

# Can States “Just Say No” to Federal Health Care Reform? The Constitutional and Political Implications of State Attempts to Nullify Federal Law

## I. INTRODUCTION

In response to the federal government’s strong push toward national health care reform,<sup>1</sup> as many as thirty-six state legislatures have taken steps to “Just Say No” to the federal health care overhaul package.<sup>2</sup> For example, the Utah State Legislature passed a bill that prohibits Utah state agencies from “implement[ing] any part of federal health care reform” unless “the Legislature . . . pass[es] legislation specifically authorizing . . . the state’s compliance.”<sup>3</sup> In Arizona, the November 2010 ballot included a proposed amendment to the state constitution that would render any potential national health insurance mandate inapplicable to Arizona citizens

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1. The federal health care reform bill, officially named the Patient Protection and Affordable Care Act, was signed into law by President Obama on March 24, 2010. Pub. L. No. 111-148, 124 Stat. 119 (2010); *see also* Sheryl Gay Stolberg & Robert Pear, *Obama Signs Health Care Overhaul Bill, With a Flourish*, N.Y. TIMES, Mar. 24, 2010, at A19.

2. Lisa Lambert et al., *Factbox: States and Healthcare Reform*, REUTERS, Mar. 22, 2010, available at <http://www.reuters.com/article/idUSTRE62L2IN20100322>; David A. Lieb, *More States Fight Mandatory Health Insurance*, ARIZ. REPUBLIC, Feb. 1, 2010, available at <http://www.azcentral.com/news/articles/2010/02/01/20100201health-states0201.html?source=nletter-news>. Notably, federal health care reform is not the only federal program that has recently drawn the ire of state legislatures. States have also suggested or passed measures opposing federal gun laws, federal land policy, and federal implementation of the Clean Air Act. *See, e.g.*, Robert Gehrke, *Guv in a Box: Herbert Faces Test on States’ Rights*, SALT LAKE TRIB., Feb. 21, 2010, available at [http://webcache.googleusercontent.com/search?q=cache:frp9BkJwe4gJ:www.sltrib.com/rss/ci\\_14445225+%22guv+in+a+box%22+%22herbert+faces+test+on+states%27+rights%22&cd=1&hl=en&ct=clnk&gl=us](http://webcache.googleusercontent.com/search?q=cache:frp9BkJwe4gJ:www.sltrib.com/rss/ci_14445225+%22guv+in+a+box%22+%22herbert+faces+test+on+states%27+rights%22&cd=1&hl=en&ct=clnk&gl=us); Kirk Johnson, *In the West, ‘Monument’ Is a Fighting Word*, N.Y. TIMES, Feb. 20, 2010, at A8; Brandon Loomis & Robert Gehrke, *Gun Bill Signed by Herbert*, SALT LAKE TRIB., Feb. 26, 2010, available at [http://webcache.googleusercontent.com/search?q=cache:Kn\\_w7cwXGl4J:www.sltrib.com/utahpolitics/ci\\_14479562%3Fsource%3Drss+%22Gun+Bill+Signed+by+Herbert%22&cd=3&hl=en&ct=clnk&gl=us](http://webcache.googleusercontent.com/search?q=cache:Kn_w7cwXGl4J:www.sltrib.com/utahpolitics/ci_14479562%3Fsource%3Drss+%22Gun+Bill+Signed+by+Herbert%22&cd=3&hl=en&ct=clnk&gl=us); Ben Neary, *Legislators Push for Increased State Sovereignty: Local Control*, WYO. TRIB. EAGLE, Feb. 10, 2010, available at [http://trib.com/news/state-and-regional/govt-and-politics/article\\_1bbcf164-f82c-59bc-9652-68523c21a852.html](http://trib.com/news/state-and-regional/govt-and-politics/article_1bbcf164-f82c-59bc-9652-68523c21a852.html).

3. UTAH CODE ANN. § 63M-1-2505.5(2)(a)-(b) (2010); *see also* Robert Gehrke, *Panel OKs Bill Letting Utah Opt Out of Health Reform*, SALT LAKE TRIB., Feb. 2, 2010.

and employers.<sup>4</sup> States pushing back against federal health care reform (whether by resolution, bill, or state constitutional amendment) are making two independent arguments against such reform. First, states assert that current federal health care proposals constitute an unconstitutional infringement on state sovereignty as protected under the Tenth Amendment of the Constitution.<sup>5</sup> States argue that they retain power under the Tenth Amendment to regulate health care within their respective borders—a power that states contend was never ceded to the federal government. States are therefore vowing to legally challenge the constitutionality of federal health care reform as violative of the Tenth Amendment.<sup>6</sup>

Second, in enacting measures to prohibit the implementation of federal health care reform within their borders, states are also asserting that they possess authority, independent of Supreme Court jurisprudence, to invalidate federal health care reform as it would apply to each state's respective citizens, employers, and agencies.<sup>7</sup> This effort by states to independently invalidate federal health care reform is referred to as the doctrine of nullification. Generally, the nullification doctrine—and its close cousin “interposition”—hold that states are independent interpreters of the federal Constitution and that states can therefore declare federal laws unconstitutional and inapplicable within their respective borders.<sup>8</sup> It is important to

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4. Stephanie Simon, *Another Health-Care Obstacle Awaits in States*, WALL ST. J., Jan. 20, 2010, available at <http://online.wsj.com/article/SB10001424052748703626604575011131989913608.html>.

5. See John Hanna, *Kansas House Approves Proposed Health Amendment*, BUSINESS WEEK, Mar. 22, 2010, available at <http://www.businessweek.com/ap/financialnews/D9EJU1EGO.htm>; David D. Kirkpatrick, *Health Lobby Takes Fight to the States*, N.Y. TIMES, Dec. 29, 2009, at A1; James Thalman, *Utah Republicans Call Health Care Bill Unconstitutional*, DESERET NEWS, Jan. 12, 2010, available at <http://www.deseretnews.com/article/705358053/Utah-Republicans-call-health-care-bill-unconstitutional.html?linkTrack=rss-30>.

6. See, e.g., UTAH CODE ANN. § 63M-1-2505.5(1)(d)(i)-(ii) (2010) (asserting that federal health care proposals “infringe on state powers” and “impose a uniform solution to a problem that requires different responses in different states”).

7. See *supra* text accompanying notes 3–4.

8. BLACK'S LAW DICTIONARY 1098, 837 (8th ed. 2004); 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]. 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

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highlight that state nullification of federal law is completely independent from whether the federal judiciary (including the Supreme Court) considers the law constitutional.<sup>9</sup> Under the theory of nullification, states themselves are independent interpreters and protectors of the federal Constitution and can therefore decide which federal laws are constitutional.<sup>10</sup>

Current state opposition to national health care reform thus presents two important and independent legal questions: (1) whether federal health care reform is constitutional under current Supreme Court jurisprudence despite state claims that such reform violates the Tenth Amendment, and (2) whether states have authority to nullify or invalidate federal health care reform if they independently deem such legislation unconstitutional, regardless of Supreme Court precedent.

The first question concerning the constitutionality of federal health care reform under current Supreme Court jurisprudence has recently been addressed by several constitutional and health care law scholars. Most of these scholars conclude that the Supreme Court’s broad interpretation of Congress’s power under both the Commerce Clause and the Taxing and Spending Clause, combined with the Court’s rather narrow view of the Tenth Amendment, suggest that federal health care reform is constitutional.<sup>11</sup> However, some scholars assert that federal health care reform, especially the provision mandating that individuals purchase health insurance, is an

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more than mere protest.” CHRISTOPHER R. DRAHOZAL, *THE SUPREMACY CLAUSE* 46 (2004). 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).

9. See DANIEL A. FARBER, *LINCOLN’S CONSTITUTION* 60–65 (2004).

10. *Id.*; see also BLACK’S LAW DICTIONARY 1098 (8th ed. 2004); Jefferson, Kentucky Resolutions, *supra* note 8, at 131–35; Madison, Virginia Resolutions, *supra* note 8, at 589–91.

11. See Mark A. Hall, *The Constitutionality of Mandates to Purchase Health Insurance*, 37 J.L. MED. & ETHICS 40, 40–41 (2009); Simon Lazarus, *Mandatory Health Insurance: Is It Constitutional?*, AM. CONST. SOC’Y FOR L. & POL’Y, Dec. 2009, available at <http://www.acslaw.org/pdf/Lazarus%20Issue%20Brief%20Final.pdf>; Corrine Propas Parver, *National Health Care Reform: Has Its Time Finally Arrived?*, 5 J. HEALTH & BIOMEDICAL L. 207, 239–40 (2009); Jack M. Balkin, *A Tax Like Any Other*, ROOM FOR DEBATE <http://roomfordebate.blogs.nytimes.com/2010/03/28/is-the-health-care-law-unconstitutional> (Mar. 28, 2010, 19:00 EST); James F. Blumstein, *A Permissible Exercise of Power*, ROOM FOR DEBATE (Mar. 28, 2010, 7:00 PM), <http://roomfordebate.blogs.nytimes.com/2010/03/28/is-the-health-care-law-unconstitutional>.

unconstitutional exercise of congressional power.<sup>12</sup> Since scholars on both sides of the debate have written extensively on the issue, this Comment will not further discuss the underlying constitutionality of federal health care reform.

The second question, and the primary focus of this Comment, is whether the doctrine of nullification allows states to independently invalidate federal health care reform within their respective borders. The doctrine of nullification in the United States traces back to Thomas Jefferson and James Madison. In their famous Kentucky and Virginia Resolutions in response to the federal government's passage of the Alien and Sedition Acts,<sup>13</sup> both men argued that state legislatures could join together in challenging unconstitutional federal action.<sup>14</sup> Using Jefferson's and Madison's arguments, states at various points throughout U.S. history have asserted their right to independently invalidate federal law within their borders. This Comment analyzes nullification's checkered past and argues that the doctrine is void of constitutional support, is repeatedly rejected throughout U.S. history, and therefore cannot be used by states to invalidate federal law.

However, despite being void of constitutional authority to nullify federal legislation, this Comment concludes that nullification can be employed by states as a powerful *political* tool in opposing federal legislation. As the majority of states move to nullify federal health care reform, state legislatures signal to the federal government that implementing such reform will be a difficult task as states will be sluggish to give effect to national health care reform within their

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12. See Peter Urbanowicz & Dennis G. Smith, *Constitutional Implications of an "Individual Mandate" in Health Care Reform*, FEDERALIST SOC'Y FOR L. AND PUB. POL'Y, July 10, 2009, available at [http://www.fedsoc.org/doclib/20090710\\_Individual\\_Mandates.pdf](http://www.fedsoc.org/doclib/20090710_Individual_Mandates.pdf); Randy Barnett, *Exceeding Congress's Authority*, ROOM FOR DEBATE (Mar. 28, 2010, 7:00 PM), <http://roomfordebate.blogs.nytimes.com/2010/03/28/is-the-health-care-law-unconstitutional>. Additionally, eighteen states have joined together in a lawsuit challenging the health care overhaul's constitutionality. Pascal Fletcher, *Florida Says Challenge to Healthcare Reform Widens*, REUTERS, Apr. 7, 2010, available at <http://www.reuters.com/article/idUSTRE6363NL20100407>.

13. Passed under the direction of President John Adams in 1798, and justified by the strong potential of war with France, the Alien and Sedition Acts "authorized the removal of dangerous aliens and effectively criminalized political dissent." Kurt T. Lash & Alicia Harrison, *Minority Report: John Marshall and the Defense of the Alien and Sedition Acts*, 68 OHIO ST. L.J. 435, 438 (2007).

14. Jefferson, Kentucky Resolutions, *supra* note 8, at 131-35; Madison, Virginia Resolutions, *supra* note 8, 589-91; see also Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 IOWA L. REV. 801, 873 (2008).

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borders. Widespread state opposition to national health care reform also places intense political pressure in an election year on those congressional leaders who voted for such reform. Such pervasive state opposition at least suggests that congressional leaders passed health care reform in spite of general public disapproval of the bill. Finally, state opposition to federal health care reform maintains the issue's political salience, potentially enabling conservatives to use the negativity surrounding health care reform to their benefit at the voting booth.

This Comment proceeds as follows: Part II addresses whether states can independently nullify or invalidate federal law. In this Part, the Comment discusses the underlying theory of the nullification doctrine and outlines the instances throughout U.S. history when states have attempted to use nullification to invalidate federal law. The Comment demonstrates how the doctrine of nullification has been repeatedly rejected as an unconstitutional exercise of state power and therefore concludes that states cannot nullify federal health care reform within their respective borders. However, Part III will discuss how nullification remains a powerful *political* tool that states can employ in opposing federal legislation, including the current federal health care overhaul. Part IV gives some concluding thoughts.

## II. STATE NULLIFICATION OF FEDERAL HEALTH CARE REFORM

Whether states possess authority to nullify federal health care reform is a wholly independent inquiry from the likelihood that such reform is constitutional under current Supreme Court jurisprudence. Nullification holds that states, regardless of Supreme Court precedent, can independently interpret the Constitution, declare federal laws unconstitutional, and invalidate such federal laws insofar as they would apply to each nullifying state.<sup>15</sup> As discussed above, as many as thirty-six states have taken steps to oppose federal health care reform by resolution, bill, or state constitutional amendment.<sup>16</sup> These state legislative measures generally declare that federal health care reform unconstitutionally infringes upon state powers, and that states retain authority to nullify the federal health care overhaul

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15. *See supra* notes 8–9 and accompanying text.

16. *See supra* text accompanying notes 1–4.

package.<sup>17</sup> In other words, many states are claiming the constitutional power to invalidate federal health care legislation within their respective borders. This Part first describes the origins of the nullification doctrine by outlining several instances in U.S. history when states have attempted to nullify federal law. This Part will then argue that because state nullification of federal law is repeatedly rejected throughout U.S. history as an unconstitutional exercise of state power, current attempts by states to nullify federal health care reform are equally invalid and will likewise be rejected.

*A. The Origins and Evolution of the Nullification Doctrine in the United States*

Supporters of the nullification doctrine repeatedly assert that state nullification of federal law traces its roots back to Founding Fathers James Madison and Thomas Jefferson—the authors of the Virginia and Kentucky Resolutions.<sup>18</sup> This Section provides background to nullification by exploring the origins and evolution of the doctrine, including three separate nullification movements—the Virginia and Kentucky Resolutions in the late eighteenth century, John Calhoun’s more radical theory of nullification in the 1830s, and the post-Civil War nullification movement labeled “Massive Resistance” in response to *Brown v. Board of Education* and the Civil Rights Movement’s “Passive Resistance.”

*1. The Virginia and Kentucky Resolutions*

In the late 1700s, the fledgling United States was in deep turmoil. Federalist John Adams won the very partisan and contentious 1796 presidential election by three electoral votes over his political rival—Democratic-Republican Thomas Jefferson.<sup>19</sup> Following the election, the political climate was so volatile and divisive that both Federalists and Republicans feared the Union

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17. See *supra* text accompanying notes 1–4.

18. See Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2734–35 (2003); J. David Goodman, *History, Nostalgia, and Nullification*, CITY ROOM (Feb. 16, 2010, 11:12 AM), <http://cityroom.blogs.nytimes.com/2010/02/16/history-nostalgia-and-nullification>.

19. ALEXANDER JOHNSTON, AMERICAN POLITICAL HISTORY 1763–1876, at 181 (James Albert Woodburn ed., 1905). At this point in U.S. history, the candidate receiving the second highest number of votes (the runner-up) became Vice-President—making Thomas Jefferson Vice-President. *Id.*

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could disintegrate.<sup>20</sup> Accompanying this tempestuous political climate was a widespread fear of an American war with France.<sup>21</sup> The Federalist-controlled Congress worried (probably unjustifiably) that Democratic-Republicans would somehow take advantage of this potential war with France to seize control of the federal government.<sup>22</sup> Seeking to consolidate their power, Federalists passed the Alien and Sedition Acts in the summer of 1798.<sup>23</sup> The Alien Acts authorized the President, without a showing of guilt, to deport foreigners whose activities he considered dangerous.<sup>24</sup> The Sedition Act generally forbade citizens from opposing any measure of the Federalist-controlled government and “made it illegal to speak, write, or print any statement that would bring the president into ‘contempt or disrepute.’”<sup>25</sup>

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20. GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 22 (2004) (explaining that Federalist leaders “feared the breakup of the union” and even “predicted a civil war” while Democratic-Republican Senator John Taylor warned that “secession must be considered an option”).

21. *Id.* at 22–25. Great Britain declared war against France following the French Revolution in 1789, fearing that revolution could spread throughout Europe. *Id.* at 21. Federalists supported the British cause whereas Democratic-Republicans, most notably Thomas Jefferson, “insisted that war with France would be calamitous” by “[driving] the United States into the arms of England.” *Id.* at 23.

22. *Id.* at 28. Federalists even accused the Democratic-Republican opposition of conspiring with the French. *Id.* at 28–29. Some scholars argue that decriing the threat of a French-American war was a pretext for Federalists to build a stronger military force in case of civil war. PAUL S. BOYER ET AL., *THE ENDURING VISION: A HISTORY OF THE AMERICAN PEOPLE* 160 (6th ed. 2008).

23. JOHNSTON, *supra* note 19, at 182; *see also* STONE, *supra* note 20, at 29 (explaining that in passing the Alien and Sedition Acts, Federalists attempted to strike a critical blow against the Democratic-Republicans). President Adams was actually apprehensive about these Acts but went along with his Federalist cohorts in Congress. *See* Melissa M. Tomkiel, Note, *Enemy Combatants and Due Process: The Judiciary’s Role in Curbing Executive Power*, 21 ST. JOHN’S J. LEGAL COMMENT. 411, 419–20 (2006). Ironically, the Alien and Sedition Acts eventually “resulted directly in displacing the Federalists from power and bringing the Jeffersonian Republicans into the control of the Government.” JOHNSTON, *supra* note 19, at 182; *see also* Part III.A.

24. BOYER ET AL., *supra* note 22, at 160. There were three Alien Acts: (1) the Alien Enemies Act (which outlined procedures for determining whether a hostile country’s citizens threatened the United States), (2) the Alien Friends Act (which authorized the President to deport foreign persons whose activities President Adams considered dangerous), and (3) the Naturalization Act (which increased the residency requirement for United States citizenship from five to fourteen years). *Id.* at 160–61.

25. *Id.* at 161 (quoting 1 Stat. 596 § 2 (1798) (expired 1801)). The Sedition Act also made it a federal crime to “write, print, utter or publish . . . any false, scandalous and malicious’ words about Congress.” Bradford R. Clark, *The Procedural Safeguards of*

Following the passage of the Alien and Sedition Acts, Democratic-Republican politicians and citizens throughout the country continued to criticize both the Acts and the Federalist government despite the threat of prosecution for federal crimes.<sup>26</sup> The Virginia and Kentucky Resolutions became the leading battle cry of Democratic-Republicans who viewed many acts of the Federalist leadership in Washington as unconstitutional. “These resolutions reflected the Republicans’ grim conclusion that to save republicanism from the Federalist onslaught, they had to strengthen the states as ‘bastions of safety’ from repressive federal legislation.”<sup>27</sup>

The Virginia and Kentucky Resolutions (written anonymously<sup>28</sup> by Madison and Jefferson, respectively) asserted the “compact theory” of the Constitution: that sovereign states were the creators of the federal government, and as such, the states gave the federal government only those limited powers enumerated in the Constitution or “the compact.”<sup>29</sup> According to both Madison and Jefferson, all powers not enumerated in the federal Constitution were retained by the states and protected under the Tenth Amendment.<sup>30</sup> Jefferson’s Kentucky Resolutions asserted that if the federal government exceeds its limited powers, such federal action is “unauthoritative, void and of no force.”<sup>31</sup> The Kentucky Resolutions also urged that state “nullification . . . is the rightful remedy” when the federal government violates its constitutional compact with the states.<sup>32</sup> The Resolutions endorsed a collective, cooperative

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*Federalism*, 83 NOTRE DAME L. REV. 1681, 1692 (2008) (quoting 1 Stat. 596 § 2 (1798) (expired 1801)).

26. See STONE, *supra* note 20, at 44.

27. *Id.* Notably, Jefferson did not reveal his authorship of the Resolutions until years later, in December of 1821. JOHNSTON, *supra* note 19, at 188.

28. The Resolutions were written anonymously for obvious reasons: Jefferson was serving as Vice-President under President and Federalist John Adams, and neither Jefferson nor Madison wanted to publicly oppose the Federalists and risk prosecution under the Sedition Act. See STEPHANIE P. NEWBOLD, ALL BUT FORGOTTEN: THOMAS JEFFERSON AND THE DEVELOPMENT OF PUBLIC ADMINISTRATION 6 (2010).

29. Judith A. Hagley, *Massive Resistance—The Rhetoric and the Reality*, 27 N.M. L. REV. 167, 192 (1997) (citing JOHN C. MILLER, THE FEDERALIST ERA, 1789–1801, at 239–40 (1960)).

30. See DONALD F. KETTL, THE TRANSFORMATION OF GOVERNANCE: PUBLIC ADMINISTRATION FOR TWENTY-FIRST CENTURY AMERICA 37 (2002) (summarizing both Jefferson’s and Madison’s views of the Tenth Amendment).

31. FARBER, *supra* note 9, at 47 (quoting Jefferson, Kentucky Resolutions, *supra* note 8, at 131) (internal quotation marks omitted).

32. JOHNSTON, *supra* note 19, at 191–92.



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opposition process where states, as independent interpreters and protectors of the Constitution, could band together to invalidate federal law.<sup>33</sup> For this reason, the Kentucky Resolutions pleaded with other states to “concur in declaring these [acts] void and of no force” and requested “their repeal at the next session of Congress.”<sup>34</sup>

Madison’s Virginia Resolutions were more tempered than the Kentucky Resolutions, but nonetheless argued that “states . . . have the right, and are . . . duty bound, to interpose”<sup>35</sup> when the federal government exceeds its limited constitutional powers. Although Madison’s original draft of the Virginia Resolutions called upon other states to “cooperate in the annulment” of the Alien and Sedition Acts, “Madison was more cautious than Jefferson about giving state legislatures any power to block federal legislation.”<sup>36</sup> For this reason, the Virginia Resolutions did not use the word “nullification” or endorse the theory that states could individually declare federal laws void.<sup>37</sup> It is worth reiterating that neither Jefferson nor Madison endorsed the theory that a state could *independently* nullify federal law.<sup>38</sup> Both men believed, to varying degrees, that states could band together to interpret the constitutionality of federal laws and, *as a group*, lawfully oppose federal legislation. However, neither advanced the idea that states

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33. JAMES MADISON: PHILOSOPHER, FOUNDER, AND STATESMAN 273 (John R. Vile et al. eds., 2008) [hereinafter Vile].

34. FARBER, *supra* note 9, at 47 (alteration in original) (quoting Jefferson, Kentucky Resolutions, *supra* note 8, at 134).

35. *Id.* at 48. The doctrine of interposition (alluded to in Madison’s Virginia Resolution) is usually thought of as being different from nullification. 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.” Note, *Defending Federalism: Realizing Publius’s Vision*, 122 HARV. L. REV. 745, 747 n.14 (2008) (quoting DRAHOZAL, *supra* note 8) (internal quotation marks omitted). Interposition is not “categorical defiance by an individual state,” but interposition allows states to “seek support of other members of the compact.” *Id.* (quoting McKay, *supra* note 8). “Failing in such support, the interposing state . . . would seem obligated to accede to the unwelcome act . . .” *Id.* (quoting McKay, *supra* note 8).

36. FARBER, *supra* note 9, at 47.

37. See JOHNSTON, *supra* note 19, at 196. Madison saw a difference between invalidating or voiding federal law and opposing federal law. FARBER, *supra* note 9, at 67–69. Opposition, according to Madison, involved organizing a convention of states to interpret the Constitution and assert the unconstitutionality of federal laws. *Id.* This assertion of unconstitutionality did not translate to nullification for Madison. *Id.*

38. See JOHNSTON, *supra* note 19, at 197–98.

could independently or individually invalidate federal law.<sup>39</sup> As discussed below,<sup>40</sup> Jefferson and his Democratic-Republican cohorts took advantage of this strong popular resentment against the Alien and Sedition Acts to seize the Presidency and control of Congress in the election of 1800. Nullification movements throughout U.S. history, including the current movement against federal health care reform, base their nullification arguments on the Kentucky and Virginia Resolutions.<sup>41</sup>

## 2. *John Calhoun and the Nullification Crisis of 1832*

Thirty years after Jefferson's and Madison's stand against the Alien and Sedition Acts, John Calhoun used the Kentucky and Virginia Resolutions as ammunition in his own fight against the federal government. In 1832, the state of South Carolina and Vice-President John Calhoun made a serious attempt to revive the nullification doctrine during the Nullification Crisis of 1832–33.

The Tariff of 1828, labeled by Southerners as the “Tariff of Abominations,”<sup>42</sup> triggered the crisis. The tariff had a disproportionate impact on the price of manufactured goods coming from the South—thereby “penalizing southern exports and the southern economy”<sup>43</sup> while protecting western agriculture and New England manufacturing.<sup>44</sup> In 1832, when pleas for tariff reform fell on deaf ears (likely because of the high revenue such tariffs generated for the federal government), South Carolina, led by Vice-President John Calhoun (a South Carolina native), passed an ordinance

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39. *Id.* John Calhoun, on the other hand, greatly expanded the opposition doctrines of the Kentucky and Virginia Resolutions by allowing independent state nullification of federal law. See *infra* text accompanying notes 42–50. This expansion of the ideas found in the Resolutions enraged Madison. See *infra* Part II.B.2.

40. See *infra* Part III.A.

41. See *infra* Parts II.A.2 & 3; Hagley, *supra* note 29, at 192 (explaining that the nullification resolutions passed by southern states in response to the Supreme Court's ruling in *Brown v. Board of Education* “borrowed greatly from the original Virginia Resolution of 1798”); Goodman, *supra* note 18 (briefly describing the underlying theories of the current nullification movement against the cap and trade movement—including a discussion concerning the compact theory of the Constitution).

42. WILLIAM M. DAVIDSON, A HISTORY OF THE UNITED STATES 297 (1902).

43. Ben Baack et al., *Constitutional Agreement During the Drafting of the Constitution: A New Interpretation*, 38 J. LEGAL STUD. 533, 551 (2009).

44. BOYER ET AL., *supra* note 22, at 219.

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declaring the tariffs unconstitutional.<sup>45</sup> The nullification ordinance declared that the tariffs on southern exports were “utterly null and void” as they applied to South Carolina, “and directed the legislature to pass statutes preventing the implementation” of such tariffs in the state.<sup>46</sup> The ordinance gravely warned that if the federal government attempted to forcibly enforce the tariffs on southern exports, *South Carolina would secede from the Union*.<sup>47</sup> With this ordinance, South Carolina and Calhoun took the compact principles established in the Kentucky and Virginia Resolutions and greatly expanded them.

While the more moderate Kentucky and Virginia Resolutions claimed that states could band together and “concurrently and cooperatively”<sup>48</sup> oppose unconstitutional federal action, South Carolina’s nullification ordinance asserted that each state could individually and independently nullify federal law.<sup>49</sup> Calhoun asserted that single-state nullification would suspend the operation of the nullified federal law as it applied to all other states until a convention could be called to allow the other states to either accept or reject the nullification ordinance.<sup>50</sup> According to Calhoun, if the convention of states rejected the single state’s nullification ordinance, the nullifying state would either be required to rescind the nullification ordinance

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45. FARBER, *supra* note 9, at 60. Previously a nationalist, John Calhoun switched course and wholeheartedly endorsed the nullification doctrine—publicly speaking in support of nullification in 1831. *Id.*; see also WILLIAM W. FREEHLING, *PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA, 1816–1836*, at 154 (1992) (stating that Calhoun had privately espoused the nullification doctrine as early as 1827, midway through his first term as Vice President). “South Carolina’s Ordinance of Nullification was a concrete implementation of Calhoun’s theory.” FARBER, *supra* note 9, at 60.

46. FARBER, *supra* note 9, at 60. South Carolina clearly covered its bases with its nullification ordinance—the ordinance required military, civil officers, and jurists to take an oath supporting nullification. *Id.* The ordinance also attempted to preclude appeals to the U.S. Supreme Court concerning its legality. *Id.* at 60–61.

47. FARBER, *supra* note 9, at 61.

48. Vile, *supra* note 33, at 273.

49. FARBER, *supra* note 9, at 65 (“As parties to the constitutional compact, they [(states)] retain the right . . . of interposing for the purpose of arresting, within their respective limits, an act of the federal government in violation of the constitution; and thereby of preventing the delegated from encroaching on the reserved powers.”) (quotation omitted). James Madison ardently and publicly opposed Calhoun’s theory of nullification. See *infra* Part II.B.2.

50. Vile, *supra* note 33, at 270. James Read describes the consequences of Calhoun’s nullification theory very well, “Thus . . . any questionable act of [federal] legislation, would have to not only achieve a majority in both houses of U.S. Congress but also be supported, or at least not actively opposed, by a majority within any individual state. In what was in effect a reversal of the constitutional amending process.” *Id.*

or constitutionally secede from the Union—an attempt by Calhoun to legitimize South Carolina’s threats of secession.<sup>51</sup> By nullifying the federal tariff statutes and by threatening dire consequences if the federal government responded unfavorably, South Carolina’s nullification ordinance triggered a national crisis.

President Andrew Jackson, furious with the actions of South Carolina and his Vice-President Calhoun, issued a presidential proclamation declaring nullification and secession illegal and vowing to use his Article II powers to forcibly compel compliance with the tariffs if necessary.<sup>52</sup> After a long process of negotiation, South Carolina rescinded its nullification of the tariffs, President Jackson no longer felt compelled to intervene with military force, and South Carolina accepted the federal government’s compromise tariff.<sup>53</sup>

### 3. “Massive Resistance” by southern legislatures against the Brown decision

Although the country avoided South Carolina’s secession (at least for a few years), Calhoun’s expansion of the nullification doctrine had a lasting impact. In the 1950s, for example, southern state legislatures relied on Calhoun’s more radical theory of nullification in opposing desegregation rather than the more moderate opposition theories found in the Virginia and Kentucky Resolutions.<sup>54</sup>

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51. *Id.* There is absolutely no mention of secession in the Kentucky and Virginia Resolutions, nor is there any implication in these Resolutions that secession would be available to a state opposing federal law. *Id.* at 274–75.

52. FARBER, *supra* note 9, at 61–62. Jackson’s statement, known as the Nullification Proclamation, was a “cogently argued statement” that not only focused on the actions of South Carolina, but attacked the general theory of nullification “as a doctrine ‘incompatible with the existence of the Union.’” RICHARD E. ELLIS, *THE UNION AT RISK: JACKSONIAN DEMOCRACY, STATES’ RIGHTS, AND THE NULLIFICATION CRISIS* 179 (1989). Readers of Jackson’s opposition to nullification at first doubted its authenticity because of Jackson’s previous defense of state rights. *Id.* Despite President Jackson’s well-reasoned constitutional argument against nullification in his public statements, Jackson reportedly told Martin Van Buren that Calhoun should be hanged as a traitor to his country. FARBER, *supra* note 9, at 61.

53. BOYER ET AL., *supra* note 22, at 220–21; *see also* FARBER, *supra* note 9, at 62. The Compromise of 1833 between Calhoun and Jackson was spearheaded by Senator Henry Clay—the South begrudgingly accepted a less burdensome tariff bill and President Jackson begrudgingly accepted the Senate’s refusal to allow him to collect the 1828 and 1832 tariffs by force. *See* ELLIS, *supra* note 52, at 170–77.

54. Modern-day nullification supporters also point to Calhoun’s nullification theories for support. *See infra* note 71 and accompanying text.

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Following the Supreme Court’s 1954 desegregation decision in *Brown v. Board of Education*,<sup>55</sup> southern states mounted what became known as Massive Resistance to the federal government’s desegregation policies.<sup>56</sup> As part of this resistance against the *Brown* decision, southern legislatures revived Calhoun’s ideas of nullification and interposition, reasserted the compact theory of the Constitution, and declared that *Brown* was an unconstitutional federal usurpation of state sovereign prerogatives and power.<sup>57</sup> The resolutions passed by southern legislatures borrowed directly from Calhoun’s opposition to the 1828 tariff statutes, declaring the *Brown* decision “null, void and of no effect” (Alabama) and resolving to “take all appropriate measures . . . to resist this illegal encroachment upon our sovereign powers” (Virginia).<sup>58</sup> Mississippi’s resolution labeled *Brown* “unconstitutional, invalid and of no lawful effect within . . . Mississippi.”<sup>59</sup> Unlike Calhoun and South Carolina, southern legislatures opposed to *Brown* did not threaten secession, but they did claim authority to invalidate *Brown* pending a constitutional amendment.<sup>60</sup> Southern states saw *Brown* not as an interpretation of the Constitution by the Supreme Court, but as an unlawful amendment to the Constitution.<sup>61</sup> These states asserted their right and duty, referring to Madison’s language in the Virginia Resolutions, to resist the Supreme Court’s “illegal” constitutional

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55. 347 U.S. 483 (1954).

56. See DEWEY W. GRANTHAM, *THE LIFE AND DEATH OF THE SOLID SOUTH: A POLITICAL HISTORY* 136–38 (1992). The term “Massive Resistance” describes southern legislatures’ opposition to the desegregation movement while “passive resistance” describes the actions by those fighting against southern states and in support of the *Brown* decision. See GENE ROBERTS & HANK KLIBANOFF, *THE RACE BEAT: THE PRESS, THE CIVIL RIGHTS STRUGGLE, AND THE AWAKENING OF A NATION* 109 (2007).

57. See GRANTHAM, *supra* note 56, at 139. Southerners saw the nullification and interposition doctrines as a panacea that could “turn back federal intervention in the South’s traditional pattern of race relations and a solution to the region’s problem resulting from *Brown v. Board of Education*.” *Id.*

58. RACE, REASON, AND MASSIVE RESISTANCE: THE DIARY OF DAVID J. MAYS, 1954–1959, at 96 (James R. Sweeney ed., 2008) [hereinafter Sweeney].

59. William G. Ross, *Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail*, 50 BUFF. L. REV. 483, 493 (2002) (quoting 102 CONG. REC. 3767 (1956)). In all, six southern states passed resolutions asserting the unconstitutionality of the *Brown* decision. *Id.* at 493–94.

60. See Hagley, *supra* note 29, at 193; see also Sweeney, *supra* note 58, at 95–96.

61. Hagley, *supra* note 29, at 193.

amendment until a valid, lawful amendment could be passed under Article V of the Constitution.<sup>62</sup>

As will be discussed in detail below, the South's attempts to nullify *Brown* were eventually rejected,<sup>63</sup> the push to amend the Constitution in opposition to *Brown* failed, and southern states opposed to desegregation were eventually compelled by force to comply with the provisions of *Brown* and its progeny.<sup>64</sup> However, the Massive Resistance movement against the *Brown* decision demonstrated that Calhoun's ideas concerning state nullification and interposition still garnered a relatively large degree of support—thus surviving the Civil War and the passage of the Fourteenth Amendment.

The preceding discussion concerning the origins and evolution of nullification demonstrates that the doctrine has a long and checkered past. What directly follows is a discussion of whether the nullification doctrine ever had, or currently has, any degree of constitutional legitimacy in the U.S. constitutional scheme.

*B. The Doctrine of Nullification Is an Unconstitutional Exercise of State Power and Is Repeatedly Rejected Throughout U.S. History*

As explained above, states throughout U.S. history have attempted to use variations of the nullification doctrine to invalidate federal law. However, every attempt by states to nullify federal law was clearly rejected by not only the federal government, but also by other states. This Section describes how the Virginia and Kentucky Resolutions, John Calhoun's nullification movement, and the South's Massive Resistance movement were each resoundingly rejected. This unanimous historical rejection of nullification demonstrates the doctrine's unconstitutionality and undermines the legality of the current movement to nullify federal health care reform.

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62. *Id.*

63. See *infra* Part II.B.3. The most explicit rejection of the South's attempt to nullify *Brown* is found in the Supreme Court opinion of *Cooper v. Aaron*, 358 U.S. 1, 18–19 (1958) (quoting *U.S. v. Peters*, 9 U.S. 115, 136 (1809)), which stated that the nullification doctrine would render the Constitution “a solemn mockery.” The *Cooper* case and several other cases rejecting the nullification doctrine are discussed in detail below. See *infra* Part II.B.3.

64. Hagley, *supra* note 29, at 210–11.

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*1. The rejection of the Kentucky and Virginia Resolutions*

Despite a valiant attempt by Jefferson and Madison to gain widespread support in opposing the Alien and Sedition Acts, the Kentucky and Virginia Resolutions, and the principles therein, were resoundingly rejected by a majority of other states.<sup>65</sup> The Resolutions pleaded with other states to join Kentucky and Virginia in declaring the Alien and Sedition Acts “void, and of no force.”<sup>66</sup> However, no other state joined the opposition, and ten states actually repudiated the Resolutions.<sup>67</sup> The Maryland Legislature, for example, called the resolutions “highly improper” and stated that “no State government . . . is competent to declare an act of the Federal Government unconstitutional.”<sup>68</sup> In a long and detailed response, the Massachusetts Legislature also repudiated any notion that state legislatures were competent to determine the constitutionality of federal laws.<sup>69</sup> Moreover, Vermont’s legislature turned the tables on Virginia and Kentucky by accusing both states of encroaching upon powers “exclusively vested in the judiciary courts of the Union.”<sup>70</sup>

Modern proponents of the nullification doctrine repeatedly argue that if two great Founders such as Jefferson and Madison espoused the view that states could join together and invalidate federal law, the doctrine of nullification should not be dismissed as a mere rejected theory of the past.<sup>71</sup> These nullification proponents seem to

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65. WILLIAM J. WATKINS, JR., *RECLAIMING THE AMERICAN REVOLUTION: THE KENTUCKY AND VIRGINIA RESOLUTIONS AND THEIR LEGACY* 75 (2004).

66. STONE, *supra* note 20, at 45.

67. *Id.* at 45. According to William Watkins, “Nine states north of the Potomac put their objurgations in writing . . . . The Southern states did not respond at all.” WATKINS, *supra* note 65, at 75.

68. STONE, *supra* note 20, at 45 (alteration in original).

69. See JOHNSTON, *supra* note 19, at 189. Then U.S. Senator from Massachusetts, Theodore Sedgwick, called the Resolutions “little short of a declaration of war.” STONE, *supra* note 20, at 45.

70. STONE, *supra* note 20, at 45.

71. See, e.g., Bradley D. Hays, *A Place for Interposition? What John Taylor of Caroline and the Embargo Crisis Have to Offer Regarding Resistance to the Bush Constitution*, 67 MD. L. REV. 200, 202 (2007) (citing the Kentucky and Virginia Resolutions as examples where “State governments . . . explicated constitutional norms in an effort to define the new constitutional order,” but failing to mention that this “effort” by Kentucky and Virginia garnered absolutely no support from other states); Paulsen, *supra* note 18, at 2734–35 (arguing that the nullification and interposition doctrines should not be regarded as “constitutional profanities” because of the doctrine’s “respectable roots” in Jefferson’s and Madison’s Kentucky and Virginia Resolutions); Note, *supra* note 35, at 746–49, 748 n.20, 749 n.25 (using Madison to support arguments favoring a “horizontal” structure of federalism where states would be

ignore the fact that the Virginia and Kentucky Resolutions, and the principles found therein, did not receive support from even one other state in the Union. Many leaders of the states that declined to join in opposing the federal government were also Founders.<sup>72</sup> Yet the great majority of state leaders openly repudiated the ideas found in the Resolutions. This open rejection of the compact theory of the Constitution and the doctrine of nullification by Madison's and Jefferson's contemporaries greatly weakens—if not completely invalidates—current arguments for extending the doctrine. However, to more fully demonstrate that the doctrine of nullification is truly dead, the following Sections describe two subsequent instances where the doctrine of nullification was rejected.

## 2. *The rejection of John Calhoun's nullification theories*

Proponents of the nullification doctrine also point to John Calhoun's theories in order to support the doctrine's continued validity.<sup>73</sup> However, what these proponents fail to acknowledge is that even James Madison—"the father of the Constitution"<sup>74</sup>—was appalled by Calhoun's nullification movement.<sup>75</sup> "Madison was particularly upset with what he regarded as an effort to pervert the Kentucky and Virginia Resolutions into a pretext for disunion."<sup>76</sup> Through several well-publicized letters, Madison intensely criticized

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"guard dogs" of the Constitution rather than the current vertical form of federalism). Michael Paulsen also uses Jefferson's and Madison's views to assert the likelihood that the Founders espoused "[a] multiplicity of voices" in interpreting the Constitution. Paulsen, *supra* note 18, at 2736–38.

72. In 1798, a number of signatories to the Constitution were state and national leaders: William Samuel Johnson in Connecticut; Richard Bassett and Gunning Bedford in Delaware; Nicholas Gilman and John Langdon in New Hampshire; Jonathan Dayton in New Jersey; Jared Ingersoll and Thomas Mifflin in Pennsylvania; and Pierce Butler, Richard Dobbs Spaight, and Charles Pinckney in South Carolina. See R. B. BERNSTEIN, *THE FOUNDING FATHERS RECONSIDERED* (2009); MELVIN E. BRADFORD, *FOUNDING FATHERS: BRIEF LIVES OF THE FRAMERS OF THE UNITED STATES CONSTITUTION* 144–71 (2d ed. 1994).

73. See Pat Buchanan, *Secession Is in the Air*, JACKSONVILLE OBSERVER, Feb. 15, 2010, <http://www.jaxobserver.com/2010/02/15/secession-is-in-the-air/> (last visited Jan. 25, 2011); Patrick Krey, *State vs. Federal: The Nullification Movement*, NEW AM., Feb. 18, 2010, <http://thenewamerican.com/index.php/usnews/constitution/2957-state-vs-federal-the-nullification-movement> (last visited Jan. 25, 2011).

74. GARRY WILLIS, *JAMES MADISON* 37 (2002).

75. FARBER, *supra* note 9, at 66.

76. *Id.* Farber explains that during the final six years of Madison's life, he "could not get the nullifiers out of his mind," being so anxious about the Nullification Crisis that the subject sometimes led to "physical collapse." *Id.* at 66–67.



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and rejected Calhoun’s theory of nullification.<sup>77</sup> In these letters, Madison reasserted the compact theory of the Constitution, but he rejected any notion that individual states could *independently* nullify federal law or interpret the Constitution—saying that this practice would “altogether distract the Govt. of the Union & speedily put an end to the Union itself.”<sup>78</sup> Madison criticized Calhoun’s theory of nullification as upsetting the balance between the states themselves. Specifically, Madison argued that the fundamental problem with Calhoun’s nullification theory is that it “would allow a single state to immunize itself from constitutional restrictions, thereby making at least a temporary de facto amendment to the Constitution without the consent of any other state, far less the three-fourths required by the amendment procedure.”<sup>79</sup> This, according to Madison, would improperly result in the minority imposing its will on the majority.<sup>80</sup>

To add insult to the injuries caused by Madison’s rejection of the nullification doctrine, South Carolina and Calhoun could not muster support from even one other southern state.<sup>81</sup> The Georgia Legislature, for example, responded to South Carolina’s call for widespread nullification by directly citing Madison: “[I]t is not believed among us that a State can annul an act of Congress within her boundary and remain in the confederacy . . . . Mr. Madison’s recent exposition of [the Virginia Resolutions of 1798] is highly approved here.”<sup>82</sup> By the end of Calhoun’s Nullification Crisis, most

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77. *Id.* at 67; Vile, *supra* note 33, at 270–71.

78. FARBER, *supra* note 9, at 67. Madison reasoned that uniformity of laws is “itself a vital principle,” and that if both state and federal interpretations of federal laws were upheld, federal and state officers “would have rencounters in executing conflicting decrees, the result of which would depend on the comparative force of the local posse.” *Id.* (quotation marks omitted). If and when compromise broke down, union would be threatened. *Id.*

79. *Id.* at 68. Madison stated that Calhoun’s doctrine “puts it in the power of the smallest fraction over ¼ of the U.S. . . . to give the law and even the Const[itution] to 17 States.” Vile, *supra* note 33, at 274 (quoting JAMES MADISON, WRITINGS 848 (Jack N. Raklove ed., 1999)).

80. See Vile, *supra* note 33, at 281. Madison believed Calhoun’s theories hearkened back to the rejected Articles of Confederation “under which a single state could block any significant nationwide action.” *Id.* at 271. James H. Read also asserts that the southern states’ continuous attempt “to have their way on every federal question” was the impetus behind the Civil War. *Id.* at 281. “Madison had intended in the Virginia Resolutions not to thwart permanently the will of a national majority but to build a national majority to overturn the obnoxious laws in some constitutional manner.” *Id.* at 273.

81. Vile, *supra* note 33, at 272.

82. *Id.* (quoting Charles J. McDonald to Calhoun (May 30, 1831) *in* THE PAPERS OF JOHN C. CALHOUN, 11:396–97 (Clyde N. Wilson ed., 1959–2001)). This isolation of South

other southern states “were sick to death of South Carolina.”<sup>83</sup> In short, Calhoun’s nullification theories fell flat, even among his peers in the South.

Just as Jefferson’s and Madison’s contemporaries rejected the Kentucky and Virginia Resolutions, Calhoun’s contemporaries rejected his nullification theories. Madison’s pointed criticisms of Calhoun’s ideas also seemed to drive the final nails into the nullification doctrine’s coffin. However, as discussed above, southern states resurrected the doctrine by opposing the federal implications of the *Brown* decision. Segregationist states fought hard to establish nullification’s validity, but the doctrine was once again completely rejected for not being a viable constitutional principle.

### *3. The rejection of the nullification doctrine during the Civil Rights Movement*

Massive Resistance by southern state legislatures in opposition to *Brown v. Board of Education* involved a more widespread attempt to nullify federal law than previous nullification movements. Virginia and Kentucky were alone in opposing the Alien and Sedition Acts; South Carolina could not garner any support during the Nullification Crisis of 1832; but Massive Resistance in the 1950s involved resolutions passed by eight southern states attempting to nullify the *Brown* decision.<sup>84</sup> Despite this more widespread attempt to nullify federal law, Massive Resistance, including the movement’s underlying nullification principles, was categorically rejected. This rejection of nullification is especially illuminating because of the judiciary’s role in dismissing the South’s nullification arguments.

Although many southern legislators viewed nullification and interposition as solutions to the “problems” created by the *Brown* decision, leaders of the legal community throughout the country (including the South) knew that the nullification doctrine had no legal or constitutional foundation.<sup>85</sup> Future Supreme Court Justice

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Carolina by the entire block of southern states was a problem that South Carolina worked hard to resolve in the years leading up to the Civil War. See FREEHLING, *supra* note 45, at 323–24.

83. FREEHLING, *supra* note 45, at 326.

84. See *infra* notes 85–100 and accompanying text.

85. See Hagley, *supra* note 29, at 193 n.184 (quoting MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961 240–41 (1994)); Ross, *supra* note 59, at 495–96 (quoting *Recent Attacks Upon the Supreme Court: A Statement by Members of the Bar*, 42 A.B.A. J. 1128, 1128–29 (1956)).

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Lewis Powell (then acting superintendent of Richmond, Virginia’s public schools) wrote that nullification and interposition were “legal nonsense that no court would ever adopt.”<sup>86</sup> A group of over one-hundred “politically and geographically diverse” attorneys attacked the South’s nullification resolutions as “reckless in their abuse[,] . . . heedless of the value of judicial review[,] . . . and dangerous in fomenting disrespect for our highest law.”<sup>87</sup> Virginia’s own Attorney General thought his state’s interposition resolution was “legally meaningless.”<sup>88</sup> A University of Texas law professor offered a practical rejection of the nullification doctrine, saying that “nullification or interposition just will not work” because federal officials had “the will and the raw power to enforce any judgment of a federal court.”<sup>89</sup> These attorneys and scholars were proven correct in their criticism of the nullification doctrine as several court decisions (discussed below) patently rejected the South’s attempt to nullify *Brown* and destroyed any hope for the nullification doctrine’s general acceptance.

*a. The Supreme Court’s rejection of nullification.* In *Cooper v. Aaron*, the U.S. Supreme Court unanimously rejected any notion that nullification is, or ever was, within a state’s power.<sup>90</sup> In *Cooper*, an Arkansas school board filed a petition in district court seeking to postpone its desegregation program.<sup>91</sup> The school board claimed that “the maintenance of a sound educational program . . . would be impossible” at Central High School in Little Rock because of the extreme public hostility against desegregation that was allegedly

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86. See Hagley, *supra* note 29, at 193 n.184 (quoting TUSHNET, *supra* note 85, at 240). Powell also wrote that if he were a federal judge, an attorney’s citation to interposition or nullification resolutions would persuade him to rule the other way. TUSHNET, *supra* note 85, at 240–41.

87. Ross, *supra* note 59, at 495–96 (quoting *Recent Attacks Upon the Supreme Court: A Statement by Members of the Bar*, 42 A.B.A. J. 1128, 1128–29 (1956)).

88. TUSHNET, *supra* note 85, at 241.

89. Ross, *supra* note 59, at 495 (citing George W. Stumberg, *The School Segregation Cases: Supporting the Opinion of the Supreme Court*, 42 A.B.A. J. 318, 319–20 (1956)). The federal government was forced to use this “raw power” to enforce desegregation because state officials in the South refused to end their opposition to *Brown*. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 8–12 (1958) (describing the violent circumstances surrounding desegregation in Little Rock, Arkansas that required federal troops to keep the peace at Central High School for several months).

90. *Cooper*, 358 U.S. at 4, 18.

91. *Id.* at 12.

engendered by Arkansas's Governor and legislature.<sup>92</sup> In an attempt to nullify the decision, Arkansas's legislature amended the state constitution to render the *Brown* case unconstitutional. Furthermore, the Governor prevented African-American students from entering the school for a three-week period, at which time the federal government was forced to intervene with federal troops.<sup>93</sup> The Court refused to grant the school board's petition for postponement despite this hostile environment—finding that the nine African-Americans' constitutional rights could not be sacrificed simply because of violence or disorder.<sup>94</sup> However, the Court did not stop there; it went on to categorically reject the nullification doctrine and dismiss Arkansas's attempt to nullify the *Brown* decision.<sup>95</sup>

Rejecting the nullification doctrine was not a difficult exercise of judicial decision making for the Court; the Court stated that to dismiss the doctrine, "It is necessary only to recall some basic constitutional propositions which are settled doctrine."<sup>96</sup> The Court cited the Supremacy Clause of the Constitution and referred to *Marbury v. Madison*<sup>97</sup> for the principle that "the federal judiciary is supreme in the exposition of the law of the Constitution," a principle that is a "permanent and indispensable" component of our constitutional system.<sup>98</sup> The Court spoke in no uncertain terms in rejecting nullification, stating that the doctrine would render the Constitution "a solemn mockery"<sup>99</sup> and reasoning that if a governor could nullify a federal court order, "the fiat of a state Governor, and not the Constitution . . . would be the supreme law of the land."<sup>100</sup> The Court concluded that the principles announced in *Brown*, "and

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92. *Id.*

93. *Id.* at 8–9, 11–12.

94. *Id.* at 15–17 ("[T]he *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.").

95. *Id.* at 17–18.

96. *Id.* at 17.

97. 5 U.S. (1 Cranch) 137 (1803).

98. *Cooper*, 358 U.S. at 18.

99. *Id.* at 18 (quoting *United States v. Peters*, 9 U.S. (5 Cranch) 115, 136 (1809)). Chief Justice Marshall's full statement on the issue of nullification reads, "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery." *Peters*, 9 U.S. (5 Cranch) at 115, 136.

100. *Cooper*, 358 U.S. at 19 (quoting *Sterling v. Constantin*, 287 U.S. 378, 397–98 (1932)).

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the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us.”<sup>101</sup> Nullification, therefore, was unanimously and expressly rejected by the Supreme Court of the United States.

*b. The nullification doctrine was again rejected.* In *Bush v. Orleans Parish School Board*, three federal district court judges reiterated that the nullification doctrine has no legal efficacy in the U.S. constitutional system.<sup>102</sup> The *Bush* case involved several plaintiffs who sought to enjoin measures passed by the Louisiana legislature opposing the Supreme Court’s decision in *Brown v. Board of Education*. One such law attempted to nullify *Brown*, announcing that the decision was “null, void and of no effect as to the State of Louisiana.”<sup>103</sup> The three-judge panel granted the plaintiffs’ injunctions and held that Louisiana’s attempt to nullify the *Brown* decision was unconstitutional.<sup>104</sup>

Like the Supreme Court in *Cooper v. Aaron*, the *Bush* court outlined the absolute necessity that the U.S. Supreme Court be respected as the final tribunal for constitutional adjudication. The district court cited several of Madison’s contributions to *The Federalist*, emphasizing that a final constitutional tribunal “is clearly essential to prevent an appeal to the sword and a dissolution of the compact.”<sup>105</sup> Additionally, the three-judge panel labeled Louisiana’s interposition resolution as “a preposterous perversion of Article V of the Constitution” because the resolution improperly asserted that the Supreme Court’s *Brown* decision would cease to be law until the people could ratify a constitutional amendment—an idea completely foreign to the Article V amendment process.<sup>106</sup> The district court ended its complete rejection of the nullification and interposition doctrines by stating, “The conclusion is clear that interposition is not a constitutional doctrine. If taken seriously, it is illegal defiance of

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101. *Id.* at 19–20.

102. *Bush v. Orleans Parish Sch. Bd.*, 188 F. Supp. 916, 926 (E.D. La. 1960), *aff’d per curiam*, 365 U.S. 569 (1961).

103. *Id.* at 922.

104. *Id.* at 926.

105. *Id.* at 924–25 (quoting THE FEDERALIST NO. 39, at 214 (James Madison) (E. H. Scott ed., 1898)).

106. *Id.* at 926.

constitutional authority.”<sup>107</sup> In a one paragraph per curiam opinion, the U.S. Supreme Court affirmed the district court’s decision in *Bush*; the Court cited to its earlier rejection of the nullification and interposition doctrines in *Cooper v. Aaron* and reiterated that these doctrines are “without substance.”<sup>108</sup> With the *Cooper* and *Bush* decisions, the federal judiciary has thoroughly dismantled any hope that the nullification doctrine has constitutional validity.

The repeated rejection of the nullification and interposition doctrines—from the Virginia and Kentucky Resolutions, to John Calhoun’s Nullification Crisis, and finally to Massive Resistance in the South—demonstrates that states retain no constitutional power to nullify federal law. Next this Comment will discuss how the current state opposition to federal health care reform constitutes an attempt to nullify such legislation and is therefore an unconstitutional exercise of state power.

*4. Measures taken by states opposing federal health reform are unconstitutional attempts to nullify federal law*

Current state opposition to federal health care reform constitutes an unconstitutional attempt by states to nullify or invalidate federal law. This Section examines a specific provision taken in opposition to federal health care reform and demonstrates that such measures are unconstitutional attempts to nullify or invalidate federal law.

The bill passed by the Utah State Legislature (House Bill 67) is an example of an attempt to invalidate part of the federal health care legislation and is representative of similar bills being passed or proposed in other states.<sup>109</sup> Utah House Bill 67, entitled “Freedom from Federal Health Reform Efforts,” declares that “the federal government proposals for health systems reform infringe on state powers” and that federal health care reform “infringe[s] on the

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107. *Id.* The district court also stated, “However solemn or spirited, interposition resolutions have no legal efficacy.” *Id.*

108. *Bush v. Orleans Parish Sch. Bd.*, 364 U.S. 500, 500–01 (1960) (per curiam) (citing *Cooper v. Aaron*, 358 U.S. 1 (1958)).

109. See H.B. 67, Gen. Sess. (Utah 2010), available at <http://le.utah.gov/~2010/bills/hbillint/hb0067s01.pdf> (codified at UTAH CODE ANN. § 63M-1-2505.5 (2010)); see also *Health Backlash in the States*, WALL ST. J., Feb. 20, 2010, at A12 (explaining how Utah’s bill is similar to proposed bills in many other states).

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rights of citizens of this state to provide for their own health care.”<sup>110</sup> The Utah bill goes on to assert that “[a] department or agency of the state may not implement any part of federal health care reform passed by the United States Congress . . . unless . . . the Legislature pass[es] legislation specifically authorizing the state’s compliance with, or participation in, federal health care reform.”<sup>111</sup>

Even though Utah House Bill 67 does not use terms of art like “nullify” or “interpose”—terms used in past nullification movements—the language quoted above demonstrates that Utah’s law opposing federal health care reform constitutes an unconstitutional attempt to invalidate federal law. Like the previously discussed nullification ordinance passed by South Carolina in 1832, which declared federal tariff laws inapplicable inside the state of South Carolina,<sup>112</sup> Utah House Bill 67 purports to make federal health care reform inapplicable within the state of Utah unless the Utah state legislature explicitly approves participation in such federal law—thereby unconstitutionally attempting to invalidate federal health care reform as it would apply to Utah citizens. Additionally, just as southern state legislatures improperly passed resolutions asserting that the *Brown v. Board of Education* decision unconstitutionally infringed upon state powers over education,<sup>113</sup> Utah House Bill 67 suggests that federal health care reform infringes upon state powers to administer health care, powers the states claim are retained under the Tenth Amendment.<sup>114</sup> This assertion that federal health care reform “infringe[s] on state powers”<sup>115</sup> is a direct declaration that such reform is unconstitutional. Utah’s declaration that federal health care reform is unconstitutional is similar to the declarations of unconstitutionality found in the Kentucky and

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110. H.B. 67, Gen. Sess. (Utah 2010), available at <http://le.utah.gov/~2010/bills/hbillint/hb0067s01.pdf> (codified at UTAH CODE ANN. §§ 63M-1-2505.5 (1)(d)(i), (iv) (2010)).

111. *Id.* § 1(2) (codified at UTAH CODE ANN. § 63M-1-2505.5 (2)(a), (b) (2010)).

112. See *supra* Part II.A.2.

113. See *supra* Part II.A.3.

114. H.B. 67, Gen. Sess., § 1(1)(d) (Utah 2010), available at <http://le.utah.gov/~2010/bills/hbillint/hb0067s01.pdf> (codified at UTAH CODE ANN. § 63M-1-2505.5 (1)(d)(i) (2010)); see also Thalman, *supra* note 5 (describing how some leading Utah Republicans have recently asserted their belief that federal health care reform is unconstitutional).

115. H.B. 67, Gen. Sess., § 1(1)(d) (Utah 2010), available at <http://le.utah.gov/~2010/bills/hbillint/hb0067s01.pdf> (codified at UTAH CODE ANN. § 63M-1-2505.5 (1)(d)(i) (2010)).

Virginia Resolutions, the South Carolina ordinance passed during the Nullification Crisis, and the resolutions passed by southern legislatures to nullify *Brown*—all of which were constitutionally invalid efforts by states to oppose federal law. Consequently, “[i]f taken seriously,” Utah’s attempt to invalidate federal health care reform within its borders constitutes “illegal defiance of constitutional authority.”<sup>116</sup>

In fact, the Utah Office of Legislative Research and General Counsel (the Utah legislature’s in-house legal counsel) directly questions Utah House Bill 67’s constitutionality, stating that the bill “might violate the Supremacy Clause,” that Congress likely has power under both the Commerce Clause and the Taxing and Spending Clause to enact federal health care reform, and pointing out that states cannot challenge federal law under the Tenth Amendment because “the Supreme Court has interpreted the 10th Amendment as a ‘truism.’”<sup>117</sup> The Office of Legislative Research and General Counsel further explains that it is “unlikely” that the Supreme Court “would invalidate an exercise of [federal] commerce power as violative of the 10th Amendment.”<sup>118</sup> The Office also concludes that Utah House Bill 67 likely violates the separation-of-powers provisions of Utah’s own constitution, which prohibit one branch of state government from interfering with the powers of another branch of state government.<sup>119</sup> Utah’s bill violates separation of powers because it would prohibit the executive branch of the state from implementing any provision of federal health care reform without state legislative approval.<sup>120</sup> Therefore, the Utah Legislature’s own legal counsel repeatedly questions the validity and constitutionality of Utah House Bill 67.

State attempts to nullify federal law within their borders have been repeatedly rejected throughout U.S. history as unconstitutional exercises of state power. Current attempts by as many as thirty-six

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116. *See supra* Part II.B.3.b.; *Bush v. Orleans Parish Sch. Bd.*, 188 F. Supp. 916, 926 (E.D. La. 1960).

117. H.B. 67, Gen. Sess. (Utah 2010) (Legis. Rev. Note), *available at* <http://le.utah.gov/~2010/bills/hbillint/hb0067s01.pdf>.

118. *Id.*

119. *Id.*; UTAH CONST. art. V.

120. H.B. 67, Gen. Sess., at 4–5 (Utah 2010) (Legis. Rev. Note), *available at* <http://le.utah.gov/~2010/bills/hbillint/hb0067s01.pdf> (“The separation of powers doctrine prohibits one department of government from interfering with, encroaching upon, or exercising the powers of either of the other branches of state government.”).



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states to nullify federal health care reform are no different—these efforts are clear violations of the Constitution.

III. NULLIFICATION AS A POLITICAL CHECK AGAINST FEDERAL POWER

If state movements to nullify federal law have been repeatedly rejected throughout U.S. history, why do states continue their attempts to invalidate federal law? Although the nullification doctrine has no constitutional foundation, state attempts to nullify federal law function as a powerful *political* check on the national legislative process. Nullification movements may communicate widespread public opposition to the federal law in question, may foreshadow a costly fight for the federal government in implementing the federal law, and may help maintain an issue’s political salience for the long-term—enabling the opposition to benefit politically from a seemingly unpopular federal law.

“Salience” is the public prominence of a political issue and is the product of interaction between voters and interest groups, media, political parties, and activists.<sup>121</sup> Political issues are typically linked to particular events (e.g., the passage of a controversial law) that cause the issue to break through into the public’s consciousness.<sup>122</sup> However, once political issues attain such public prominence, they begin to lose their salience as these events “fade in public memory.”<sup>123</sup> When the political and economic stakes are high, interest groups and politicians seek to maintain an issue’s salience long enough to capitalize from the political issue in the voting booth.<sup>124</sup>

This Part will first outline the political capital gained by those involved in *past* nullification movements. The Part will then discuss the potential ways in which *current* state opposition to federal health

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121. Roderick M. Hills, Jr., *Corruption and Federalism: (When) Do Federal Criminal Prosecutions Improve Non-Federal Democracy?*, 6 THEORETICAL INQUIRIES L. 113, 122 (2005); see also Edward G. Carmines & James A. Stimson, *On the Evolution of Political Issues*, in AGENDA FORMATION 151, 151–53 (William H. Riker ed., 1993).

122. See Carmines & Stimson, *supra* note 121, at 157; see also David A. Super, *From Greenhouse to the Poorhouse: Carbon-Emissions Control and the Rules of Legislative Joinder*, 158 U. PA. L. REV. 1093, 1122 n.86 (2010).

123. Carmines & Stimson, *supra* note 121, at 157; see also Super, *supra* note 122, at 1122 n.86.

124. See Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 644; see also Super, *supra* note 122, at 1122.

care reform maintains the issue's salience leading up to the 2010 election and applies political pressure to Democratic congressional leaders and the Obama Administration.<sup>125</sup>

*A. The Kentucky and Virginia Resolutions Directly Impacted the Election of 1800*

Although the principles espoused in the Kentucky and Virginia Resolutions were generally rejected by other states, opposition to the Alien and Sedition Acts became a major rallying cry against Federalist candidates in the election of 1800.<sup>126</sup> This widespread opposition to the Alien and Sedition Acts “may be said to be the first party platform in the history of American parties,” and “resulted directly in displacing the Federalists from power and bringing the Jeffersonian Republicans into the control of the Government.”<sup>127</sup> In his presidential inauguration speech, Jefferson stated that the first step toward national harmony “would be the termination of the Alien and Sedition Acts.”<sup>128</sup> Jefferson and his Democratic-Republican cohorts used the Kentucky and Virginia Resolutions to publicize their dissatisfaction with and opposition to the controlling party in Washington—thereby maintaining the political salience of the Alien and Sedition Acts up to and throughout the election of 1800.<sup>129</sup> This public opposition eventually translated to a change in political leadership and a *constitutional* repeal of the very laws Virginia and Kentucky unconstitutionally attempted to nullify.<sup>130</sup>

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125. In describing the political value to be gained from attempts by states to nullify federal law, this Comment by no means endorses such unconstitutional movements. The Comment merely discusses the potential political value of such conduct and suggests reasons why states continue to engage in nullification of federal law despite the doctrine's clear unconstitutionality.

126. JOHNSTON, *supra* note 19, at 182; *see also* EDWARD J. LARSON, A MAGNIFICENT CATASTROPHE: THE TUMULTUOUS ELECTION OF 1800, AMERICA'S FIRST PRESIDENTIAL CAMPAIGN 96 (2007).

127. JOHNSTON, *supra* note 19, at 182; *see also* Alan Taylor, *The Alien and Sedition Acts*, in *THE AMERICAN CONGRESS: THE BUILDING OF DEMOCRACY* 63 (Julian E. Zelizer ed., 2004) (“[T]he Alien and Sedition Acts proved so unpopular that they contributed to the Federalists' crushing defeat in the pivotal national election of 1800.”).

128. JOHN FERLING, *ADAMS VS. JEFFERSON: THE TUMULTUOUS ELECTION OF 1800* 205 (2004).

129. *See supra* Part II.A.1.

130. JOHNSTON, *supra* note 19, at 197 (“[Madison's and Jefferson's] descendants have found that the small percentage of the voting population, which can, by a change of vote overturn the dominant party in Congress, is a better guarantee against Congressional usurpation than all the resolutions of our history.”).

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*B. Calhoun’s Nullification Crisis Led to Political Compromise with the Federal Government*

South Carolina’s strong opposition (expressed through nullification) to federal tariffs on southern products in 1832 eventually compelled the federal government to adopt a compromise tariff.<sup>131</sup> The dire threat of secession asserted by South Carolina and Calhoun forced the federal government to assess whether the tariff laws were worth internal conflict.<sup>132</sup> Notably, Congress could have constitutionally approved the Force Bill allowing President Jackson to compel compliance with federal law by military force; it is within the federal government’s power to see that its laws are faithfully executed and there is no question South Carolina was acting unconstitutionally.<sup>133</sup> However, South Carolina’s nullification resolution required members of Congress to ask themselves a political question—was compromise a better or easier solution to the crisis than compelling South Carolina’s compliance by military force?

Since many feared the use of force could lead to more widespread conflict and dissent, Congress made the policy decision that despite South Carolina’s unconstitutional actions of nullification and threatened secession, a compromise tariff was the better political choice at that time.<sup>134</sup> The Nullification Crisis suggests that nullification movements, despite their unconstitutionality, force the federal government to make difficult policy decisions that may weaken the political strength of those in power. Compromise by the federal government in the face of state opposition validates such opposition because it communicates to states that they may have something to gain in opposing (even unlawfully) federal law.

*C. Massive Resistance to the Brown Decision Made Implementation of Federal Law Much More Difficult for the Federal Government*

Attempts by southern states to thwart the Supreme Court’s decision in *Brown* made implementing school desegregation plans

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131. ELLIS, *supra* note 52, at 172–77 (describing the federal government’s precarious position and the events that led to compromise).

132. *Id.* at 173.

133. *Id.* at 158–60.

134. *Id.* at 170–77 (explaining the difficult political decisions Congress was forced to make in response to South Carolina’s nullification declaration).

much more difficult for the federal government.<sup>135</sup> In an effort to evade *Brown*'s implementation, southern legislatures, over a three-year period, passed 450 laws aimed at delaying desegregation.<sup>136</sup> These actions by southern states called Washington's bluff, and the federal government was once again faced with a difficult political choice—compromise with the South by tempering desegregation requirements despite the states' unconstitutional attempts to thwart *Brown*, or compel compliance with the *Brown* decision by force.

Unlike Congress's decision to avoid forcible compliance in response to the Nullification Crisis, the federal government had "the will and the raw power" to compel the desegregation process.<sup>137</sup> However, forcing states to comply with *Brown* was not an easy task for the federal government. On multiple occasions, the federal government was required to dispatch federal troops or federalize National Guard units in order to stop states from avoiding desegregation.<sup>138</sup> Additionally, since the 1950s, federal district courts have been required to closely supervise the desegregation of school districts throughout the country—in 2001, over four-hundred school districts remained under court supervision.<sup>139</sup> Massive Resistance to desegregation demonstrates that if the federal government decides to compel states to abide by federal law, state opposition requires the federal government to actively mandate detailed state-by-state compliance, by force if necessary. Forcing such compliance may prove costly and may take decades to accomplish.

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135. See Hagley, *supra* note 29, at 195. Again, this Comment in no way argues that opposing desegregation was a positive or valuable campaign—on the contrary, this Comment argues that such action was facially unconstitutional. However, state opposition to the *Brown* decision did delay desegregation by forcing the federal government to compel state compliance with *Brown*. States today may look back to the Massive Resistance movement and recognize the potential political gains for states and possible high costs for the federal government when states oppose federal law.

136. *Id.*

137. Ross, *supra* note 59, at 495–96 (citing George W. Stumberg, *The School Segregation Cases: Supporting the Opinion of the Supreme Court*, 42 A.B.A. J. 318, 319–20 (1956)).

138. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 8–12 (1958) (describing actions taken by state leaders to thwart desegregation efforts at Central High School in Little Rock and the subsequent circumstances surrounding the placement of federal troops at the school to compel compliance with desegregation); CHARLES W. EAGLES, *THE PRICE OF DEFIANCE: JAMES MEREDITH AND THE INTEGRATION OF OLE MISS* 340–41 (2009) (explaining how President Kennedy federalized Mississippi's National Guard, and mobilized both the army and U.S. marshals to protect James Meredith as he attended the University of Mississippi).

139. Monika L. Moore, *Unclear Standards Create an Unclear Future: Developing a Better Definition of Unitary Statute*, 112 YALE L.J. 311, 311 (2002).

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*D. State Attempts to Nullify the Real ID Act of 2005 Have Contributed to the Act’s Possible Repeal*

State opposition to the Real ID Act is part of a widespread effort that may lead to the Act’s repeal in Congress. The Real ID Act, passed in response to recommendations made by the 9/11 Commission, requires states to follow heightened standards and procedures in the issuance of state driver’s licenses and will create a national identification system.<sup>140</sup> Opponents to Real ID, including a number of states, argue that the Act is unconstitutional because it violates a person’s inherent right of privacy in amassing a federal identification database.<sup>141</sup> Opponents to the Act also assert that Real ID violates the Tenth Amendment by legislating in an area (state identification) reserved to the states.<sup>142</sup> Since 2005, as many as twenty states have passed measures which prohibit their state agencies from complying with Real ID—thereby attempting to invalidate the Act within their borders.<sup>143</sup> Several more states are in the process of passing similar legislation opposing the Act.<sup>144</sup> Although these attempts to nullify Real ID are unconstitutional and without legal foundation, the state opposition movement against Real ID contributes to the Act’s continued political salience by

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140. Christopher Wolf, *Recent Federal Developments in Privacy and Information Security*, 969 PLI/PAT 449, 472–74 (2009) (discussing recent developments with the Real ID Act).

141. Bob Barr, *Real ID Act a Real Intrusion on Rights, Privacy*, ATLANTA J. CONST., Feb. 6, 2008, at A23 (arguing that the Real ID Act violates the right of privacy and commending the state of Georgia for “standing against this assault on states’ rights and the Bill of Rights”).

142. Anthony D. Romero, *Repeal Real ID*, USA TODAY, Mar. 6, 2007, at A12 (“Real ID is an unfunded mandate that violates the Constitution’s 10th Amendment on state powers, destroys states’ dual sovereignty and consolidates every American’s private information, leaving all of us far more vulnerable to identity thieves.”).

143. *See, e.g.*, Declan McCullagh, *Maine Rejects Real ID Act*, CNET NEWS, Jan. 25, 2007, [http://news.cnet.com/2100-7348\\_3-6153532.html](http://news.cnet.com/2100-7348_3-6153532.html) (Maine); Dena Potter, *Real ID Mandate Resisted in Virginia*, WASH. TIMES, Jan. 3, 2009, available at <http://www.washingtontimes.com/news/2009/jan/03/some-legislators-oppose-real-id-act-mandate> (Virginia); *Governor Signs Bill Defying U.S. ID Law*, BILLINGS GAZETTE, Apr. 17, 2007, available at [http://billingsgazette.com/news/state-and-regional/montana/article\\_1855fed8-6e4c-5be1-82de-7ffe2f953c0c.html](http://billingsgazette.com/news/state-and-regional/montana/article_1855fed8-6e4c-5be1-82de-7ffe2f953c0c.html) (Montana). Notably, despite invalidating Real ID within its borders, Montana claims it has not “nullified” the Real ID Act, but has only “opposed” the Act. *See id.* However, it is difficult to determine how declaring a federal law unconstitutional and invalidating such a law within the state’s borders is not a form of nullification even though Montana wants to avoid using such language.

144. *Anti-Real ID Legislation in the States*, ACLU, <http://www.realnightmare.org/news/105/> (last visited Jan. 25, 2011).

keeping the issue in the public's consciousness while adding to a widespread call for the Act's lawful repeal in Congress.<sup>145</sup>

State opposition to Real ID, like previous nullification movements, presents the federal government with several difficult political choices. The government can risk political backlash and somehow force state compliance with the Act, adjust the Act's requirements in a way that would satisfy state concerns, or even repeal the Act completely. Thus, the unconstitutionality of nullification movements does not end the inquiry because such movements may place a great deal of political pressure upon the federal government to change or repeal an unpopular law.

*E. The Potential Political Value of State Opposition to Federal Health Care Reform*

Regardless of the nullification doctrine's unconstitutionality, state opposition to the health care overhaul package keeps the issue in the general public's consciousness, maintains the issue's political salience, and thereby enables Republicans to capitalize on such opposition in the November 2010 election. State opposition to the health care overhaul also conveys (at least the appearance of) widespread public disapproval of such reform—forcing congressional Democrats to defend passing such legislation despite strong public opposition against it. State opposition also warns the federal government that implementation of federal health care reform on a state level will be resisted by a majority of states and may require the federal government to actively compel detailed state-by-state compliance.

*1. State opposition to health care reform applies political pressure to leaders in Washington*

As states join together in their opposition to federal health care legislation, they place a great deal of political pressure on federal leaders who supported reform. Similar to the way state opposition to

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145. Anne Broache, *Senators Skeptical of Real ID Act Rules*, CNET NEWS, Mar. 26, 2007, [http://news.cnet.com/Senators-skeptical-of-Real-ID-Act-rules/2100-1028\\_361705\\_83.html](http://news.cnet.com/Senators-skeptical-of-Real-ID-Act-rules/2100-1028_361705_83.html) ("Leaders of a U.S. Senate Homeland Security and Governmental Affairs panel joined a chorus of outsiders, including many state government officials, who have questioned the costs and privacy implications of the congressionally mandated shift to identification cards that must adhere to a bevy of national standards."); *see also* Andrea Fuller, *Effort to Replace Federal Driver's License Mandate Gains*, N.Y. TIMES, July 16, 2009, at A20.

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the Alien and Sedition Acts became a powerful political platform in the election of 1800 that propelled the opposition party into power, widespread state hostility to federal health care reform could contribute to (and arguably already has contributed to) Republican gains at the voting booth.<sup>146</sup> Even before Congress passed the health care reform bill, one observer noted, “[C]onservative commentators are already calling ‘Obamacare’—in whatever form it takes—a loss for the Democrats.”<sup>147</sup> Republicans claim the bill was passed in the face of strong public opposition, a sign that congressional Democrats and the Obama Administration ignored the will of the people.<sup>148</sup> State nullification movements simply bolster Republican claims that the current leadership in Washington is not listening to the people—nullification movements are concrete examples of public disapproval. Democrats currently up for reelection will especially feel the political heat of federal health care reform because they will be forced to explain why they voted for the bill despite thirty-six states (possibly including their own state) undertaking measures to oppose it.<sup>149</sup>

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146. See Editorial, *The Massachusetts Election*, N.Y. TIMES, Jan. 21, 2010, at A38 (suggesting that fierce public opposition by Republicans against health care reform may have contributed to Scott Brown’s unexpected victory in the Massachusetts Senate race); see also Patrick H. Caddell & Douglas E. Schoen, *If Democrats Ignore Health-Care Polls, Midterms Will Be Costly*, WASH. POST, Mar. 12, 2010, at A17 (“For Democrats to begin turning around their political fortunes there has to be a frank acknowledgment that the comprehensive health-care initiative is a failure, regardless of whether it passes. . . . Unless the Democrats fundamentally change their approach, they will produce not just a march of folly but also run the risk of unmitigated disaster in November.”). In making this comparison between the Alien and Sedition Acts and the current federal health care legislation, the author in no way is suggesting that the two laws are similar in their constitutionality or lack thereof. As discussed above, most scholars argue that the health care reform legislation is constitutional, see *supra* notes 11–12 and accompanying text, while few would disagree that the Sedition Act violated the First Amendment. See *N.Y. Times, Co. v. Sullivan*, 376 U.S. 254, 276 (1964) (“Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.”).

147. Stephanie Condon, *Health Care Reform: No Good Options for Dems?*, CBS NEWS, Jan. 22, 2010, [http://www.cbsnews.com/8301-503544\\_162-6130085-503544.html](http://www.cbsnews.com/8301-503544_162-6130085-503544.html) (last visited Jan. 3, 2011).

148. This claim was made by those opposing federal health care reform and will continue to be made throughout the November 2010 election. See, e.g., Kristen Wyatt, *Vulnerable Democrats Are Tiptoeing on Health Care*, ASSOCIATED PRESS, Apr. 8, 2010; Pamela Rogowicz, Letter to the Editor, *Obama Is Not Listening to the People*, POCONO REC., Feb. 21, 2010, available at <http://www.pocorecord.com/apps/pbcs.dll/article?AID=/20100221/NEWS04/2210307/-1/news0401>.

149. Michael Riley, *Markey, DeGette in Middle of Health Care Reform Quagmire*, DENVER POST, Mar. 5, 2010, at A1 (describing how House Democrat Betsy Markey from Colorado “is a vulnerable Democrat” who is currently “squeezed between the unpleasant

*2. State opposition to health care reform maintains the issue's long-term political salience*

State opposition to federal health care reform, whether through nullification movements or through lawsuits challenging the health care overhaul's constitutionality,<sup>150</sup> also contributes to maintaining health care reform's long-term political salience. As discussed above, important political issues lose their political salience as the events giving rise to the issue fade from the public's memory.<sup>151</sup> Consequently, those who have something to gain (e.g., political capital) by keeping the issue in the public's consciousness will engage in efforts to maintain an issue's salience long enough to capitalize in the voting booth.

State opposition to federal health care reform garners media coverage, generates political discussion and literature, and otherwise keeps the issue in the public eye—thereby playing an important role in health care reform's continued salience in the November 2010 election and possibly in elections to come. As long as opposing health care reform is politically salient, interest groups will continue spending money supporting such opposition,<sup>152</sup> and the Republicans will continue reminding voters that the fight against health care reform is not yet lost. In other words, the longer the issue remains politically salient, the longer Republicans can seek to capitalize on the negativity surrounding health care reform.<sup>153</sup>

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prospect of alienating her base Democratic voters or the independents she'll need in a tough 2010 fight"); see also Dick Polman, *If Democrats Stumble on Health Care, Republicans Win*, OLYMPIAN, Mar. 11, 2010 ("[A]ccording to polls, swing-voting independents generally oppose the sweep and price tag of Obama's proposed overhaul."); Wyatt, *supra* note 148 ("Tough votes for Obama's health care plan have further complicated the re-election prospects of dozens of already vulnerable freshman and second-term Democrats.").

150. See Fletcher, *supra* note 12 (explaining that eighteen states have filed a lawsuit in Florida challenging the constitutionality of the federal health care reform package).

151. See *supra* text accompanying notes 121–24.

152. Kirkpatrick, *supra* note 5, at A1 (discussing the large campaign contributions made by the health care lobby to Republican sponsors of state nullification bills). The health care lobby's large donations to state lawmakers, "[are] just one example of how insurance companies, hospitals and other health care interests have been positioning themselves in statehouses around the country to influence the outcome of the proposed health care overhaul." *Id.*

153. See Christine Todd Whitman et al., *Can the Republicans Win in November with a Negative Strategy?*, WASH. POST, Apr. 4, 2010, at A11 (compiling opinions from political experts on both sides of the aisle concerning whether the Republican Party would win in the November 2010 election with a negative strategy). However, Republicans must continue to pay close attention to public sentiment regarding the health care overhaul package because, as



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*3. State opposition to health care reform may contribute to the law being repealed*

Widespread state opposition to federal health care reform may even eventually contribute to the reform’s repeal in Congress. Just as widespread state and national opposition to the Real ID Act has many in Congress calling for the Act’s repeal,<sup>154</sup> the current opposition to federal health care reform, whether by states attempting to nullify such reform or by Republican congressional leaders campaigning against it, will likely lead to future Republican attempts to repeal federal health care reform.<sup>155</sup> Conservative politicians and pundits are already claiming that, since Democrats used the reconciliation process in passing amendments to the health care reform bill, Republicans will use the same process to repeal the health care overhaul when they eventually reclaim the congressional majority.<sup>156</sup> As states continue their efforts in opposing the federal health care overhaul, calls for the law’s repeal will only increase because Republicans will point to such widespread state opposition as an indication that the nation wants the bill repealed. As long as there is political capital to be gained by promising the law’s repeal, Republicans will continue making such promises—especially in an election year.

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Christine Todd Whitman, Chair of the Republican Leadership Council points out, “if voters start to see benefits or even a lack of disaster from the recently passed [health care] legislation, Republicans could be in jeopardy over our doomsday predictions.” *Id.*

154. See *supra* note 145 and accompanying text.

155. See Stephanie Condon, *Health Care Repeal Effort Splits Conservative, Moderate Republicans*, CBS NEWS, Apr. 8, 2010, [http://www.cbsnews.com/8301-503544\\_162-20002023-503544.html](http://www.cbsnews.com/8301-503544_162-20002023-503544.html) (last visited Jan. 3, 2011) (“Right-wing members of the Republican party continue to push for a full repeal of the Democrats’ new package of health care reforms, even as GOP leaders have blunted their message to one of ‘repeal and replace.’”).

156. See, e.g., Karl Rove, *The Trouble with ‘Reconciliation,’* WALL ST. J., Mar. 11, 2010, at A15. Congress also used the reconciliation process to pass amendments to the health care bill, and to take private banks out of the federal student loan process. Christi Parsons & Janet Hook, *Obama Signs Reconciliation Bill with Major Student Loan Change*, L.A. TIMES, Mar. 31, 2010, at A8. Since Obama could veto a Republican repeal of federal health care reform, “Republicans probably couldn’t mount a real threat unless they won the White House in 2012.” Ronald Brownstein, *GOP Faces Choice If Health Bill Passes*, NAT’L J. MAG., Nov. 14, 2009, available at [http://www.nationaljournal.com/njmagazine/nj\\_20091114\\_2045.php](http://www.nationaljournal.com/njmagazine/nj_20091114_2045.php); see also Patricia Zengerle, *Obama Dares Republicans to Seek Healthcare Repeal*, REUTERS, Mar. 25, 2010, available at <http://www.reuters.com/article/idUSTRE62N61Y20100325>.

*4. State opposition to health care reform may require the long and expensive process of compelling state-by-state compliance*

Compelling state compliance with federal health care reform may also prove economically burdensome for the federal government. As discussed above, compelling desegregation in the 1950s and 1960s was extremely costly for the federal government, though obviously worth the cost. Washington was required to dispatch hundreds of federal law enforcement officers to compel short-term compliance,<sup>157</sup> and the federal judiciary is still—over fifty years later—involved in assuring long-term desegregation compliance in many states.<sup>158</sup>

In light of widespread state opposition to federal health care reform, compelling compliance with the reform package is also likely to place great costs on the federal government. The federal government may be forced to engage in the very expensive process of challenging (or responding to challenges from) state opposition measures in courts throughout the country.<sup>159</sup> This litigation may take years to resolve, and may delay the application of federal health care reform. Additionally, if state agencies refuse to implement portions of federal health care reform (as state nullification laws currently require), federal agencies would either be required to implement federal health care reform themselves, or the federal government would be required to somehow forcibly compel state agencies to comply with implementation mandates.

Therefore, despite nullification's clear unconstitutionality, attempts by states to nullify federal law may place tremendous political pressure on the federal government. Nullification movements require the federal government to make difficult political choices that may not have a clear solution or outcome. As long as there is political capital to be gained by such action, states will likely continue their attempts to nullify federal legislation.

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157. *See supra* Part III.C.

158. ALFRED A. LINDSETH, *Legal Issues Related to School Funding/Desegregation*, in *SCHOOL DESEGREGATION IN THE 21ST CENTURY* 41–43 (Christine H. Rossell et al. eds., 2002).

159. As discussed above, the federal government is already engaged in several lawsuits challenging the constitutionality of health care reform. *See Fletcher, supra* note 12.

## IV. CONCLUSION

In response to a strong push toward federal health care reform in Washington, states across the country have taken measures to oppose such legislation. This opposition effort by states against health care reform constitutes state nullification of federal law. These state nullification measures generally declare that federal health care reform is unconstitutional and claim to prevent any such reform from applying within the borders of their respective states. However, the nullification doctrine is an unconstitutional exercise of state power and has been repeatedly rejected throughout U.S. history. States have no authority to declare federal laws unconstitutional and cannot invalidate federal laws that would otherwise apply within their borders.

Despite the unconstitutional nature of the nullification doctrine, state attempts to nullify federal health care reform may serve a political purpose. Such opposition maintains the issue’s political salience, conveys at least the appearance of widespread political opposition to federal health care reform, and makes the implementation of such reform more difficult for the federal government. Therefore, state nullification measures, from the opposition’s point of view, may be useful political tools in opposing federal law generally and federal health care reform specifically.

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