legislatures have adopted non-binding resolutions or memorials to the federal government. Arizona, Arkansas, Georgia, Missouri, Montana, New Hampshire, North Carolina, Utah and Wyoming have laws restricting further compliance with PPACA without state legislative approval. Eighteen states provide that state government will not implement or enforce mandates requiring the purchase of insurance by individuals or payments by employers and bar state agencies and employees from enforcing fines and penalties. Alabama, Georgia, Indiana, Kansas Missouri, Oklahoma, South Carolina, Utah and Texas have enacted laws authorising entry into interstate health compacts, aimed at giving a group of states primary responsibility for regulating health care goods and services within their boundaries (except military). Most of the measures also include this provision: “Each Member State... may suspend by legislation the operation of all federal laws, rules, regulations, and orders regarding Health Care that are inconsistent with the laws” adopted by the member state as part of a compact. The creation of any interstate compact is not binding without congressional approval, so far untested in relation to health, and will not of itself operate to block PPACA implementation;¹⁵ the aim is the expressive one of asserting primary responsibility for an important area of regulation traditionally regarded as within the power of the state.

Additional oppositional state legislative measures include the non-expansion of Medicaid, non-participation in the health exchange or marketplace provisions, including regulating and/or restricting the functions of navigators and others who assist consumers in selecting health insurance in exchanges or Marketplaces (more than a dozen states have enacted laws of this kind) and blocking individual health benefits, most notably contraception. However, the nuclear option and the focus of this paper is the bill of nullification.

Some context is in order. Nullification bills properly so-called take as their starting point the 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. The term is often combined with that of interposition and both claim to derive from the Virginia and Kentucky Resolutions of 1798 & 99 drafted by James Madison and Thomas Jefferson respectively in response to the Alien and Sedition Acts enacted as a wartime measure by a Federalist Congress and signed into law by President Adams.¹⁶

A detailed discussion of the detail of what Tenth Amendment Center and nullification proponent Thomas W. Woods calls ‘the Principles of 98’ is beyond the present scope of

¹⁴ 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>.

¹⁵ Utah repealed most of its compact statute in 2014.

¹⁶ Thomas Jefferson, Kentucky Resolutions (Nov. 10, 1798 & Nov. 14, 1799), reprinted in 5 *The Founders’ Constitution* 131-35 (Phillip B. Kurland & Ralph Lerner eds., 1987) [hereinafter Jefferson, Kentucky Resolutions]; James Madison, Virginia Resolutions Against the Alien and Sedition Acts (Dec. 21, 1798), reprinted in JAMES MADISON, WRITINGS 589-91 (Jack N. Rakove ed., 1999) [hereinafter Madison, Virginia Resolutions].

this paper.¹⁷ Briefly, we can observe that nullification and interposition, though often combined, are in fact different. Nullification represents the idea that a state can declare a federal law which it regards as unconstitutional to be null and void within its borders. Interposition asserts the right of the state to interpose its own authority between its citizens and unconstitutional laws and to seek the support of other states in so doing.¹⁸ However, typically in the discourse of Calhoun and contemporary advocates the term interposition is used interchangeably with nullification.¹⁹ Underpinning both is a theory of state sovereignty as a counter-balance to the power of the federal government and an explanation of the U.S. constitutional framework which sees the relationship between the states and the federal government in terms of a compact or contract. Compact theory offers more than a historical understanding of what the union is and where it came from; compacts have terms of engagement, providing parameters by which state grievances can be articulated and correspondingly rectified. The significance was picked up by John Calhoun and deployed initially in opposition to the 1828 tariff statutes which threatened to ruin the cotton-based economy of the South and subsequently in justification of full-blown secession.²⁰ The South Carolina Ordinance of Nullification was enacted into law on November 24, 1832 but despite widespread support for the sentiment, no other state legislature followed this lead. Another attempt to nullify federal law took place in 1855 when the Wisconsin's Supreme Court ruled that the federal Fugitive Slave Act was unconstitutional. On appeal to the U.S. Supreme Court, the decision was reversed²¹, and the language of nullification, interposition and states' rights was not heard again until it resurfaced following the 1954 decision of the Supreme Court in *Brown v. Board of Education* and the so-called Massive Resistance that ensued.²² Led by Virginia, eight states adopted nullification and interposition resolutions which borrowed directly from Calhoun.²³ Arkansas went so far as to amend its constitution. In Texas a referendum "to invoke some form of interposition to halt federal encroachment

¹⁷ See THOMAS E. WOODS, JR., NULLIFICATION: HOW TO RESIST FEDERAL TYRANNY IN THE 21ST CENTURY, 15 (2010); see also Ilaria Di-Gioia, *When Liberty Subverts Federalism: Is Nullification of Federal Law Legitimate?* 4 EDINBURGH STUDENT L. REV., 155-168 (2015); James H. Read & Neal Allen, *Living, Dead, and Undead: Nullification Past and Present*, in Levinson ed., *supra* note 12, at 91; Robert S. Claiborne Jr., *Why Virginia's Challenges to the Patient Protection and Affordable Care Act Did Not Invoke Nullification*, 46 U. RICH. L. REV. 917.

¹⁸ Judith A. Hagley, *Massive Resistance; The Rhetoric and the Reality*, 27 N. M. L. REV. 167 (1997); Christopher R. Drahozal, *The Supremacy Clause* 46 (2004) (Nullification is the idea that states can declare federal laws unconstitutional, whereas interposition "is a more variable concept, sometimes synonymous with nullification, sometimes something less than nullification but more than mere protest.")

Interposition is not "categorical defiance by an individual state," but interposition allows states to "seek support of other members of the compact [or other states]." Robert B. McKay, *"With All Deliberate Speed": A Study of School Desegregation*, 31 N.Y.U. L. REV. 991, 1038 (1956).

¹⁹ See Read & Allen, *supra* note 17, at 104-06 (referencing John Calhoun, James Kilpatrick, the strategist of southern opposition to the Brown decision and Thomas E Woods Jr. of TAC).

²⁰ South Carolina legislature used Calhoun's reasoning to nullify the Tariff of 1832, which had earlier replaced the Tariff of Abominations.

²¹ *Ableman v. Booth*, 62 U.S. 506 (1859).

²² See Hagley, *supra* note 18.

²³ The timeline was as follows: Feb. 1, 1956: Virginia joint resolution; Feb. 2, 1956: Alabama House Joint Resolution; Feb. 14, 1956: South Carolina joint resolution; Feb. 29, 1956: Mississippi Senate Concurrent resolution no. 125, adopted; Apr. 18, 1956; Arkansas interposition Constitutional Amendment adopted. May 29, 1956: Louisiana interposition resolution, May 2, 1957: Florida interposition resolution.

on States' rights" received an affirmative vote.²⁴ The North Carolina legislature passed a "resolution of protest" against the *Brown* desegregation decision, having "defeated efforts to strengthen the resolution into one of interposition, and turned down a plan to soften its words"²⁵ The Tennessee House of Representatives did adopt an interposition resolution, but the Senate did not ratify it.²⁶ We consider the texts of these resolutions/constitutional amendments in more detail shortly. At this stage we note simply that in constitutional terms they could not survive the decision of the Supreme Court in *Cooper v. Aaron*²⁷ as was comprehensively explained by a three member federal court in *Bush v. Orleans Parish Sch. Bd.*: "interposition is not a constitutional doctrine. If taken seriously, it is illegal defiance of constitutional authority."²⁸ The Court addressed the compact theory directly:

Interposition is an amorphous concept based on the proposition that the United States is a compact of states, any one of which may interpose its sovereignty against the enforcement within its borders of any decision of the Supreme Court or act of Congress, irrespective of the fact that the constitutionality of the act has been established by decision of the Supreme Court. Once interposed, the law or decision would then have to await approval by constitutional amendment before enforcement within the interposing state. In essence, the doctrine denies the constitutional obligation of the states to respect those decisions of the Supreme Court with which they do not agree. The doctrine may have had some validity under the Articles of Confederation. On their failure, however, 'in Order to form a more perfect Union,' the people, not the states, of this country ordained and established the Constitution. Thus the Keystone of the interposition thesis, that the United States is a compact of states, was disavowed in the Preamble to the Constitution. ²⁹

²⁴ TEXAS ALMANAC, 1958-1959, 451,455, available at <https://texashistory.unt.edu/ark:/67531/metapth117139/m1/453/?q=interposition>

²⁵ See SOUTHERN SCHOOL NEWS, Aug., 1956, available at http://crdl.usg.edu/export/html/gua/ssn/crdl_gua_ssn_ssnvol3no2.html?Welcome

²⁶ 2 RACE REL. L. REP. 228-82; 481-83 (1957);

²⁷ 358 U.S. 1, 17-18 :

we should answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the *Brown* case. It is necessary only to recall some basic constitutional propositions which are settled doctrine.

'Article VI of the Constitution makes the Constitution the 'supreme Law of the Land.' In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as 'the fundamental and paramount law of the nation', declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 177 (2 L. Ed. 60), that 'It is emphatically the province and duty of the judicial department to say what the law is.' This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3, 'to support this Constitution.'" *Cooper v. Aaron*, *supra*.

²⁸ 188 F.Supp. 916 (E.D. La. 1960).

²⁹ *Id.* at 922-23 (citing *Martin v. Hunter's Lessee*, 1 Wheat. 304, 324, 14 U.S. 304, 324, 4 L.Ed. 97.

Ultimately, the question was one of authority: who, under the Constitution, should have the final say on questions of constitutionality. To this there could be only one answer; the Supreme Court of the United States rather than any statute authority is the ultimate judge of constitutionality.³⁰ Louisiana's Interposition Act purporting to 'interpose' the sovereignty of state against enforcement of the *Brown* decision pending a change to the law of the land by proper constitutional amendment, was invalid, and the related package of segregation measures must fall with it.³¹

As the *Bush* Court observed, "throughout the early history of this country, the standard of interposition was raised whenever a state strongly disapproved of some action of the central government."³² It is claimable, as the Louisiana statute observed and contemporary proponents of nullification stress, that the doctrines have antecedents that are benign.³³ These claims notwithstanding, it is the Massive Resistance resolutions which followed the *Brown II* decision in May 1955³⁴ that cast the shadow of Jim Crow and it is to their texts that we now turn.

Virginia's Interposition and Nullification Resolution, was typical of those that followed. It began with a "firm resolution to maintain and to defend the Constitution of the United States, and the Constitution of this State, against every attempt, whether foreign or domestic, to undermine the dual structure of this Union, and to destroy those fundamental principles embodied in our basic law, by which the delegated powers of the Federal government and the reserved powers of the respective States have long been protected and assured." There then followed recitals of what have become the basic tenets of states' rights arguments; ie that the powers of the Federal Government result solely from the compact to which the States are parties; that its powers are limited by that compact to the enumerated powers; that all powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people; and that the Supreme Court has no power to amend the Constitution.³⁵ We then get to the crux of the matter. The power to operate separate schools being a power reserved to the States

³⁰ *Id.*, at 925.

³¹ *Id.*

³² *Id.* at 923.

³³ notably by Thomas E. Woods, Jr. of the Tenth Amendment Center: See THOMAS E. WOODS, JR., NULLIFICATION: HOW TO RESIST FEDERAL TYRANNY IN THE 21ST CENTURY, 78-81 (2010). Woods refers to the case of Sherman Booth, found guilty by a federal court of violating the Fugitive Slave Act. The Wisconsin State Supreme Court ordered his release, declaring the Fugitive Slave Act to be unconstitutional but was firmly rebuked by the U.S. Supreme Court. See *Ableman v. Booth*, 62 U.S. 506, 526 (1858): "No State judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them." Woods goes on to quote the resolution of the Wisconsin State legislature to the effect that the action of the U.S. Supreme Court was "without authority, void and of no force". Woods, *id.* at 8. Although the Wisconsin Supreme Court was the only state high court to declare the Fugitive Slave Act unconstitutional, jury nullification occurred when juries refused to convict persons who assisted fugitive slave, See Gary Collison "This Flagitious Offense": Daniel Webster and the *Shadrach Rescue Cases, 1851-1852*. 68 *NEW ENG. Q.* 609 (1995). Legislative nullification occurred in Vermont, November 1850, when the state legislature passed a "Habeas Corpus Law," requiring Vermont judicial and law enforcement officials to assist captured fugitive slaves, in effect making the federal Fugitive Slave Act unenforceable in Vermont.

³⁴ Requiring that state school boards with federal court supervision dismantle their dual systems "with all deliberate speed".

³⁵ 1 RACE REL. L. REP. 445-47 (1956).

exercisable “without intervention of the Federal courts under the Federal Constitution” so that the *Brown* decision of May 17, 1954 “placed upon the Constitution an interpretation, having the effect of an amendment thereto, which interpretation Virginia emphatically disapproves,” the General Assembly of Virginia, “mindful of the resolution it adopted on December 21, 1798, ... again asserts this fundamental principle: That whenever the Federal Government attempts the *deliberate, palpable, and dangerous* exercise of powers not granted it, the States who are parties to the compact have the right, and are in duty bound, to interpose . . .).³⁶

Presciently for *Sebelius* and our purposes, Virginia then expresses concern about federal overreach:

we have watched with growing concern as the power delegated to the Congress to regulate commerce among the several States has been stretched into a power to control local enterprises remote from interstate commerce; we have witnessed ... the advancing tendency to read into a power to lay taxes for the general welfare a power to confiscate the earnings of our people for purposes unrelated to the general welfare as we conceive it; we have been dismayed at judicial decrees permitting private property to be taken for uses that plainly are not public uses; we are disturbed at the effort now afoot to distort the power to provide for the common defense, by some Fabian alchemy, into a power to build local schoolhouses³⁷

Finally, mirroring the Kentucky Resolution of 1798, Virginia appeals to her sister States and respectfully requests them to join her in taking appropriate steps, pursuant to settle, (by constitutional amendment) “the issue of contested power here asserted,” pending which she resolves, “to take all appropriate measures honorably, legally and constitutionally available to us, to resist this illegal encroachment upon our sovereign powers.”³⁸

Virginia used the language of interposition; other states borrowed from Calhoun's opposition to the 1828 tariff statutes to declare the *Brown* decision “null, void and of no effect” (Alabama); “unconstitutional, invalid and of no lawful effect within . . . Mississippi.”(Mississippi); “null, void, and of no effect.” (Georgia,³⁹ Florida⁴⁰ Alabama⁴¹) or used the language of both e.g. Arkansas (“...the State of Arkansas shall take appropriate action and pass laws opposing in every Constitutional manner the Un-Constitutional desegregation decisions...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,

³⁶ *Id.* (emphasis added). We italicize the words “*deliberate, palpable, and dangerous*” to emphasise the borrowing of these terms from the Virginia Resolution of 1798. The same wording is present in the resolutions that came later.

³⁷ *Id.* at 447.

³⁸ *Id.*

³⁹ 1 RACE REL. L. REP. 438 (1956).

⁴⁰ 2 RACE REL. L. REP. 707 (1956).

⁴¹ *Id.* at 437.

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 States....”⁴² The legislature of Louisiana pulled its punches; its resolution “solemnly declare[d] the decision of the Supreme Court of the United States...to be in violation of the Constitution of the United States, and the State of Louisiana; and, We declare, further, our firm intention to take all appropriate measures honorably and constitutionally available to us, to void this illegal encroachment upon the rights of the several States...”⁴³

Unlike Calhoun and South Carolina in 1828, the legislatures stopped short of threatening secession, but underpinning all their claims lie the premises of state sovereign rights and illegal federal overreach, that *Brown* was a “*deliberate, palpable and dangerous attempt*”⁴⁴ to change the true intent and meaning” of the Constitution, and a state had both the right and duty to resist the Court's illegal amendment until the issue was settled by a valid constitutional amendment. We return now to twenty-first century state legislative activity which is not confined to the PPACA but extends across a spectrum of issues which has included decriminalizing the use of medical marijuana, and opposing implementation of the REAL ID Act of 2005 and federal gun control laws,⁴⁵ but now spreads even wider to take on matters such as the surveillance state, the ‘militarization’ of the police and restrictions on the commercial production of hemp. We consider these matters shortly. For now we consider specifically federalism scholar John Dinan’s view that critics who connect these practices with those of southern states in the 1830s and 1950s misunderstand the contemporary nature of state sovereignty assertions and their potential as legitimate responses to federal government overreach.⁴⁶

Scholars, he claims, have not fully appreciated the continued vitality of these sorts of assertions of state sovereignty in part because they have often misunderstood recent state challenges to federal law and what they aim to accomplish. Scholarly supporters and critics alike have been complicit in this misunderstanding, with critics understandably seeking to de-legitimize recent state measures by associating them with the repudiated doctrine of nullification, especially as practiced by southern states in the 1830’s and 1950’s, and some supporters equally willing to embrace the nullification label out of a desire to associate them with the Jeffersonian doctrine of nullification invoked in the 1790’s. However, when we undertake a close examination of these recent state sovereignty measures, it is evident that they partake of something short of, and other than, nullification.⁴⁷

⁴² Arkansas Constitutional amendment – text available at 1 RACE REL L. REP 116.

See also Florida, 2 RACE REL. L. REP. 707-08: a resolution to declare [the *Brown* decision] “to be null, void and of no effect; to declare that a contest of powers has arisen between the State of Florida and the Supreme Court of the United States; to invoke the doctrine of interposition; and for other purposes.”

⁴³ 1 RACE REL. L. REP. 755 (1956).

⁴⁴ South Carolina Act of Feb. 14 1956, *id.* at 443; Georgia House Resolution No. 185 1956 Legislative Session Georgia General Assembly; *id.* at 438; Alabama, *id.* at 437; Arkansas; Florida, *id.* at 708

⁴⁵ See, e.g. Tenth Amendment Center, 2015 State of the Nullification Movement Report, <http://tenthamendmentcenter.com/report/>.

⁴⁶ Dinan, *supra* note 12, at 1666-67.

⁴⁷ Dinan, *id.*

We approach this claim with specific reference to opposition to the PPACA in 2014, a year in which the legislatures of 26 states considered in the region of 120 oppositional bills and 37 bills were signed into law in 10 states. Analysis of the content of the bills suggests a classification into three groups as follows:

1. Bills declaring the PPACA and its core provision “the individual mandate” unconstitutional and therefore inapplicable within the state. These bills use the language of nullification and we term them “nullification bills properly so-called”.
2. Bills establishing measures to prohibit state agencies or employees from implementing the individual mandate within the state. These bills presuppose the constitutionally respectable anti-commandeering doctrine, according to which the federal government cannot impose targeted, affirmative or coercive duties upon state legislators or executive officials.⁴⁸ They do not use the language of nullification but make declarations of state sovereignty and assertions of rights, freedoms and liabilities of citizens within the state, largely with the aim of establishing the groundwork for federal court challenges to the PPACA on constitutional grounds.
3. Bills establishing authority to join an interstate compact for multiple states opposing federal regulation over health matters which are properly the province of the states. Except in so far as these bills typically include declarations of opposition or incompatibility of state law with federal law, as noted above, these bills are not relevant to this present discussion and are included here for completeness only.⁴⁹
4. Illustrative of bills of the first group is South Carolina Senate Bill n. 147/ 2013 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.”⁵⁰ 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). 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 had been moderated and the nullification bill transformed in a sovereignty declaration. Notable absents are Texas and Florida. Five of the states proposing nullification bills used to be part of the

48

[https://ballotpedia.org/Arizona_Rejection_of_Unconstitutional_Federal_Actions_Amendment,_Proposition_122_\(2014\)](https://ballotpedia.org/Arizona_Rejection_of_Unconstitutional_Federal_Actions_Amendment,_Proposition_122_(2014)); see also Matthew D. Adler, *The Supreme Court's Federalism: Real or Imagined*, 574 ANNALS AM. ACAD. POL. & SOC. SCI, 158 (2001). *See*

⁴⁹ See text accompanying note 15 *supra*.

⁵⁰ Section 38-71-2120. The bill, like many other similar nullification bills in other states, died in committee.

Confederacy and all the states proposing nullification bills are red, ie Republican, states.

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

Type 3 bills included for taxonomy purposes only, we now focus specifically on types 1 and 2 and observe in relation to the former that while 23 states have considered bills seeking to nullify the legal validity of the PPACA, none of the bills have become law in their original form. **The experience of North Dakota**, is instructive here. S. 2309 S. in its original form provided that:

1. (...) the federal laws known as (PPACA) ... 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.⁵¹

By the time the provision reached the statute book, the language had been significantly toned down and the criminal penalty removed. The current version now declares more temperately:

1. ... the federal laws known as (PPACA) ... *likely* are not authorized by the United States Constitution and may violate its true meaning and intent as given by the founders and ratifiers.

⁵¹ S.B. 2309, Leg.62d Sess. (N.D. 2011).

2. The legislative assembly shall *consider* enacting any measure necessary to prevent the enforcement of the (PPCA).

3. No provision of the (PPCA) may interfere with an individual's choice of a medical or insurance provider except as otherwise provided by the laws of this state.⁵²

The first draft replicated the first model nullification bill published by the Tenth Amendment Center (TAC), referred to earlier, but was toned down in committee in order to respond to objections that the language of nullification was constitutionally discredited.⁵³ For similar reasons it is generally type 2 bills modelled on the American Legislative Exchange Council's (ALEC) model "Freedom of Choice in Health Care Act," which have received statehouse success. Promoted by ALEC as "How Your State Can Block Single-Payer and Protect Patients' Rights," these now called healthcare freedom bills gathered considerable state legislative interest during the period 2009-2012 and their language mirrors Arizona Proposition 101, which was narrowly defeated in 2008 but passed on the November 2010 ballot. The wording of the Idaho Health Freedom Act, enacted March 17, 2010 (before the PPACA passed into law) is typical:

(1) The power to require or regulate a person's choice in the mode of securing health care services, or to impose a penalty related thereto, is not found in the Constitution of the United States of America, and is therefore a power reserved to the people pursuant to the Ninth Amendment, and to the several states pursuant to the Tenth Amendment. The state of Idaho hereby exercises its sovereign power to declare the public policy of the state of Idaho regarding the right of all persons residing in the state of Idaho in choosing the mode of securing health care services free from the imposition of penalties, or the threat thereof, by the federal government of the United States of America relating thereto.

(2) It is hereby declared 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.⁵⁴

⁵² S.B. 2309, Leg.62d Sess. (N.D. 2011) (emphasis added) (original draft available at www.legis.nd.gov/assembly/62-2011/documents/11-0742-02000.pdf (last visited Dec. 21, 2016)).

⁵³ See Senate Standing Committee Minutes, Conference Committee Apr. 18, 2011. On 4/18/2011 Rep. Kasper explained that although in his personal opinion the ACA was not authorized by the U.S. Constitution the words "likely" and "may" were necessary for the survival of the bill: "[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 bill". Rep. Ruby emphasized that a softer language would have left room for some kind of result at higher court level.

⁵⁴ I.C. § 39-9003 (2010).

TAC which promotes itself as “the nation’s leading source for constitutional education and nullification activism” no longer promotes bills which directly confront the Supremacy Clause. Instead their model “nullification bill” is called an “anti-commandeering bill” and, after reciting the Tenth Amendment’s reservation of state powers and federal PPACA overreach which “makes a mockery of James Madison’s assurance in Federalist #45 that the “powers delegated” to the Federal Government are “few and defined”, while those of the States are “numerous and indefinite,” prohibits state agencies employees or contractors, subject to civil penalties, from

- 1) Enforc[ing] any federal act, law, order, rule or regulation of the federal government of the United States designed to give effect to the Patient Protection and Affordable Care Act, signed by President Barack Obama on March 23, 2010.
- (2) Provid[ing] material support, participation or assistance in any form, with any federal agency or employee engaged in the enforcement of any federal act, law, order, rule, or regulation of the federal government of the United States designed to give effect to the Patient Protection and Affordable Care Act.
- (3) Utiliz[ing] any assets, state funds or funds allocated by the state to local entities on or after (DATE), in whole or in part, to engage in any activity that aids a federal agency, federal agent, or corporation providing services to the federal government in the enforcement of any federal act, law, order, rule, or regulation of the federal government of the United States designed to give effect to the Patient Protection and Affordable Care Act.⁵⁵

What are we to make of this and specifically of John Dinan’s argument that what we see here represents the mechanics of federalism at work? The first point is this. Dinan’s claim was made specifically in relation to state legislative bills legalizing medical marijuana and opposing implementation of the REAL ID Act (requiring state-issued driving licences to conform to uniform federal standards).⁵⁶ These bills, he argues, do not invoke nullification which he describes as a “discredited doctrine inconsistent with the constitutional principles underlying the American federal system.”⁵⁷ Instead they should properly be regarded as mechanisms by which states can “talk back” to Washington when the federal government puts in place regulations and directives fixing states with fiscal or administrative burdens without paying sufficient attention or conceding sufficient respect to state reservations or concerns.⁵⁸ In other words, they are a legitimate tool of effective state response to perceptions of federal overreach.

Although this paper has focused on state legislative opposition to PPACA, it is certainly the case that this fits into a pattern of expanding areas of state concern that is now finding

⁵⁵ <http://tenthamentendmentcenter.com/legislation/obamacare/>.

⁵⁶ See also John Dinan, *How States Talk Back to Washington and Strengthen American Federalism*, 744 POLICY ANALYSIS (Dec 3, 2013).

⁵⁷ *Id.* at 2

⁵⁸ *Id.*

expression with similar tactics.⁵⁹ TAC now lists as targets for its self-designated “nullification bills” the following areas of state concern in descending order of priority: the Federal Food, Drug, and Cosmetic Act (controlling access to experimental drugs),⁶⁰ the mechanisms of the “surveillance state,” (specifically the use of drones, ALPRs and stingrays), federal restrictions on the commercial production of hemp, federal gun control regulations federal funding of military grade weaponry for local police, and the legalization of marijuana for personal use. Opposition to “Obamacare” now occupies seventh place listed with ‘other issues’ including “Sound Money” – *ie* state gold and silver backed currency competition with Federal Reserve notes and opposition to Common Core educational standards. ALEC which earlier promoted “Healthcare Freedom Bills” and now anticipates its repeal under a Trump regime has removed these from its web-site.

The second point concerns the ‘anti-commandeering’ doctrine announced by the Supreme Court in *Printz v. United States* to the effect that Congress cannot compel the States to enact or enforce a federal regulatory program.⁶¹ It is clear, as we saw earlier, that nullification bills properly so-called are unlikely to be successful in state legislatures. TAC now calls its bills “anti-commandeering” and equates this with “nullification” on the grounds that in practical terms what is important is the actual effect.⁶² Since as they claim, most federal acts or programs require a federal/state partnership to actually carry them out, bills that ban state participation can make those acts or programs “nearly impossible” to enforce; in effect, if not in law, the result is nullification.⁶³ Nullification in this sense becomes a practice not an ideology so that, as both Dinan and TAC claim, the link with Massive Resistance and the legacy of Calhoun is misplaced.

The third point follows. *Printz* itself involved a challenge to provisions in the federal Brady Handgun Violence Prevention Act requiring local chief law enforcement officers to check the backgrounds of prospective purchasers of handguns pending the establishment of a national system. Holding this provision to be unconstitutional, Justice Scalia, for the majority, wrote:

Today we hold that Congress cannot circumvent that prohibition by conscripting the States’ officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ 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*.⁶⁴

⁵⁹ See text accompanying note 45 *supra*.

⁶⁰ Tenth Amendment Center, 2015 State of the Nullification Movement: Report on the Growth of State-Level Resistance to Federal Power, <http://tenthamendmentcenter.com/report/>.

⁶¹ 521 U.S. 898 (1997).

⁶² <http://tenthamendmentcenter.com/legislation/obamacare/>.

⁶³ Tenth Amendment Center, *supra* note 60.

⁶⁴ 521 U.S. at 935 (emphasis added)..

Here, we argue, lies the rub. Justice Scalia claims that a system of “dual sovereignty” in U.S. constitutional arrangements is “incontestable”⁶⁵ but as Professors Read and Allen suggest, the absence of the words “sovereign” and “sovereignty” from the Constitution supports a strong inference that “those who framed, ratified and amended the document did not agree among themselves about what sovereignty was and where in the Constitution it was found.”⁶⁶ Justice Scalia looked to “historical understanding and practice in the structure of the Constitution, and in the jurisprudence of this Court” for the answer.⁶⁷ In terms of the first, as this paper details and President Obama understood, the language of state sovereignty is tainted by the practice of the past and this may likely be irredeemable.⁶⁸ A study of the last is beyond the present scope of this paper. That leaves the structure of the Constitution and Professor Dinan’s claim that states are working within the vertical separation of powers to exploit the constitutional options open to them for combatting federal government overreach.

In a recent article in *Prospect*, Adam Tomkins has argued that federalism U.S. style is “dying”,⁶⁹ distorted by a twenty-first century power imbalance in favour of the federal government that now leaves little for the states to do:

The reach of American government into not only the economy but social policy continued to grow, not shrink. From abortion to gay marriage, from Obamacare to the American government’s controversial “no child left behind” and “every student succeeds” education policies, there is less and less for the states to do. Arizona cannot control its long border with Mexico even when the immigration controls it enacts are held to be consistent with federal law: it is pre-empted from doing so by the fact that Congress has “occupied the field.”⁷⁰

From this perspective it is not just the language of state sovereignty but the concept itself that is outdated to the point of irrelevance. When, as he suggest, “some influential American policy-makers think now that states are little more than a relic from the past, and that it is clusters of cities and city-regions that are the economic powerhouses” the “live questions in American politics” now are: “can the states survive? And can they survive with anything meaningful to do?”⁷¹

This is itself an ideological view. The “liberal Yale law professors” that Tomkins refers to, share with the avowedly ideological TAC, the understanding that as Professor Heather Gerken explains:

[t]he federal government doesn’t have enough resources to deal with immigration, enforce its own drug laws, carry out its environmental policies, build its own infrastructure, or administer its health care system. Instead, it relies

⁶⁵ *Id.* at 919.

⁶⁶ Read & Allen, *supra* note 11, at 99.

⁶⁷ 521 U.S. at 905.

⁶⁸ See text accompanying note 13 *supra*.

⁶⁹ Adam Tomkins, *British American and European Politics: Federal Flaw*, PROSPECT Oct. 2016.

⁷⁰ *Id.*

⁷¹ *Id.*

on the states to do much of this work. We call such arrangements between the states and federal government “cooperative federalism.” But we forget that they create many opportunities for what Jessica Bulman-Pozen and I have called “uncooperative federalism”.⁷²

From this point of view the resources and enforcement mechanisms of state regulatory apparatus are far from irrelevant but as Professor Gerken’s colleague points out, in a context of polarized political partisanship, federalism and states’ rights of themselves have no valence. Whether state legislative opposition to the PPACA has a legitimate place as an appropriate tactic of contemporary federalism is a profoundly ideological question: “without an appreciation of partisanship’s influence, dynamics considered fundamental to our federal system are obscure.”⁷³ The PPACA was the signature achievement of a Democratic president and state opposition was partisan from day one; no Republican supported its passage and no Democratic state officials joined the multi-state legal challenge. As we stand at the beginning of a Trump presidency and progressives fear the worst for the future not only of the PPACA but even more profoundly for what might be termed an equality agenda, can we expect the language of states’ rights with its associated tactics of nullification and interposition to be deployed for a liberal agenda?

Nullification theory, write Professors Read and Allen gains traction not from it being good constitutional theory but from the mere fact that it *is* a constitutional theory- one addressed to nonjudicial actors in language they understand, within a political community founded on the premise that the Constitution ultimately expresses the will of the people. Those who use constitutional arguments, even weak ones, have an advantage over those who neglect constitutional arguments altogether. Contemporary nullification theory thrives in this vacuum.⁷⁴

As Professors Bulman-Pozen and Gerken point out, traditional states’ rights arguments fit a model of federalism in which autonomous states rival the federal government from a position of outsider.⁷⁵ The alternative model of “co-operative federalism” allocates to the states only a subservient role as “supportive insiders--servants and allies to the federal government” with, as Bulman-Pozen and Gerken put it, no “fully developed account of the ways in which states playing the role of federal servant can also resist federal mandates, the ways in which integration--and not just autonomy--can empower states to challenge federal authority”⁷⁶ If the negative connotations of state challenges to federal authority are to be discarded, what is needed is new constitutional theorising with a new conceptual framework and vocabulary that can not only accommodate but accord value to challenge, dissent and

⁷² Heather Gerken, We’re About to See States’ Rights Used Aggressively Against Trump, <http://www.vox.com/the-big-idea/2016/12/12/13915990/federalism-trump-progressive-uncooperative>, Dec 12, 2016, 8:50am EST (referring to Jessica Bulman-Pozen, Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009).

⁷³ Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1079 (2014).

⁷⁴ Read & Allen, *supra* note 16, at 124.

⁷⁵ Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258 (2009).

⁷⁶ *Id.* at 1264.

even resistance at state-level. Bulman-Pozen and Gerken’s “uncooperative federalism” which celebrates state strength at the heart of the federal regulatory state offers just such a model, not least because of their “counter-intuitive” conclusions concerning current Supreme Court federalism doctrine:

In our view, a strong commitment to uncooperative federalism would lead you to conclude that the Supreme Court has two central doctrines of federalism backwards. Rather than proscribe commandeering and expansively construe preemption as it does now, a Court attentive to uncooperative federalism should allow commandeering and cabin preemption. By fostering integration and overlap in regulatory spheres, this doctrinal 180 would facilitate state dissent while pushing federal engagement with state challenges.⁷⁷

Given the current political balance on the Supreme Court and the likely impact of future presidential nominees, we are tempted to say that at the present time, this is for the birds. We return therefore to the point where we began this paper and President Obama’s observations concerning the negative history of states’ rights arguments. This history needed to be addressed, he continued, “so that [opponents] understand if I am concerned about leaving it up to states to expand Medicaid that it may not simply be because I am this power-hungry guy in Washington who wants to crush states’ rights but, rather, because we are one country and I think it is going to be important for the entire country to make sure that poor folks in Mississippi and not just Massachusetts are healthy”⁷⁸

The point is exactly that. Current state legislative oppositional activity may be in constitutional terms no more “than a protest, an escape valve through which the legislators blew off steam to relieve their tensions”⁷⁹ but political though these strategies may be, as Professor Jost puts it: “health care reform is only about politics, except insofar as it is still about the morality of equal treatment for all.”⁸⁰ The onus is on those who now find themselves in opposition to make that case.

⁷⁷ *Id.* at 1295.

⁷⁸ Obama, *supra* note 13

⁷⁹ *Bush v. Orleans Parish Sch. Bd.*, 188 F. Supp. 916, 926 (1960) (citing *Shuttlesworth v. Birmingham Bd. Educ.*, 62 F.Supp. 372, 381(N.D. Ala., 1958).

⁸⁰ Timothy S. Jost, *Can the States Nullify Health Care Reform?*, 362 N. ENG. J. MED. 869-871 (2010).