

2012

Why Virginia's Challenges to the Patient Protection and Affordable Care Act Did Not Invoke Nullification

Robert S. Claiborne Jr.
University of Richmond

Follow this and additional works at: <http://scholarship.richmond.edu/law-student-publications>



Part of the [Health Law and Policy Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Robert S. Claiborne, Jr., Comment, *Why Virginia's Challenges to the Patient Protection and Affordable Care Act Did Not Invoke Nullification*, 46 U. Rich. L. Rev. 917 (2012).

This Article is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Student Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

COMMENT

WHY VIRGINIA'S CHALLENGES TO THE PATIENT PROTECTION AND AFFORDABLE CARE ACT DID NOT INVOKE NULLIFICATION

I. INTRODUCTION

Virginia's challenges to the Patient Protection and Affordable Care Act ("ACA"), via its minimum essential coverage provision, or individual mandate, have drawn both criticism and praise as modern invocations of nullification. The distinct doctrine of nullification entails a legal process exceeding that of a merely litigious challenge to federal law or a vocal protest from a state legislature. Its exercise by a state purportedly renders a targeted federal law unconstitutional and thus null, void, and of no effect within the respective state's borders. At nullification's core are the premises that the Supreme Court does not have final authority to interpret the Constitution in cases and controversies arising between a state and the federal government and that an individual state, as a party to the Constitution, has ultimate authority to interpret the compact as applied to constitutional disputes arising with the federal government.

This comment's focus is to convincingly demonstrate that neither the General Assembly's Health Care Freedom Act nor the Commonwealth's constitutional challenge to the minimum essential coverage provision were exercises of nullification. Part II of this comment relates a brief history of the ACA's passage alongside the Virginia Health Care Freedom Act's enactment and the Attorney General of Virginia Ken Cuccinelli's suit against Secretary of Health and Human Services Kathleen Sebelius. Part III defines nullification and further explains it through the historical instances when Virginia has considered the doctrine. Part IV demonstrates that—far from nullifying the minimum essential

coverage provision—Virginia has followed the course of action recommended by nullification’s earliest opponents. The Commonwealth’s actions, both in anticipation of and response to the ACA, did not invoke nullification. Rather, Virginia challenged the congressional enactment through traditionally and constitutionally accepted means, and the motives and concessions of the General Assembly and the Attorney General of Virginia, in so doing, directly countered the form and premises of nullification.

II. VIRGINIA’S ACTIONS AGAINST THE MINIMUM ESSENTIAL COVERAGE PROVISION

In 2008, the Democratic Party won the Presidency and increased its majorities in the Senate and the House of Representatives.¹ Comprehensive health care reform was among the Party’s legislative prerogatives.² While the dramatic election of President Barack Obama and the Democratic Congress was interpreted by some as an endorsement of the Party’s national policies,³ the proposed means of health care reform were nonetheless discordant with the public.⁴ Accordingly, the legislative outcome of proposed reform remained uncertain until the ACA’s actual passage.⁵ Despite Democratic majorities in each House of Congress, significant negotiation, compromise, and political dealing were necessary to garner support for the legislation.⁶ Congressional Democrats held town hall meetings in an attempt to clarify the

1. Susan Page, *In Congress, a Democratic Wave; Economic Concerns Fuel a ‘Turning Point’ in Politics*, USA TODAY, Nov. 5, 2008, at A1.

2. See *Clock Ticking on U.S. Democrats’ Health Care Reform*, BOSTON HERALD, Oct. 26, 2009, available at <http://www.bostonherald.com/business/healthcare/view.bg?articleid=1207376&srvc=business&position=recent>.

3. See Alec MacGillis & Jon Cohen, *Democrats Add Suburbs to Their Growing Coalition*, WASH. POST, Nov. 6, 2008, at A1; see also Page, *supra* note 1.

4. See Matthew R. Farley, *Challenging Supremacy: Virginia’s Response to the Patient Protection and Affordable Care Act*, 45 U. RICH. L. REV. 37, 41 (2010) (citing *Town Hall Meeting on Health Care Turns Ugly*, CNN (Aug. 18, 2009, 10:53 AM), <http://www.cnn.com/2009/POLITICS/08/07/health.care.scuffles/index.html>); Lori Montgomery & Perry Bacon, Jr., *Senator Calls for Narrower Measure; Republican Grassley Cites Town Hall Anger*, WASH. POST, Aug. 20, 2009, at A1.

5. Petition for Writ of Certiorari at 19, *Virginia ex rel. Cuccinelli v. Sebelius*, No. 11-420 (Sept. 30, 2011).

6. See, e.g., Michael Gerson, Editorial, *What Obama Has Lost; Even if Health Care Passes, the Damage Is Done*, WASH. POST, Mar. 10, 2010, at A23; Chris Frates, *Payoffs for States Get Harry Reid to 60 Votes*, POLITICO (Dec. 19, 2009, 7:56 PM), <http://www.politico.com/news/stories/1209/30815.html> (discussing the compromises made to secure votes for the ACA).

legislation and to assuage the public's concerns, but those meetings only provided the citizenry a more direct medium of expressing their disapproval.⁷ Two of the most villified aspects of the ACA were the proposed public option and the minimum essential coverage provision,⁸ which in relevant part, would require that: "[a]n applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month."⁹ The central complaints against the minimum essential coverage provision were that it intruded upon personal liberty, exceeded Congress's enumerated powers, and offered a precedent by which the federal government could increasingly regulate and compel Americans' commercial choices.¹⁰

Political opposition arose alongside public protest.¹¹ In the midst of ongoing congressional negotiations, the agenda of the national Democrats engendered increasing opposition in states throughout the Republic, including Virginia.¹² While in 2008 Virginia's voters replaced four Republican congressmen with Democrats and the Commonwealth's electors pledged their votes to the Democratic Party's presidential ticket for the first time since 1964,¹³ they reversed course in 2009 when they elected Bob

7. See Montgomery & Bacon, *supra* note 4; see also Emma Brown, James Hohmann, & Perry Bacon, Jr., *Lashing Out at the Capitol; Tens of Thousands Protest Obama Initiatives and Government Spending*, WASH. POST, Sept. 13, 2009, at A1 (describing public protests and gatherings, composite of "a loose-knit movement . . . galvanizing anti-Obama sentiment across the country" and decrying President Obama's health care reform plan and other policy proposals).

8. See, e.g., Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 606-07 (2010); Dana Milbank, *The Health-Care War Gets a Little More Civil*, WASH. POST, Sept. 22, 2009, at A2.

9. 26 U.S.C. § 5000A(a) (Supp. IV 2010). The bill that President Obama ultimately signed into law did not contain the public option, so its further discussion is unwarranted. See Z. Byron Wolf & Huma Khan, *Public Option No More? Obama Throws Weight Behind New Health Care Deal*, ABC NEWS (Dec. 9, 2009), http://abcnews.go.com/Politics/Health_Care/health-care-harry-reid-senators-medicare-drop-public-option/story?id=9290406.

10. Barnett, *supra* note 8, at 604-07; Kenneth T. Cuccinelli, II, E. Duncan Getchell, Jr., & Wesley G. Russell, Jr., *Why the Debate Over the Constitutionality of the Federal Health Care Law Is About Much More than Health Care*, 15 TEX. REV. L. & POL. 293, 335-36 (2011).

11. Farley, *supra* note 4, at 51-52.

12. *Id.* at 51-53.

13. Liz Halloran, *Barack Obama Wins Conservative Virginia*, U.S. NEWS (Nov. 4, 2008), <http://www.usnews.com/news/campaign-2008/articles/2008/11/04/barack-obama-win-s-conservative-virginia>; *Virginia Delegation Now Has Democratic Majority*, RICH. TIMES-

McDonnell as the first Republican Governor of Virginia in eight years.¹⁴ Before the transition of power, then-Attorney General Bill Mims issued a formal advisory opinion questioning the constitutionality of the proposed ACA and the minimum essential coverage provision included therein.¹⁵ Attorney General Mims, along with the Attorneys General of thirteen other states, threatened to file suit challenging the constitutionality of the “Nebraska Compromise.”¹⁶ These events would foretell further state opposition during the 2010 legislative session.

In 2010, the General Assembly considered legislation opposing the minimum essential coverage provision. The General Assembly passed Senate Bills 283, 311, and 417, in addition to House Bill 10,¹⁷ which was revised to reflect the language of the senate bills.¹⁸ This legislation, popularly known as the Virginia Health Care Freedom Act, provided that “[n]o resident of this Commonwealth . . . shall be required to obtain or maintain a policy of individual insurance coverage,” with “[n]o provision of this title [rendering] a resident of this Commonwealth liable for any penalty, assessment, fee, or fine as a result of his failure to procure or obtain health insurance coverage.”¹⁹ Having passed the legislation through the Republican House of Delegates and the Democratic Senate, Virginia legislators used the Act to signal their constituents’ disapproval of the minimum essential coverage provision and to propose a means by which the Attorney General of Virginia could challenge the provision if Congress enacted the ACA.²⁰

DISPATCH, Jan. 5, 2009, at A1.

14. Virginians elected Republican candidates Bob McDonnell, Bill Bolling, and Ken Cuccinelli, respectively, as their Governor, Lieutenant Governor, and Attorney General. Tyler Whitley, *McDonnell Leads GOP Sweep of Statewide Races*, RICH. TIMES-DISPATCH, Nov. 4, 2009, at A1.

15. Farley, *supra* note 4, at 40, 58–59.

16. *Id.* at 39–40 (citing Letter from Henry McMaster, Att’y Gen. of S.C., et al. to Nancy Pelosi, Speaker of the U.S. House of Representatives, and Harry Reid, Majority Leader, U.S. Senate (Dec. 30, 2009), available at <http://www.attorneygeneral.gov/uploadedFiles/Press/Health%20Care%20provision%20letter.pdf>).

17. *Id.* at 53–55. By voice vote, the House of Delegates incorporated House Bill 722 into House Bill 10. *Id.* at 56.

18. *Id.*

19. VA. CODE ANN. § 38.2-3430.1:1 (Cum Supp. 2011). As submitted to Governor McDonnell, this legislation included an exception only for “individuals voluntarily applying for coverage under a state-administered program pursuant to Title XIX or Title XXI of the Social Security Act.” *Id.*

20. Interview by Greta Van Susteren with Senator Phillip Puckett (Feb. 3, 2010); Interview by Megyn Kelly with Delegate Robert Marshall (Mar. 15, 2010); Interview by Brian Wilson with Delegate Robert Marshall, in Wash., D.C. (Feb. 13, 2010).

Governor McDonnell returned the bills to the General Assembly for recommended revisions,²¹ which the General Assembly adopted on March 10, 2010.²² Pursuant to the Virginia Constitution, the Health Care Freedom Act became law on that date.²³ Governor McDonnell and members of the General Assembly held a ceremonial bill signing on March 24, and the Governor characterized the Act as defining the Commonwealth's policy toward individual choice in the health insurance market.²⁴

The General Assembly considered amending the Virginia Constitution to reflect the language of the Health Care Freedom Act and also resolving that Congress respect the rights reserved to the states by the Tenth Amendment.²⁵ Neither the amendment nor the resolution passed the General Assembly.²⁶

Congressional Democrats eventually secured the votes necessary to approve the ACA.²⁷ On March 21, 2010, the Act passed with all congressional Republicans dissenting,²⁸ and on March 23, President Obama signed the ACA, including the minimum essential coverage provision into law.²⁹ The Act addressed far-reaching

21. Governor McDonnell requested additional exceptions for "students being required by an institution of higher education to obtain and maintain health insurance as a condition of enrollment" and individual parties "as required by a court or the Department of Social Services . . . in a judicial or administrative proceeding." Farley, *supra* note 4, at 55 (citing S. RES. 417, VA. GEN. ASSEMBLY (Reg. Sess. (2010))).

22. *Id.* at 55; see Act of Mar. 10, 2010, ch. 106, 2010 Va. Acts 102 (codified as amended at VA. CODE ANN. § 38.2-3430.1:1 (Cum. Supp. 2011)); Act of Mar. 10, 2010, ch. 107, 2010 Va. Acts 102 (codified as amended at VA. CODE ANN. § 38.2-3430.1:1 (Cum. Supp. 2011)); Act of Mar. 10, 2010, ch. 108, 2010 Va. Acts 102, 102–103 (codified as amended at VA. CODE ANN. § 38.2-3430.1:1 (Cum. Supp. 2011)); Act of Apr. 21, 2010, ch. 818, 2010 Va. Acts 1720 (codified as amended at VA. CODE ANN. § 38.2-3430.1:1 (Cum. Supp. 2011)). House Bill 10 was assigned to the wrong senate committee, and its enactment was delayed. Farley, *supra* note 4, at 56 n.137.

23. Petition for Writ of Certiorari, *supra* note 5, at 19 n.5 (citing VA. CONST. art. V, § 6(b)(iii)); Farley, *supra* note 4, at 55.

24. Press Release, Taylor Thornley, Deputy Dir. Commc'ns, Office of Governor of Va., Governor McDonnell Signs Virginia Health Care Freedom Act Legislation (Mar. 24, 2010), available at <http://www.governor.virginia.gov/News/viewRelease.cfm?id=88> [hereinafter Press Release, Taylor Thornley]; see also Cuccinelli, Getchell, & Russell, *supra* note 10, at 335–36.

25. Farley, *supra* note 4, at 56–57 (discussing House Joint Resolution 7 and House Joint Resolution 125).

26. *Id.* at 27.

27. Robert Pear & David M. Herszenhorn, *Congress Sends White House Landmark Health Overhaul*, N.Y. TIMES, Mar. 22, 2010, at A1.

28. *Id.*

29. Sheryl Gay Stolberg & Robert Pear, *A Stroke of a Pen, Make that 20, and It's Official*, N.Y. TIMES, Mar. 24, 2010, at A19.

aspects of the health care market,³⁰ but the legislation failed to garner the public support that President Obama and the Democratic Congress expected.³¹ Further, with both the minimum essential coverage provision and the Virginia Health Care Freedom Act enacted, an alleged conflict had arisen between federal and state law.³²

Pursuant to his duty to defend the laws of the Commonwealth,³³ on March 23, Attorney General of Virginia Ken Cuccinelli filed suit in the Federal District Court for the Eastern District of Virginia seeking: (1) a declaration that the minimum essential coverage provision and the larger ACA were unconstitutional; and (2) an injunction against Secretary Sebelius's administration of the legislation.³⁴ The Attorney General of Virginia used the state statute to achieve standing, asserting that the minimal essential coverage provision threatened preemption of the Health Care Freedom Act constituted an injury-in-fact.³⁵ Virginia argued that the minimal essential coverage provision was a penalty rather than a tax and that it exceeded the Congress's commerce power.³⁶ The Commonwealth further contended that, if the minimal essential coverage provision was determined unconstitutional, the remainder of the ACA must similarly suffer invalidation because the two were not severable.³⁷ On August 2, 2010, the District Court for the Eastern District of Virginia denied Secretary Sebelius's motion to dismiss,³⁸ and on December 13, it held that the minimum essential coverage provision was constitutionally invalid but severable from the ACA.³⁹ The district court ruled that the minimum essential coverage provision was not a tax and

30. *Id.*

31. *See, e.g.*, Editorial, *Less Popular All the Time*, WALL. ST. J., Oct. 29, 2011, at A14.

32. Petition for Writ of Certiorari, *supra* note 5, at 3; *see Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598, 601 (E.D. Va. 2010).

33. Petition for Writ of Certiorari, *supra* note 5, at 3 (citing VA. CODE ANN. §§ 2.2-507, 513 (2008)).

34. Jim Nolan, *Va., 13 Other States Sue on Health Care; Attorney General's Office Says Mandate to Buy Insurance Is Unconstitutional*, RICH. TIMES-DISPATCH, Mar. 24, 2010, at A1; *see* Complaint for Declaratory and Injunctive Relief at 6-7, *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. Mar. 23, 2010) (No. 3:10CV188).

35. Plaintiff's Memorandum in Opposition to Motion to Dismiss at 1-3, 11-12, 14-17, *Virginia ex rel. Cuccinelli*, 702 F. Supp. 2d at 598 (No. 3:10CV188).

36. Plaintiff's Memorandum in Support of Motion for Summary Judgment at 5-24, *Virginia ex rel. Cuccinelli*, 728 F. Supp. 2d at 768 (No. 3:10CV188).

37. *Id.* at 24-28.

38. *Virginia ex rel. Cuccinelli*, 702 F. Supp. 2d at 598, 615.

39. *Virginia ex rel. Cuccinelli*, 728 F. Supp. 2d at 788-90.

that it exceeded Congress's enumerated power to regulate interstate commerce and its power to enact all laws necessary and proper to the execution of its enumerated powers.⁴⁰ On appeal, the Court of Appeals for the Fourth Circuit vacated and remanded judgment "with instructions to dismiss the case for lack of subject-matter jurisdiction."⁴¹ The court of appeals did not reach the merits of the case because Virginia's suit was as *parens patriae* and the Commonwealth therefore lacked standing.⁴² Virginia has petitioned the United States Supreme Court for a writ of certiorari.⁴³ The Supreme Court decided against hearing Virginia's appeal in the coming Term, but it could grant certiorari at a later date given existing circuit splits on issues other than the minimum essential coverage provision's constitutional validity.⁴⁴

Amidst the Health Care Freedom Act's passage and Virginia's subsequent litigation came cries of nullification.⁴⁵ Virginia's General Assembly and Attorney General were compared to the South Carolina Nullifiers of the early 1830's and to the Southern state governments that nullified *Brown v. Board of Education of Topeka*.⁴⁶ Some advocates of the doctrine applauded what they similarly perceived to be Virginia's nullification of the minimum essential coverage provision, although they justified their view with more supportable historical invocations.⁴⁷ While such characterizations may provide flare for newspaper articles and political dis-

40. *Id.* at 780–82, 786–88.

41. *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 266 (4th Cir. 2011).

42. *Id.* at 269–73.

43. Petition for Writ of Certiorari, *supra* note 5, at 1.

44. See also Robert Barnes, *Court to Review Health Overhaul*, WASH. POST, Nov. 15, 2011, at A1; Jim Nolan, *U.S. High Court Puts Off Decision on Taking Va. Health-Care Case*, RICH. TIMES-DISPATCH, Nov. 29, 2011, <http://www2.timesdispatch.com/news/virginia-politics/2011/nov/29/tdmet03-us-high-court-puts-off-decision-on-taking-ar-1499815/>; cf. Petition for Writ of Certiorari, *supra* note 5, at 9–26.

45. E.g., Timothy S. Jost, *Can the States Nullify Health Care Reform?*, 362 N. ENG. J. MED. 869, 869–71 (2010); E.J. Dionne, Jr., Op-Ed, *The New Nullifiers; Ken Cuccinelli's Rush Back to the 1830s*, WASH. POST, Mar. 25, 2010, at A21; Timothy S. Jost, *Health Bill Lawsuits Are Going Nowhere*, CNN, (Mar. 24, 2010, 6:57 AM), <http://www.cnn.com/2010/OPINION/03/24/jost.health.bill.challenges/index.html>.

46. Dionne, *supra* note 45; Jost, *Can the States Nullify Health Care Reform?*, *supra* note 45; Jost, *Health Bill Lawsuits Are Going Nowhere*, *supra* note 45.

47. Compare Michael Boldin, *Virginia to Consider Health Care Nullification*, TENTH AMENDMENT CENTER (Dec. 16, 2009, 8:00 AM), <http://blog.tenthamentendmentcenter.com/2009/12/virginia-to-consider-health-care-nullification/>, with Michael Boldin, *The Growing Movement to Nullify National Health Care*, TENTH AMENDMENT CENTER (Dec. 9, 2009, 8:26 AM), <http://tenthamentendmentcenter.com/2009/12/09/the-growing-movement-to-nullify-national-health-care/> (discussing the Virginia and Kentucky Resolutions of 1798 and abolitionists' advocacy of nullification in the antebellum period).

cussions, they are mistaken. They are premised under an overbroad definition of nullification that is supported by neither the precedent of historical nullification resolutions nor the traditionally accepted procedures of state dispute.

III. DEFINITION AND EXPLICATION OF NULLIFICATION DOCTRINE

A. *Definition*

Nullification is a state measure that: (1) declares an action of the federal government to be unconstitutional; and (2) purportedly renders the federal action null, void, and of no effect within the state's borders.⁴⁸ The term "nullification" is often used interchangeably with "interposition" and "state veto."⁴⁹ Through its history, state legislatures have asserted nullification by issuing state resolutions declaring a targeted federal action unconstitutional, null, void, and of no effect.⁵⁰

The measure is invalid or illegal in terms of constitutional law,⁵¹ but it claims support from natural law.⁵² States resorting to nullification, based on natural right, have maintained their loyalty to the Constitution although, at least abstractly, consistency

48. See BLACK'S LAW DICTIONARY 1173 (9th ed. 2009); see also An Ordinance to Nullify Certain Acts of the Congress of the United States, Purporting to be Laws, Laying Duties and Imposts on the Importation of Foreign Commodities (Nov. 24, 1832), reprinted in STATE DOCUMENTS ON FEDERAL RELATIONS: THE STATES AND THE UNITED STATES 169, 170-73 (Herman V. Ames ed., 1906) [hereinafter S.C. Ordinance of Nullification].

49. E.g., JOHN C. CALHOUN, *The Fort Hill Address: On the Relations of the States and Federal Government* (July 26, 1831), in UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN 367, 371 (Ross M. Lence ed., 1992). James Madison's use of "interposition" in the Virginia Resolutions of 1798 and Report of 1800 was not intended to encompass "nullification," but later usages have rendered the terms nearly synonymous. See Letter from James Madison to William Cabell Rives (Mar. 12, 1833), in 9 THE WRITINGS OF JAMES MADISON 511, 513-14 (Gaillard Hunt ed., 1910); see also IRVING BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION 1787-1800, at 463 (1950). According to these usages, a state nullifies a federal law as equally as it interposes to protect its citizenry from the operation of that law.

50. See, e.g., *infra* Part III.B.

51. *Bush v. Orleans Parish Sch. Bd.*, 364 U.S. 500, 500-01 (1960); see also *Cooper v. Aaron*, 358 U.S. 1, 17-19 (1958).

52. See, e.g., The Kentucky Resolutions of 1798: Resolutions Adopted by the Kentucky General Assembly (Nov. 10, 1798), in 30 THE PAPERS OF THOMAS JEFFERSON 550, 555 (Barbara B. Oberg et al. eds., 2003) [hereinafter Ky. Res. of 1798] ("[Resolving] that the Co-states recurring to their natural right in cases not made federal, will concur in declaring these acts void and of no force . . ."); see also James Madison, *Notes on Nullification* (1835), in 9 THE WRITINGS OF JAMES MADISON, *supra* note 49, 573-74, 588-93 (criticizing nullification's advocates by distinguishing the bounds of constitutional and natural law).

would require the nullifying state's revocation of consent to government under the Constitution and laws of the United States.⁵³ Nullification distinguishes itself from other more symbolic, amendatory, or litigious forms of state resistance because its issuance purports to declare federal actions unconstitutional, null, and void within the issuing state's borders. Nullification does not encompass a state's invitation to the several states offering to call a convention to amend the Constitution.⁵⁴ Article V of the Constitution expressly grants a two-thirds majority of state legislatures the right to compel Congress's call for a convention for constitutional amendment.⁵⁵ While state legislatures could call a convention to amend the Constitution and thereby render a federal action unconstitutional and void, this is a process of constitutional amendment rather than nullification.⁵⁶ Similarly, a state suit—seeking the federal Judiciary's invalidation of a federal law as unconstitutional—is merely litigation rather than nullification.⁵⁷ Moreover, a state's nullification resolution would be inconsistent with its constitutional litigation before the federal courts. The former diminishes the United States Supreme Court's role as arbiter of constitutional controversies between a state and the federal government.⁵⁸ Nullification is cast as a check on judicial legislation, and it assails the Supreme Court's perceived partiality to favor federal power over the rights reserved to the states and the people.⁵⁹

53. See Madison, *Notes on Nullification*, in 9 THE WRITINGS OF JAMES MADISON, *supra* note 49, at 573–74, 588–93; Resolutions of Alabama Proposing a Convention (Jan. 12, 1833), reprinted in STATE DOCUMENTS ON FEDERAL RELATIONS, *supra* note 48, at 180, 181 [hereinafter Ala. to S.C.]. This observation is offered merely to reiterate nullification's inconsistency and repugnance to the Constitution.

54. See *Bush v. Orleans Parish Sch. Bd.*, 188 F. Supp. 917, 926 (E.D. La. 1960) (“It requires no elaborate demonstration to show that [interposition] is a preposterous perversion of Article V of the Constitution.”).

55. U.S. CONST. art. V.

56. See *Bush*, 188 F. Supp. at 926.

57. Compare *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177–78 (1803), with BLACK'S, *supra* note 48, at 1173.

58. *E.g.*, Ky. Res. of 1798, *supra* note 52, in 30 THE PAPERS OF THOMAS JEFFERSON at 550 ¶ 1.

59. See JOHN C. CALHOUN, *Rough Draft of What is Called the South Carolina Exposition* (Dec. 19, 1828), in UNION AND LIBERTY *supra* note 49, at 31, 345–47, 359–60.

B. Nullification's Background as Exposed through Several Historical Examples

Nullification has received sporadic discussion and support in service of various political perspectives and geographical interests,⁶⁰ but the remainder of Part III explicates nullification through the several historical instances when Virginia has considered the measure. Virginia has played a significant role alongside the doctrine's development and distinction, and this narrowed focus will be helpful in considering how the General Assembly's recent actions are wholly separate and distinguishable from nullification.

1. Hinting Nullification: Virginia's Remonstrance Against the Assumption of Debts

Nullification grew as a Democratic-Republican response to congressional Federalists' increasing claims to power. They and their predecessors in political philosophy were frustrated by congressional enactments perceived to be beyond the scope of the enumerated powers.⁶¹ One particularly detested expansion of power came in Alexander Hamilton's proposal that Congress assume the states' debts.⁶² Virginians opposed assumption because it favored Northern commerce at the expense of Southern agriculture, and they believed that it exceeded the Constitution's enumerated powers.⁶³ Virginia's congressmen compromised, however, and assumption became law.⁶⁴

60. See JAMES M. BANNER, JR., *TO THE HARTFORD CONVENTION: THE FEDERALISTS AND THE ORIGINS OF PARTY POLITICS IN MASSACHUSETTS, 1789-1815*, at 118 (1970) (discussing the New England Federalists' calls for nullification and secession during the Hartford Convention); EDWARD PAYSON POWELL, *NULLIFICATION AND SECESSION IN THE UNITED STATES* 73, 344-45 (Lawbook Exchange 2002) (describing Northern abolitionists' arguments to nullify the Fugitive Slave Act); Wisconsin Defies the Federal Courts (Mar. 19, 1859), *reprinted in* STATE DOCUMENTS ON FEDERAL RELATIONS, *supra* note 48, at 303, 304-05 (threatening to nullify the United States Supreme Court's decision in *Ableman v. Booth*, 62 U.S. 506 (1858)).

61. See CHARLES PINNEGAR, *VIRGINIA AND STATE RIGHTS, 1750-1861*, at 99-102 (2009); DAVID J. SIEMERS, *RATIFYING THE REPUBLIC* 1-4, 19, 193-95 (2002); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 537-38 (1969).

62. PINNEGAR, *supra* note 61, at 102-04, 106.

63. *Id.* at 103-04, 106-07.

64. RICHARD R. BEEMAN, *THE OLD DOMINION AND THE NEW NATION, 1788-1801*, at 74-75 (1972).

While the compromise benefitted Virginia,⁶⁵ the deal consoled neither the Commonwealth's constituents nor their representatives in the General Assembly.⁶⁶ Guarding their sacred liberties and the Constitution's strict construction, on December 21, 1790, the General Assembly approved a Remonstrance Against the Assumption of State Debts.⁶⁷ Patrick Henry introduced the measure.⁶⁸ The Remonstrance was an early protest against the federal government's expansion of power, and it assailed Congress for acting without appropriate textual authorization from the Constitution.⁶⁹ Moreover, the General Assembly asserted Virginia's right, as a contracting party to the Constitution, to either shield its citizenry or at least "sound the alarm" when the federal government overstepped its authority.⁷⁰ This Remonstrance was significant in formulating a state protest to an allegedly unconstitutional congressional act, but it only "sound[ed] the alarm."⁷¹ It did not shield Virginians through nullification.⁷² While an incensed Hamilton lambasted the Remonstrance as dangerous in principle, John Jay and William Short consoled him that the public criticism posed no harm to assumption.⁷³ Jefferson's Kentucky Resolutions of 1798 would provide recourse of legal force to accompany the vocal protest embraced by the Remonstrance.

2. Jeffersonian Nullification and Madisonian Invitation: The Kentucky and Virginia Resolutions

Facing increasing maritime hostilities with France, in 1798 Hamilton insisted that the Congress pass a series of acts, generally referred to as the Alien and Sedition Acts.⁷⁴ While enforcement under the Alien Act was rare, the Federalists used the Sedi-

65. *Id.* Specifically, Virginia was given favorable debt treatment and Northern support for the capital's location on the Potomac River rather than in New York City. *Id.*; PINNEGAR, *supra* note 61, at 107.

66. BEEMAN, *supra* note 64, at 75–76; PINNEGAR, *supra* note 61, at 107.

67. PINNEGAR, *supra* note 61, at 107. Federalists in the House of Delegates introduced a "tone[d] down" condemnation of assumption, which suffered defeat. BEEMAN, *supra* note 64, at 78–79.

68. BEEMAN, *supra* note 64, at 78–79.

69. H.J. Res. of Dec. 16, 1790, Va. Gen. Assembly (Reg. Sess. 1790); PINNEGAR, *supra* note 61, at 108.

70. H.J. Res. of Dec. 16 (Va. 1790); PINNEGAR, *supra* note 61, at 108.

71. H.J. Res. of Dec. 16 (Va. 1790); BEEMAN, *supra* note 64, at 80–81.

72. BEEMAN, *supra* note 64, at 80–81.

73. PINNEGAR, *supra* note 61, at 108–09.

74. POWELL, *supra* note 60, at 58–59.

tion Act as a political tool to stifle the dissenting opinions of Democratic-Republican newspaper editors and elected officials.⁷⁵ Critics of then-President John Adams, and of the Acts themselves, were among those prosecuted, no matter how trivial or spontaneous their expressed dissent.⁷⁶ While Virginians expressed their outrage with the Alien and Sedition Acts in county meetings and political campaigns, Thomas Jefferson and James Madison met secretly to draft a formal state remedy to oppose the detested Acts.⁷⁷ Jefferson and Madison had previously discussed state remedies to oppose unconstitutional laws enacted by Congress: in 1788 Madison suggested a "basic doctrine" to a receptive Jefferson, and in 1789 Madison made further reference before Congress.⁷⁸ Jefferson then believed that the federal courts were the appropriate body to judge constitutional disputes between the federal and state governments, but in 1798 the federal Judiciary's partisanship evinced a necessity for state checks against a united and abusive federal government.⁷⁹ John Taylor of Caroline gave rhetorical reference to Southern secession, but Madison and Jefferson favored a public appeal that would "restor[e] their government to its true principles."⁸⁰ Between meetings in early July and October, Jefferson and Madison began writing their respective Resolutions,⁸¹ and in November, Jefferson delivered his drafted Resolutions for Madison's review.⁸² Despite their collaboration, Jefferson and Madison's drafts proposed distinct remedies.⁸³

75. BRANT, *supra* note 49, at 458; POWELL, *supra* note 60, at 61–62 (listing egregious prosecutions under section two of the Sedition Act of 1798); Letter from Thomas Jefferson to James Madison (Nov. 3, 1798), in 30 THE PAPERS OF THOMAS JEFFERSON, *supra* note 52, at 576; Letter from Stevens Thomson Mason to Thomas Jefferson (Nov. 23, 1798), in 30 THE PAPERS OF THOMAS JEFFERSON, *supra* note 52, at 586; Letter from James Madison to Thomas Jefferson (Jan. 12, 1799), in 30 THE PAPERS OF THOMAS JEFFERSON, *supra* note 52, at 619–20.

76. BRANT, *supra* note 49, at 458; POWELL, *supra* note 60, at 61–62.

77. BEEMAN, *supra* note 64, at 186.

78. BRANT, *supra* note 49, at 460.

79. *Id.*

80. C. WILLIAM HILL, JR., THE POLITICAL THEORY OF JOHN TAYLOR OF CAROLINE 219–20 (1977); RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 394 (1971).

81. BRANT, *supra* note 49, at 459–60.

82. BRANT, *supra* note 49, at 460–61; KETCHAM, *supra* note 80, at 395–96; see Letter from Thomas Jefferson to James Madison (Nov. 17, 1798), in 30 THE PAPERS OF THOMAS JEFFERSON, *supra* note 52, at 579–80 (enclosing Jefferson's fair copy of the Kentucky Resolutions).

83. BRANT, *supra* note 49, at 462–63; KETCHAM, *supra* note 80, at 396–97.

a. Jefferson and the Kentucky Resolutions of 1798

Jefferson's drafted Resolutions designed a bold recourse whereby a state nullified unconstitutional federal acts within its borders.⁸⁴ Jefferson had his Resolutions submitted before the Kentucky General Assembly where they were revised before gaining the approval of the legislature and the Governor.⁸⁵ The Resolutions: (1) described Kentucky's duty to judge infractions against the Constitution; (2) opined that the Alien Act and the Act for Punishment of Certain Frauds Committed on the Bank of the United States were unconstitutional usurpations of the states' reserved powers and that the Sedition Act infringed upon the First Amendment and exceeded Congress's enumerated powers; (3) voided and nullified these Acts within Kentucky's borders; and (4) called the several states to similarly void the Acts and to further request their repeal in Congress.⁸⁶ Jefferson did not view nullification as a concerted state recourse,⁸⁷ but rather, he proposed a remedy by which each state could protect itself from unconstitutional federal enactments.⁸⁸ Kentucky sought concurrence from the remaining states, but a lack of outside support would not affect the legislature's nullification.⁸⁹ Such a procedure was premised on natural law and the practical necessity that states must check the federal government's abuses when Congress, the Executive, and the federal Judiciary aligned against the rights of the

84. The Kentucky Resolutions of 1798: Jefferson's Draft (before Oct., 4 1798), in 30 THE PAPERS OF THOMAS JEFFERSON, *supra* note 52, at 536, 536–41 [hereinafter Jefferson's Draft Ky. Res.]; BRANT, *supra* note 49, at 462; KETCHAM, *supra* note 80, at 396.

85. The Kentucky legislature's revisions were rhetorical and did not diminish the effect of Jefferson's remedy. Compare The Kentucky Resolutions of 1798: Jefferson's Fair Copy (before Oct. 4, 1798), in 30 THE PAPERS OF THOMAS JEFFERSON, *supra* note 52, at 543, 543–49, with Ky. Res. of 1798, in 30 THE PAPERS OF THOMAS JEFFERSON, *supra* note 52, at 550–55.

86. Ky. Res. of 1798, in 30 THE PAPERS OF THOMAS JEFFERSON, *supra* note 52, at 550–55.

87. See BRANT, *supra* note 49, at 462.

88. See Letter from Thomas Jefferson to Wilson Cary Nicholas (Dec. 1, 1798), in 30 THE PAPERS OF THOMAS JEFFERSON, *supra* note 52, at 590–91.

89. BRANT, *supra* note 49, at 462; Ky. Res. of 1798, in 30 THE PAPERS OF THOMAS JEFFERSON, *supra* note 52, at 550–55.

states and the people.⁹⁰ Jefferson saw nullification as a moderate recourse, and Kentucky considered it the “rightful remedy.”⁹¹

b. Madison, Jefferson, Taylor, and the Virginia Resolutions of 1798

While he regarded the Alien and Sedition Acts with equal aversion, Madison was apprehensive of nullification.⁹² While corresponding with Jefferson, Madison first suggested that the appropriate body to invoke a principled nullification was a convention of the people of the state rather than the state legislature because the natural right belonged to the body that ratified the Constitution.⁹³ Second, Madison worried that the state legislatures might employ nullification overzealously and themselves intrude upon the legitimate exercise of federal powers enumerated in the Constitution.⁹⁴ Apparently, Jefferson had not considered nullification’s potential abuse when drafting the Kentucky Resolutions.⁹⁵

Reflecting these concerns, Madison’s Virginia Resolutions did not purport to void or nullify the Alien and Sedition Acts.⁹⁶ Like the Kentucky Resolutions they discussed the unconstitutionality of the Alien and Sedition Acts,⁹⁷ but—instead of nullifying the Acts—the Virginia Resolutions offered the “other States a choice of all modes possible of concurring in the substance”⁹⁸ While the appropriate course depended on the states’ response to the Virginia Resolutions, the conceivable remedies did not include

90. Ky. Res. of 1798, in 30 THE PAPERS OF THOMAS JEFFERSON, *supra* note 52, at 550 (“[Resolved] . . . [t]hat the Government created by this compact was not made the exclusive or final *judge* of the extent of the powers delegated to itself; since that would have made its discretion, and not the constitution, the measure of its powers; but that as in all other cases of compact among parties having no common Judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress.”).

91. BRANT, *supra* note 49, at 462; *see also* Kentucky Resolution (Dec. 3, 1799), *reprinted in* THE AVALON PROJECT: DOCUMENTS IN LAW, HISTORY AND DIPLOMACY, http://avalon.law.yale.edu/18th_century/kenres.asp [hereinafter Ky. Res. of 1799].

92. BRANT, *supra* note 49, at 462; KETCHAM, *supra* note 80, at 396.

93. Letter from James Madison to Thomas Jefferson (Dec. 29, 1798), in 30 THE PAPERS OF THOMAS JEFFERSON, *supra* note 52, at 606; KETCHAM, *supra* note 80, at 396.

94. Letter from Madison to Jefferson (Dec. 29, 1798), in 30 THE PAPERS OF THOMAS JEFFERSON, *supra* note 52, at 606; KETCHAM, *supra* note 80, at 396.

95. KETCHAM, *supra* note 80, at 396.

96. *Id.*

97. *Id.* Compare H.J. Res. of Dec. 21, 1798, Va. Gen. Assembly (Dec. Sess. 1798), with Ky. Res. of 1798, in 30 THE PAPERS OF THOMAS JEFFERSON, *supra* note 52, at 550–52.

98. Letter from Madison to Jefferson (Dec. 29, 1798), in 30 THE PAPERS OF THOMAS JEFFERSON, *supra* note 52, at 606; *see* KETCHAM, *supra* note 8, at 396.

nullification.⁹⁹ In spite of Madison's considerations, Jefferson had the Resolutions edited while they were en route to John Taylor of Caroline and the Virginia House of Delegates.¹⁰⁰ With Jefferson's revision, the Virginia Resolutions declared the Alien and Sedition Acts "null, void, and of no effect,"¹⁰¹ and they allowed the General Assembly an opportunity to consider nullification.¹⁰²

While Taylor secured enough votes in the House of Delegates to opine that the Alien and Sedition Acts were unconstitutional, nullification's support was less certain.¹⁰³ A coalition of Federalists and moderate Democratic-Republicans shared Madison's concern that a rogue state might misuse the doctrine, void legitimate exercises of federal power within its jurisdiction, and thereby wreak anarchy and disunion.¹⁰⁴ They did not wish for the Virginia Resolutions to provide such a precedent.¹⁰⁵ While Taylor tried to rally support for nullification, he favored the doctrine only insofar as he hoped it would give rise to a convention for amendment.¹⁰⁶ Accordingly, Taylor removed the language "and not law, but utterly null, void and of no force or effect" from the Virginia Resolutions.¹⁰⁷ The resulting remedy was more akin to the vocal protest of the Remonstrance Against the Assumption of State Debts, but it also called for concerted state action to oppose the unconstitutional Acts.¹⁰⁸ The House of Delegates favored Madison's invitation and protest over Jefferson's nullification,¹⁰⁹ and the Virginia Resolutions received the General Assembly's approval and the

99. See BRANT, *supra* note 49, at 463 ("It is clear that whatever remedies Madison had in mind, they did not include the power of individual states, or the legislatures of all the states, to nullify federal laws.").

100. Letter from Thomas Jefferson to Wilson Cary Nicholas (Nov. 29, 1798), in 30 THE PAPERS OF THOMAS JEFFERSON, *supra* note 52, at 590 ("The more I have reflected on the phrase in the paper you shewed [sic] me, the more strongly I think it should be altered. suppose [sic] you were to instead of the invitation to cooperate in the annulment of the acts, to make it an invitation: 'to concur with this commonwealth in declaring, as it does hereby declare, that the said acts are, and were ab initio—null, void and of no force, or effect' I should like it better."); BEEMAN, *supra* note 64, at 189.

101. KETCHAM, *supra* note 80, at 397; see BRANT, *supra* note 49, at 462.

102. BEEMAN, *supra* note 64, at 190–94; PINNEGAR, *supra* note 61, at 138.

103. BEEMAN, *supra* note 64, at 193–94.

104. Compare *id.*, with Madison to Jefferson (Dec. 29, 1798), in 30 THE PAPERS OF THOMAS JEFFERSON, *supra* note 52, and KETCHAM, *supra* note 80, at 396.

105. BEEMAN, *supra* note 64, at 193–94.

106. *Id.* at 194; see also HILL, *supra* note 80, at 226–29.

107. HILL, *supra* note 80, at 229.

108. Compare H.J. Res. of Dec. 21 (Va. 1798), with H.J. Res. of Dec. 16 (Va. 1790).

109. See BEEMAN, *supra* note 64, at 193–94.

Governor's signature before their contents were dispatched to the executives of the several states.¹¹⁰

c. Responses from the Several States

Virginia and Kentucky's fears of absolutism motivated their Resolutions, but the Federalists' fears of anarchy and ineffectual government motivated states' responses.¹¹¹ While Virginia's Remonstrance was a political expression of mere words, Federalists saw the Virginia and Kentucky Resolutions as open challenges to the enforcement of congressionally enacted laws.¹¹² In response, the legislatures of several Northern states issued their own resolutions condemning those of Virginia and Kentucky.¹¹³ These states apparently did not distinguish Kentucky's nullification from Virginia's call for concerted action.¹¹⁴ The Federalist states' responses had two purposes: (1) to condemn nullification and propose that Virginia and Kentucky pursue their interests by other means; and (2) to express their opinion that the Alien and Sedition Acts were constitutional.¹¹⁵ Important for this comment's discussion, these states suggested to Virginia and Kentucky that the proper means of challenging a federal law's constitutionality were: (1) to raise the issue before the federal courts; (2) to amend the Constitution; or (3) to seek congressional repeal of the law.¹¹⁶ They further reminded the legislatures of Virginia and Kentucky that the people returned Federalist majorities to Congress when offered the opportunity to express their disapproval in recent elections.¹¹⁷ Fearful of political backlash against the Democratic-

110. See *Replies of the States*, reprinted in STATE DOCUMENTS ON FEDERAL RELATIONS, *supra* note 48, at 16.

111. See BEEMAN, *supra* note 64, at 193-94; cf. WOOD, *supra* note 61, at 19, 23. Compare PINNEGAR, *supra* note 61, at 108-09, with POWELL, *supra* note 60, at 65.

112. Compare PINNEGAR, *supra* note 61, at 108, with POWELL, *supra* note 60, at 65.

113. *E.g.*, Response from Massachusetts to Virginia (Feb. 9, 1799), reprinted in STATE DOCUMENTS ON FEDERAL RELATIONS, *supra* note 48, at 18-20 [hereinafter Mass. to Va.]. Among the other states resolving in condemnation of the Virginia and Kentucky Resolutions were Delaware, Rhode Island, New York, Pennsylvania, Connecticut, New Hampshire and Vermont. Replies of the States, reprinted in STATE DOCUMENTS ON FEDERAL RELATIONS, *supra* note 48, at 16-17, 20-26.

114. See, *e.g.*, Mass. to Va. (Feb. 9, 1799), reprinted in STATE DOCUMENTS ON FEDERAL RELATIONS, *supra* note 113, at 18-20.

115. See *id.* at 18-19.

116. *E.g.*, *id.*

117. *E.g.*, *id.* at 19.

Republicans, Jefferson and Madison had Virginia and Kentucky clarify their respective positions in the Virginia Report of 1800 and the Kentucky Resolution of 1799.¹¹⁸

d. Aftermath: The Political Safeguards of Federalism and a Moot Question of the Alien and Sedition Acts' Constitutionality

Virginia, Kentucky, and the Democratic-Republicans ultimately relied on the "political safeguards of federalism" to redress the Federalist Congress's abuses.¹¹⁹ Virginia and Kentucky never challenged the Alien and Sedition Acts in the federal courts. Any legal challenge was sure to fail because the Judiciary "was the most partisan branch of the government."¹²⁰ There was insufficient support for an Article V convention, as evidenced by the lack of concurring responses to the Resolutions of 1798.¹²¹ While repeal bills were submitted in Congress, the Federalists "haughtily voted them down."¹²² Professor Powell characterized the Federalist Congress as heavy-handed and reckless with its political capital.¹²³ The untested realm of national politics was met with inexperience and miscalculated arbitrariness in power, and the Federalists unwittingly fractured their coalitions and caused their party's gradual demise.¹²⁴ In 1800, Jefferson was elected President, the Democratic-Republicans won the House, and the Party

118. PINNEGAR, *supra* note 61, at 143–45. Madison drafted the Virginia Report of 1800, but the authorship of the 1799 Kentucky Resolution remains unknown. H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 VA. L. REV. 689, 705 n.54 (1994).

119. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550–51 (1985); see also Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 544 (1954) ("The actual extent of central intervention in the governance of our affairs is determined far less by the formal power distribution than by the sheer existence of the states and their political power to influence the action of the national authority."). While *Garcia's* reference to the *merely* political safeguards of federalism has been criticized as a superficial and diluted gloss on federalism, *Garcia*, 469 U.S. at 557–79 (Powell, J., dissenting); *id.* at 579–80 (Rehnquist, J., dissenting), *id.* at 580–89 (O'Connor, J., dissenting), it is nonetheless instructive of the states' abilities to use elections and political posture to reflect and potentially protect their interests. *Id.* at 550–51 (majority opinion).

120. POWELL, *supra* note 60, at 84.

121. Considering the number of states responding that the Alien and Sedition Acts were affirmatively constitutional, see *supra* notes 113–15 and accompanying text, it was apparent that Virginia and Kentucky could not have achieved the concurrence necessary to require Congress's call for convention or to approve a constitutional amendment.

122. POWELL, *supra* note 60, at 91.

123. *Id.*

124. See *id.*

narrowed the Federalist majority in the Senate.¹²⁵ The Supreme Court never ruled on the Alien and Sedition Acts' constitutionality,¹²⁶ and there was no significant event that tested the Kentucky Resolutions' asserted nullification.¹²⁷ Ultimately, the political safeguards of federalism checked the Federalists' excesses,¹²⁸ and the Alien and Sedition Acts' key provisions expired under Jefferson's presidency.¹²⁹

3. The South Carolina Ordinance of Nullification: Nullification in Full Force

As the early factionalism between the Federalists and the Democratic-Republicans subsided, the era of sectionalism arose with Southern and Northern economic interests pitted against one another.¹³⁰ Nullification's next invocation came in the context of tariff controversies that boiled to the point of crisis in 1832.¹³¹ Debate over tariffs had already raged through the 1820's,¹³² and it returned as a political issue in the midst of the 1828 presidential election.¹³³ Despite contrary efforts in Congress,¹³⁴ the protective tariff of 1828, popularly derided as the Tariff of Abominations,

125. BEEMAN, *supra* note 64, at 232; Congressional Biographical Directory, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, 57–61 (Andrew R. Dodge & Betty K. Koed eds., 2005).

126. *But see* New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) (discussing the "broad consensus" that the Sedition Act was unconstitutional).

127. *But see* BEEMAN, *supra* note 64, at 224–28 (detailing the trial of James Thomas Callender in May and June of 1800 over which Federalist Judge Samuel Chase presided).

128. *See* POWELL, *supra* note 60, at 90–91.

129. Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 803 (2008).

130. POWELL, *supra* note 60, at 241–42.

131. *See* RICHARD E. ELLIS, *THE UNION AT RISK: JACKSONIAN DEMOCRACY, STATES' RIGHTS, AND THE NULLIFICATION CRISIS* 41–51 (1987) (discussing the nullification controversy during Andrew Jackson's presidency).

132. *Id.* at 41.

133. *Id.*

134. *See* FREDERIC BANCROFT, *CALHOUN AND THE SOUTH CAROLINA NULLIFICATION MOVEMENT* 10–11 (Johns Hopkins Press 1928). Specifically, then-Vice President John C. Calhoun's congressional allies tried to rally opposition from Northern manufacturers by increasing the proposed tariffs on certain raw materials that had previously enjoyed protective treatment. *Id.* at 10. They hoped that such an abominable tariff would suffer a resounding defeat in Congress. *Id.*

became law.¹³⁵ The tariff's passage did not compel the South Carolina legislature to nullification,¹³⁶ but a confluence of events in 1831 rallied the state to change course on the tariff.¹³⁷ The South was in a defensive position, and South Carolina saw nullification as the solution.¹³⁸ On November 24, 1832, South Carolina issued its Ordinance of Nullification: (1) declaring the tariff protective and, therefore, unconstitutional; (2) voiding the tariff within the state's borders; (3) prohibiting the duties' enforcement within the state; (4) prohibiting appeals of the Ordinance's validity to the United States Supreme Court and holding in contempt any individuals filing such appeals; (5) requiring state officials to take an oath to uphold the Ordinance; and (6) threatening additional nullifications, and possibly secession, in response to the federal government's further attempts to compel South Carolina's enforcement of the tariff.¹³⁹ South Carolina also called for a convention of states to amend the Constitution.¹⁴⁰

Though Georgia was receptive to a convention of Southern states,¹⁴¹ Alabama and Virginia urged conciliation,¹⁴² and the South's responses were unanimously opposed to nullification, however sympathetic they were to South Carolina's political and constitutional arguments.¹⁴³ The Virginia General Assembly fur-

135. *Id.* at 10–11.

136. Nullification still received much discussion in 1828 South Carolina. *See, e.g.,* JOHN NIVEN, JOHN C. CALHOUN AND THE PRICE OF UNION (William J. Cooper, Jr., ed., 1988). The reelected Vice President Calhoun drafted the South Carolina Exposition and Protest while on recess. *Id.* at 158–64. The document outlined a bold process of nullification, based in part on the Virginia and Kentucky Resolutions of 1798. *Id.* The South Carolina legislature only printed the Exposition and Protest. *Id.* at 163–64.

137. *See id.* at 179–83. This confluence of events included Vice President Calhoun's public support for nullification, Nat Turner's slave revolt, increasing annoyance with Northern antagonism, and dissatisfaction with President Jackson's reforms of the Tariff of Abominations. *Id.*; *see also* S.C. Ordinance of Nullification, *reprinted in* STATE DOCUMENTS ON FEDERAL RELATIONS, *supra* note 48, at 169.

138. NIVEN, *supra* note 136, at 159–60, 190.

139. S.C. Ordinance of Nullification, *reprinted in* STATE DOCUMENTS ON FEDERAL RELATIONS, *supra* note 48, at 170–73.

140. Call for a Convention of the States by South Carolina (Dec. 18, 1832), *reprinted in* STATE DOCUMENTS ON FEDERAL RELATIONS, *supra* note 48, at 176.

141. Georgia on a Southern Convention and Nullification (Dec. 14, 1832), *reprinted in* STATE DOCUMENTS ON FEDERAL RELATIONS, *supra* note 48, at 179–80.

142. Resolves of Virginia (Jan. 26, 1833), *reprinted in* STATE DOCUMENTS ON FEDERAL RELATIONS, *supra* note 48, at 185–88 [hereinafter Va. to S.C.]; Ala. to S.C., *reprinted in* STATE DOCUMENTS ON FEDERAL RELATIONS, *supra* note 48, at 180–82.

143. Ala. to S.C., *reprinted in* STATE DOCUMENTS ON FEDERAL RELATIONS, *supra* note 48, at 181 (“*And be it further resolved, That nullification, which some of our southern brethren recommend as the constitutional remedy for the evils under which we labor, is*

ther assailed the Ordinance as inconsistent with its Resolutions of 1798.¹⁴⁴ Madison returned to the public sphere to voice support for the General Assembly's position and to further criticize South Carolina's notion that a state could invoke the natural law remedy of nullification to void a federal law yet nonetheless remain a party to the constitutional compact.¹⁴⁵ South Carolina stood alone in nullifying the tariff.

a. Nullification's Effect: Crisis and Compromise

South Carolina's Ordinance of Nullification sparked a national crisis.¹⁴⁶ President Andrew Jackson compared nullification to treason,¹⁴⁷ and Congress responded by acting on a proposed Force Bill.¹⁴⁸ The legislation granted federal courts exclusive jurisdiction over customs collection cases, and it authorized the President's use of military force to ensure the unencumbered collection of the tariff.¹⁴⁹ South Carolina faced potential confrontation with the United States military.¹⁵⁰ At the same time, however, Congress began considering a tariff bill that would achieve compromise,¹⁵¹ and South Carolina's Nullifiers met to postpone their Ordinance's effective date pending congressional action on the tariff.¹⁵² With solid Southern support and additional support from the Western states and many Nationalists, Congress achieved a "liberal reduction of the tariff."¹⁵³ The Senate having already approved each

unsound in theory and dangerous in practice; that as a remedy, it is unconstitutional and essentially revolutionary, leading in its consequences to anarchy and civil discord, and finally to the dissolution of the Union."). In addition to Virginia, Alabama, and Georgia, Southern states resolving against South Carolina's nullification included North Carolina and Mississippi. *Id.* at 180–88.

144. Va. to S.C., *reprinted in* STATE DOCUMENTS ON FEDERAL RELATIONS, *supra* note 48, at 185–88 (stating that the Virginia Resolutions of 1798 and the Report of 1800 did not sanction South Carolina's nullification of the Tariff of Abominations).

145. See Madison, *Notes on Nullification*, in 9 THE WRITINGS OF JAMES MADISON, *supra* note 49, at 573–74, 576–77, 588–93.

146. See ELLIS, *supra* note 131, at 58–61, 178–80.

147. See NIVEN, *supra* note 136, at 93.

148. See *id.* at 194.

149. BANCROFT, *supra* note 134, at 150; see An Act Further to Provide for the Collection of Duties on Imports (Mar. 2, 1833), *reprinted in* THE LAWS OF THE UNITED STATES: ACTS OF THE EIGHTEENTH CONGRESS OF THE UNITED STATES 632, 632–35 (1833).

150. See BANCROFT, *supra* note 134, at 152 (describing President Jackson's determination to have a "force bill" and stating "perhaps [President Jackson] would not have objected if it had been a bit 'bloody'").

151. See *id.* at 153–54.

152. *Id.* at 150–51.

153. *Id.* at 166.

bill,¹⁵⁴ the House passed both the Force Bill and the compromise tariff on March 1, 1833.¹⁵⁵ The next day, President Jackson signed both bills into law.¹⁵⁶

Compromise warranted the Ordinance's repeal.¹⁵⁷ The Nullifiers claimed victory,¹⁵⁸ but it was pyrrhic. Nullification achieved compromise as much as compromise did away with nullification.¹⁵⁹ Though the South Carolina legislature nullified the Force Act shortly after it repealed its Ordinance of Nullification, the state complied with the new tariff and the President never invoked the Force Act.¹⁶⁰ South Carolina never accomplished "nullification in fact" despite the nullification attaining an abstract "legal or, rather, illegal form."¹⁶¹

b. Interposition and Massive Resistance

Desegregation and Massive Resistance renewed discussion of nullification in the twentieth century.¹⁶² The Southern states met the United States Supreme Court's *Brown v. Board of Education of Topeka* opinion with strong opposition, both for the opinion's stance on racial policies and its underlying legal theory.¹⁶³ Writing for the *Richmond News Leader*, editor James Jackson Kilpatrick called the Southern states to Massive Resistance and offered a model nullification statute for consideration by their legislatures.¹⁶⁴

154. *See id.* at 165.

155. *Id.* at 166.

156. *Id.* at 167.

157. *See id.* at 168–69.

158. *See id.* at 168, 171–72.

159. *See id.* at 168–72.

160. *See id.* at 169–71; *see also* An Ordinance to Nullify an Act of the Congress of the United States, Entitled "An Act Further to Provide for the Collection of Duties on Imports," Commonly Called the Force Bill (Mar. 18, 1833) *reprinted in* STATE DOCUMENTS ON FEDERAL RELATIONS, *supra* note 48, at 188, 189 [hereinafter S.C. Ordinance to Nullify the Force Bill].

161. BANCROFT, *supra* note 134, at 171.

162. *E.g.*, GEORGE LEWIS, MASSIVE RESISTANCE: THE WHITE RESPONSE TO THE CIVIL RIGHTS MOVEMENT 62 (2006).

163. *See, e.g.*, S.J. Res. 914, S.C. Gen. Assembly (Reg. Sess. 1956).

164. JAMES W. ELY, JR., THE CRISIS OF CONSERVATIVE VIRGINIA: THE BYRD ORGANIZATION AND THE POLITICS OF MASSIVE RESISTANCE 39–40 (1976).

The Virginia General Assembly briefly considered the remedy before determining that it was impractical and likely unconstitutional.¹⁶⁵ The Attorney General of Virginia James Lindsay Almond, Jr., opined that nullification would not have legal effect and that it did not raise a valid state defense.¹⁶⁶ Instead of resorting to nullification, the General Assembly called for an Article V convention to amend the Constitution and resolved a "firm intention to take all appropriate measures honorably, legally and constitutionally available . . . to resist [the United States Supreme Court's] illegal encroachment upon [the Commonwealth's] sovereign powers."¹⁶⁷ This revision demonstrated the General Assembly's preferences for constitutional procedure and vocal protest.¹⁶⁸ Virginia's impediments to desegregation would eventually cave to further rulings from the federal courts and gradual acceptance of desegregation.¹⁶⁹

Several states joined Virginia in calling for an Article V Convention, but they went further in declaring the *Brown* decision "null, void, and of no effect" unless the Constitution was otherwise amended.¹⁷⁰ These nullification resolutions were assailed by the federal courts.¹⁷¹ Leaving no question about the states' individually asserted rights to authoritatively interpret the Constitution contrary to court orders and valid congressional enactments, the United States Supreme Court in *Cooper v. Aaron* unequivocally reaffirmed that: "[I]t is emphatically the province and duty of the judicial department to say what the law is."¹⁷² The Court maintained that "the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases,"¹⁷³ if state courts, legislatures, or governors could nullify or otherwise

165. *Id.* at 40–42.

166. *Id.* at 41 (citing 1956 Op. Va. Att'y Gen. 194, 194–97).

167. S.J. Res. 3, Va. Gen. Assembly (Reg. Sess. 1956).

168. ELY, *supra* note 164, at 39–40.

169. *See id.* at 184, 203–07.

170. Compare S.J. Res. 914, S.C. Gen. Assembly (Reg. Sess. 1956), with 1960 La. Acts 2, 2–10 (30th Ex. Sess. 1960), and S.J. Res. 914 (S.C. 1956), and H.J. Res. 130, Ga. Gen. Assembly (Reg. Sess., 1956), and H.J. Res. 18, Ala. Legislature (1st Spec. Sess. 1956), and S.J. Res. 125, Miss. Legislature (Reg. Sess. 1956).

171. *Bush v. Orleans Parish Sch. Bd.*, 188 F. Supp. 916, 923–27 (1960); LEWIS, *supra* note 162, at 63, 119; *see also Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803)).

172. *Cooper*, 358 U.S. at 18 (quoting *Marbury*, 5 U.S. (1 Cranch.) at 177 (internal quotation marks omitted)).

173. *Id.* at 18–19 (quoting *Sterling v. Constantin*, 287 U.S. 378, 397–98 (1932)) (internal quotation marks omitted).

undermine orders of the federal courts.¹⁷⁴ Two years later, the Supreme Court offered a more pointed opinion of nullification by stating, “interposition is not a *constitutional* doctrine . . . [i]f taken seriously, it is illegal defiance of constitutional authority.”¹⁷⁵ These opinions confirmed what had long been widely acknowledged: that the purported right of nullification had no basis in the Constitution or the laws thereunder.¹⁷⁶

IV. VIRGINIA'S LEGISLATIVE AND CONSTITUTIONAL CHALLENGES TO THE MINIMUM ESSENTIAL COVERAGE PROVISION DID NOT INVOKE NULLIFICATION

The Virginia General Assembly has long given voice to the Commonwealth's protests,¹⁷⁷ but the body has been cautious to mount good faith political and legal challenges to what it has perceived as unconstitutional federal enactments.¹⁷⁸ The Health Care Freedom Act's passage followed in this trend. While conceding that comprehensive health care reform and universal health care insurance were laudable policy goals, Virginia's General Assembly, Governor, and Attorney General feared that the means adopted by Congress were unconstitutional and inimical to American liberty.¹⁷⁹ The General Assembly nonetheless adhered to the processes of the Constitution and abided the federal government's appropriate authority when it passed the Health Care Freedom Act. The Commonwealth's suit against Secretary Sebelius simi-

174. *Id.* at 18–19 (citing *United States v. Peters*, 9 U.S. (5 Cranch) 115, 136 (1809)).

175. *United States v. Louisiana*, 364 U.S. 500, 501 (1960) (quoting *Bush v. Orleans Parish Sch. Bd.*, 188 F. Supp. 916, 926 (E.D. La. 1960) (internal quotation marks omitted)). The brief per curiam opinion affirmed the district court's more detailed rejection of the doctrine.

176. *Id.* at 501; *see also* Letter from James Madison to William Cabell Rives (Mar. 12, 1983), in 9 THE WRITINGS OF JAMES MADISON; *supra* note 49, at 511–13; Ala. To S.C., *reprinted in* STATE DOCUMENTS ON FEDERAL RELATIONS, *supra* note 48, at 181; Mass. to Va., *reprinted in* STATE DOCUMENTS ON FEDERAL RELATIONS, *supra* note 48, at 18–19.

177. *See supra* Part III.B; *see also* RICHARD BLAND, AN INQUIRY INTO THE RIGHTS OF THE BRITISH COLONIES 6, 11–16 (Earl Grey Swem ed., 1766) (protesting Parliament's usurpations and discussing the General Assembly's precedential assertions against parliamentary power over the Colony's internal affairs).

178. *See supra* Part III.B.

179. Cuccinelli, Getchell, & Russell, *supra* note 10, at 335–36; Press Release, Taylor Thornley, *supra* note 24; Press Release, Office Att'y Gen. of Va., Virginia Wins Federal Court Challenge Over Constitutionality of Federal Health Care Act: Health Insurance Mandate Is Unconstitutional (Dec. 13, 2010), available at http://www.oag.state.va.us/Media%20and%20News%20Releases/News_Releases/Cuccinelli/121310_HealthCare_Ruling.html.

larly respected the Constitution and shunned the doctrine of nullification. To address the mischaracterizations of the Health Care Freedom Act and the subsequent suit against Secretary Sebelius, it is necessary to consider the actions of the General Assembly and Attorney General Cuccinelli in turn. This discussion will be assisted by the further consideration that Virginia challenged the minimum essential coverage provision in the manner recommended by nullification's earliest critics.

A. *The General Assembly Did Not Nullify the Minimum Essential Coverage Provision*

1. Neither the Plain Text nor the Legislative History of the Health Care Freedom Act Suggested the General Assembly's Nullification of the Minimum Essential Coverage Provision

Neither the Health Care Freedom Act's plain text nor its legislative history suggested any intention by the General Assembly to nullify the minimum essential coverage provision. Noticeably absent from the Act and its drafts was any language purporting to render the minimum essential coverage provision null, void, and of no effect.¹⁸⁰ State legislatures have historically nullified federal enactments by expressly resolving that the targeted law is unconstitutional, null, void, and of no effect,¹⁸¹ and a model "Federal Health Care Nullification Act" included these terms to effect a desired nullification.¹⁸² Virginia's Health Care Freedom Act employed neither these effective terms nor any equivalents.¹⁸³ Given that the General Assembly has considered nullification resolutions on several notable occasions and responsively averted the doctrine by removing the effective terms null, void, and of no effect,¹⁸⁴ it appears that the present Act's absence of the language is

180. See VA. CODE ANN. § 38.2-3430.1:1 (Cum Supp. 2011); Act of Mar. 10, 2010, ch. 106, 2010 Va. Acts 102 (codified as amended at VA. CODE ANN. § 3.82-3430.1:1 (Cum. Supp. 2011)); Act of Mar. 10, 2010, ch. 107, 2010 Va. Acts 102 (codified as amended at VA. CODE ANN. § 3.82-3430.1:1 (Cum. Supp. 2011)); Act of Mar. 10, 2010, ch. 108, 2010 Va. Acts 102, 102-103 (codified as amended at VA. CODE ANN. § 3.82-3430.1:1 (Cum. Supp. 2011)); Act of Apr. 21, 2010, ch. 818, 2010 Va. Acts 1720 (codified as amended at VA. CODE ANN. § 3.82-3430.1:1 (Cum. Supp. 2011)).

181. See *supra* Part III.B.

182. Federal Health Care Nullification Act, TENTH AMENDMENT CENTER 1-2 (2010), available at <http://www.tenthamendmentcenter.com/legislation/federal-health-care-nullification-act/>.

183. See VA. CODE ANN. § 38.2-3430.1:1 (Cum. Supp. 2011).

184. See *supra* Part III.B.

a similar rejection of nullification. Nor did the General Assembly assert its own authority to interpret the United States Constitution and declare the minimum essential coverage provision unconstitutional and invalid within Virginia's borders.¹⁸⁵ These are determinative characteristics of nullification resolutions,¹⁸⁶ and they are noticeably absent from any legislation considered or enacted by the General Assembly in anticipation of, and in response to, Congress's passage of the ACA and the minimum essential coverage provision contained therein.¹⁸⁷ The absence of this effective language suggests either that legislators rejected nullification as an inappropriate remedy early in the drafting process or that they never considered nullification as a possible recourse.

Further, the timing of the Health Care Freedom Act's passage weighs against its characterization as an invocation of nullification. It is significant to this discussion that the General Assembly passed the Act when Congress was still considering the ACA. At that time the ACA's final form and eventual passage remained uncertain.¹⁸⁸ It would seem nonsensical for the General Assembly to have nullified a proposed federal enactment. By definition, nullification is a logically impossible remedy when the targeted federal law has not been enacted. When a state intends to nullify and void a federal law, it follows that there must be an existing federal law, regulation, or opinion to render null and void.¹⁸⁹ Accordingly, all invocations of nullification have come in response to enacted federal legislation or issued Supreme Court opinions.¹⁹⁰ While South Carolina threatened to nullify the Force Act before its passage, the nullification did not occur until the South Carolina legislature resolved to do so subsequent to the Force Act's enactment.¹⁹¹ Virginia's legislation does not suggest any sort of threatened or logically impossible preemptive nullification,¹⁹² and any characterization of the Health Care Freedom Act as such is

185. See VA. CODE ANN. § 38.2-3430.1:1 (Cum. Supp. 2011).

186. See *supra* Part III.B.

187. See VA. CODE ANN. § 38.2-3430.1:1 (Cum. Supp. 2011); see also *supra* note 180.

188. Petition for Writ of Certiorari, *supra* note 5, at 19.

189. See *supra* Part III.

190. See *supra* Part III.B.

191. Compare S.C. Ordinance of Nullification, reprinted in STATE DOCUMENTS ON FEDERAL RELATIONS, *supra* note 48, at 170–72, with S.C. Ordinance to Nullify the Force Bill, reprinted in STATE DOCUMENTS ON FEDERAL RELATIONS, *supra* note 48, at 189.

192. See VA. CODE ANN. § 38.2-3430.1:1 (Cum. Supp. 2011).

justified neither by the actions of the General Assembly nor by precedential nullification resolutions.

2. The Intended Purposes of the Health Care Freedom Act Did Not Imply the General Assembly's Nullification of the Minimum Essential Coverage Provision

While the Health Care Freedom Act's plain text and legislative history should sufficiently establish that the General Assembly did not invoke nullification, an exhaustive analysis will consider whether the Act's intended purposes implicated nullification. The Health Care Freedom Act, as either a definition of state policy or a message to Congress, posed no nullification threat to the pending minimum essential coverage provision.¹⁹³ As a means to satisfy Article III standing requirements and challenge the minimal essential coverage provision in federal court, the Act's intended end nonetheless conceded the federal Judiciary's authority to interpret the Constitution in controversies arising between a state and the federal government.¹⁹⁴ Even if the suit accomplished the minimal essential coverage provision's invalidation as unconstitutional, the authority to render such an opinion concededly belonged to the federal Judiciary rather than the General Assembly or the Attorney General of Virginia.¹⁹⁵

a. As a Definition of the Commonwealth's Public Policy, the Virginia Health Care Freedom Act Did Not Impliedly Nullify the Minimum Essential Coverage Provision

The most convincing and identifiable purpose of the Virginia Health Care Freedom Act was to define the Commonwealth's policy of individual choice in the market for health care insurance. During the ceremonial bill signing of March 24, Governor McDonnell stated that the "Health Care Freedom Act sets as the policy of the Commonwealth that no individual, with several specific exceptions, can be required to purchase health insurance coverage."¹⁹⁶ Delegate Robert Marshall, the sponsor of House Bill 10, promoted a similar purpose for the Act as defining state policy

193. See *infra* Parts IV.A.1.a–b.

194. See *infra* Part IV.A.2.c.

195. *Id.*

196. Press Release, Taylor Thornley, *supra* note 24.

toward health care insurance, as applied to state officials.¹⁹⁷ When prompted how the Act would be effected relative to a hypothetically enacted federal minimum essential coverage provision, he responded that: (1) in cases of uninsured and noncompliant Virginians; (2) against whom federal Internal Revenue officials assessed a tax-penalty pursuant to the minimum essential coverage provision; (3) the federal officials having ordered state officials to collect the tax-penalty or otherwise seize the noncompliant individual's property; (4) the Health Care Freedom Act would bar state officials from collecting the tax-penalty or any other property under the federal officials' order.¹⁹⁸ Delegate Marshall characterized the Act in the context of *Printz v. United States* and *New York v. United States*,¹⁹⁹ which acknowledged the dual-sovereignty of the state and federal governments and forbade the latter from commandeering officials of the former.²⁰⁰ The states retain the prerogative to govern and direct their own officials, and in a hypothetical scenario such as Delegate Marshall's, Virginia's officials would be constitutionally protected from federal compulsion to implement the federal government's regulatory scheme.²⁰¹

Though the court of appeals considered the Health Care Freedom Act's "only apparent function" to be the declaration of the Commonwealth's opposition to the minimum essential coverage provision, this conclusion was premised heavily on an error in dating the Act's codification and a selective reading of the statements accompanying the ceremonial bill signing.²⁰² The court operated under the mistaken understanding that the Health Care Freedom Act became law when Governor McDonnell ceremonially signed it on March 24.²⁰³ According to the Virginia Constitution, however, the Act became law on March 10 when the General Assembly approved the Governor's recommended revisions.²⁰⁴ Believing the Act to be responsive to the ACA's passage, the court of

197. See Interview by Megyn Kelly with Delegate Robert Marshall, *supra* note 20.

198. Interview by Brian Wilson with Delegate Robert Marshall, *supra* note 20; Interview by Megyn Kelly with Delegate Robert Marshall, *supra* note 20.

199. *Id.*

200. *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 155–56 (1992).

201. Compare Interview by Megyn Kelly with Delegate Robert Marshall, *supra* note 20, with *Printz*, 521 U.S. at 935, with *New York*, 505 U.S. at 156.

202. *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 270–71 (4th Cir. 2011).

203. Petition for Writ of Certiorari, *supra* note 5, at 19 n.5 (citing VA. CONST. art. V, § 6(b)(iii)).

204. *Id.*; accord VA. CONST. art. V, § 6(b)(iii).

appeals was convinced that Virginia's Act was merely declaratory.²⁰⁵ Further, the court apparently considered only the accompanying statements that the Act would "sen[d] a strong message."²⁰⁶ The opinion mentioned neither Governor McDonnell's statement that the Act defined state policy nor Delegate Marshall's discussion of the Act in the context of *Printz*.²⁰⁷ Nor did the opinion discuss the General Assembly's express rejection of a merely declaratory purpose when it voted down Senator Chap Petersen's proposed amendment to render the Health Care Freedom Act declaratory and non-binding.²⁰⁸ These significant omissions are probably attributable to the court's limited focus of considering whether there existed an actual and imminent injury-in-fact to the Commonwealth's ability to enforce its code of laws,²⁰⁹ and its interpretation should not be read to undermine the General Assembly's power to define state policy as it intended in the Health Care Freedom Act.

The Health Care Freedom Act did not limit the federal government's authority to assess and collect tax-penalties on uninsured and noncompliant Virginians.²¹⁰ The Act did not attempt to define the federal government's policy toward individual choice in the health insurance market, and the statements of Governor McDonnell and Delegate Marshall only suggested application to the officers of the Commonwealth.²¹¹ The Attorney General argued its application to state businesses and localities.²¹² The dual-sovereignty shared between the Commonwealth and the federal government prevents either co-sovereign from commandeering

205. *Virginia ex rel. Cuccinelli*, 656 F.3d at 270.

206. *Id.* (quoting Press Release, Taylor Thornley, *supra* note 24).

207. *See id.*

208. *See id.*; Farley, *supra* note 4, at 56 & n.138 ("This legislation is merely intended to inform the United States Congress of the resolve of the General Assembly of Virginia in regard to proposed Federal legislation. It is not intended to have any effect upon the existing laws of the Commonwealth or any future laws enacted by this body." (quoting S. JOURNAL, Senate of Va., Reg. Sess. ____ (2010) (internal quotation marks omitted))).

209. *See Virginia ex rel. Cuccinelli*, 656 F.3d at 270 & n.2.

210. *Id.* at 270 (citing *Ohio v. Thomas*, 173 U.S. 276, 283 (1899)).

211. *See* VA. CODE ANN. § 38.2-3430.1:1 (Cum. Supp. 2011); Press Release, Taylor Thornley, *supra* note 24; Interview by Megyn Kelly with Delegate Robert Marshall, *supra* note 20.

212. *See Virginia ex rel. Cuccinelli*, 656 F.3d at 270.

the officials of the other.²¹³ Accordingly, the court of appeals determined that the Health Care Freedom Act had no application to the federal government or its officers.²¹⁴ Assuming that the Supreme Court does not determine the minimum essential coverage provision repugnant to the Constitution, the federal government could lawfully assess and enforce the tax-penalty within the boundaries of Virginia regardless of the Commonwealth's opposite policy.²¹⁵

As a statute directing the duties of state officers—and thereby withholding application to federal officers in their respective duties—the Health Care Freedom Act posed no threat to the minimum essential coverage provision's enforcement in Virginia and further conceded the federal government's enforcement of its laws within the Commonwealth's boundaries. If the General Assembly had invoked nullification, the body would have expressly denied the federal government's sovereign interest in enforcing and assessing the minimum essential coverage provision's tax-penalties in Virginia.²¹⁶ This was not the General Assembly's chosen course, and, as such, no nullification occurred.

b. As a Signal of Opposition, the Health Care Freedom Act Did Not Impliedly Nullify the Minimum Essential Coverage Provision

The court of appeals interpreted the Health Care Freedom Act to be a merely declaratory enactment “announc[ing] the genuine opposition of a majority of Virginia's leadership to the individual mandate,”²¹⁷ and commentators have similarly considered the measure to be largely symbolic.²¹⁸ Public statements of Governor

213. Compare *Printz v. United States*, 521 U.S. 898, 935 (1997), with *Ohio*, 173 U.S. at 283 (“Federal officers who are discharging their duties in a State and who are engaged . . . in superintending the internal government and management of a Federal institution, under the lawful direction of its board of managers and with the approval of Congress, are not subject to the jurisdiction of the State in regard to those very matters of administration which are thus approved by Federal authority.”).

214. *Virginia ex rel. Cuccinelli*, 656 F.3d at 270 (citing *Ohio*, 173 U.S. at 283).

215. Compare *id.*, with 26 U.S.C. § 5000A(a) (Supp. IV 2010).

216. See *supra* Part IV.A.1.

217. *Virginia ex rel. Cuccinelli*, 656 F.3d at 270–71.

218. Farley, *supra* note 4, at 58; Jost, *Can the States Nullify Health Care Reform?*, *supra* note 45, at 869–71; see also Elizabeth Weeks Leonard, *Rhetorical Federalism: The Value of State-Based Dissent to Federal Health Reform*, 39 HOFSTRA L. REV. 111, 161–62 (2010).

McDonnell and Lieutenant Governor Bill Bolling supported this interpretation.²¹⁹ Among the Commonwealth's Democrats supporting the legislation, Senator Phillip Puckett discussed the legislation's symbolic value both conveying local sentiments to Congress and urging the national Democrats to "take a step back" and pursue health care reform through "bipartisan effort[s]."²²⁰ Floor debate, votes, and press coverage provided the congressional delegation a reminder of their constituents' sentiments,²²¹ and the General Assembly was able to send a particularly strong message because the Health Care Freedom Act passed with bipartisan support.²²²

As the court of appeals observed, the Health Care Freedom Act—as a merely symbolic declaration of state opposition—had no apparent regulatory application.²²³ The court found no regulatory purpose in the statute as applied to state officials, municipalities, or employers, and the court correctly observed that, as a measure of merely vocal protest, the Health Care Freedom Act had no regulatory application to the federal government.²²⁴ If the Act was only symbolic and had no regulatory purpose or effect, it follows that it did not render, or purportedly render, the minimum essential coverage provision null, void, and of no effect within the Commonwealth. Moreover, the Act's oppositional facet could have inhibited the federal government's passage and implementation of the minimal essential coverage provision only by dissuading Congress from enacting the legislation or rallying the dissenting electorate to send new majorities to Congress to repeal the minimum essential coverage provision. This objective relied on the

219. *Virginia ex rel. Cuccinelli* 656 F.3d at 270 (quoting Press Release, Taylor Thornley, *supra* note 24).

220. Interview by Greta Van Susteren with Senator Phillip Puckett, *supra* note 20 ("The health care bill, as I see it, is sort of on the side track right now. And I learned something early in politics. When people speak, you better listen. And if I learned anything from what went on in Massachusetts [when voters elected Republican Scott Brown to the United States Senate], it's time for Democrats to take a step back and simply, you know, refresh themselves on what people are saying and try to have a bipartisan effort to get a health care bill that does bring true reform to the system . . . I also think it represents how the people of my district feel. I represent a group in the far southwest, in the coal field regions that are very independent-thinking . . . But they're very concerned about the health care issue. They too want health care reform, but they don't like to be told what they have to do in a situation like this.").

221. Farley, *supra* note 4, at 58.

222. *See id.*

223. *Virginia ex rel. Cuccinelli*, 656 F.3d at 270–71.

224. *Id.* at 269–71.

“political safeguards of federalism” rather than any purported nullification.²²⁵ While nullification remains an extra-constitutional remedy claimed by a single state, the electoral and political processes are enshrined in the Constitution of the United States.²²⁶ A definition of nullification encompassing a merely symbolic opposition statute would be overbroad and unsupported. The Commonwealth has before averted nullification in favor of vocal protest,²²⁷ and to confuse the two would unnecessarily blur the distinction between the “illegal defiance of constitutional authority”²²⁸ and “the essence of self-government.”²²⁹

c. As a Means to Achieve Standing Before the Federal Courts, the Health Care Freedom Act Did Not Impliedly Nullify the Minimum Essential Coverage Provision

The Health Care Freedom Act was also discussed as a possible means by which the Commonwealth could achieve state standing and challenge the minimum essential coverage provision before the federal courts.²³⁰ In Delegate Marshall’s aforementioned hypothetical scenario, federal orders that state officers assess and collect tax-penalties from noncompliant and uninsured citizens—conflicting with the policy set forth in Virginia’s Health Care Freedom Act—would give rise to a valid state claim under *Printz* and *New York*.²³¹ If the federal commandeering of state officials had occurred, Virginia would have satisfied the standing requirements to sue in federal court. The Commonwealth would have suffered an injury-in-fact owing to the federal government’s actions, and a federal court would have been able to redress the injury.²³²

225. See Wechsler, *supra* note 119, at 543–544.

226. Compare *supra* Part.III.A, with U.S. CONST. art. I, §§ 4,7, art. II, §§ 1, 4, amend. I.

227. See *supra* Part III.B.1.

228. *Bush v. Orleans Parish Sch. Bd.*, 364 U.S. 50, 501 (1960).

229. *Snyder v. Phelps*, ___ U.S. ___, ___, 131 S. Ct. 1207, 1215 (2011) (“The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. That is because speech concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”) (internal citations omitted)).

230. Interview by Brian Wilson with Delegate Robert Marshall, *supra* note 20; Interview by Megyn Kelly with Delegate Robert Marshall, *supra* note 20.

231. Interview by Megyn Kelly with Delegate Robert Marshall, *supra* note 20.

232. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

The Attorney General of Virginia used the Health Care Freedom Act to argue state standing by another avenue,²³³ perhaps, because Delegate Marshall's hypothetical scenario will not likely occur. The ACA suggested no intention to commandeer state officials for the minimum essential coverage provision's implementation, and the Internal Revenue Service and the Tax Courts are more probable administrators of the tax-penalty.²³⁴ The Commonwealth employed the Health Care Freedom Act to achieve standing to sue Secretary Sebelius in federal court, arguing that the minimum essential coverage provision's threatened preemption over the Act posed an injury-in-fact to its sovereign interest in enforcing and maintaining its code of laws.²³⁵ The district court adopted the Commonwealth's argument when it determined the Article III standing requirements satisfied,²³⁶ but the court of appeals reversed and remanded judgment on this issue because it found there to be no actual conflict and considered the litigation an improper *parens patriae* suit.²³⁷

Passing the Health Care Freedom Act with the intent to satisfy standing requirements, under either Delegate Marshall's hypothetical suit or the Attorney General's actual litigation, the General Assembly could not have intended or implied nullification of the minimum essential coverage provision. A pleading for the federal courts' redress of injury undermines any such intent because the federal courts' interpretation of the Constitution, in a controversy between a state and the federal government, is antithetical to nullification. Nullification is a remedy assigned to a state convention or legislature, by which the body declares a federal act unconstitutional, null, void, and of no effect,²³⁸ and further rejects the federal courts' authority to render a binding interpretation.²³⁹ Intending to achieve an injury-in-fact to satisfy standing requirements, the General Assembly must have implicitly acknowledged the federal courts' authority to interpret the Constitution in the Commonwealth's controversy with the federal

233. Complaint for Declaratory and Injunctive Relief, *supra* note 34, at 2–3.

234. See 26 U.S.C. § 5000A(a) (Supp. IV 2010). *But see* Farley, *supra* note 4, at 51.

235. Complaint for Declaratory and Injunctive Relief, *supra* note 34, at 2–3; *see also* Virginia *ex rel.* Cuccinelli v. Sebelius, 656 F.3d at 253, 268 (4th Cir. 2011).

236. Virginia *ex rel.* Cuccinelli v. Sebelius, 702 F. Supp. 2d 598, 607 (E.D. Va. 2010).

237. Virginia *ex rel.* Cuccinelli, 656 F.3d at 270–73.

238. See *supra* Part III.A.

239. See, e.g., Ky. Res. of 1798, in 30 THE PAPERS OF THOMAS JEFFERSON, *supra* note 52, at 550; CALHOUN, in UNION AND LIBERTY, *supra* note 59, at 345–47, 359–60.

government. Conceding the federal Judiciary's authority to interpret the Constitution in either Delegate Marshall's hypothetical controversy or the Attorney General's suit, the General Assembly forewent nullification in favor of a litigious challenge consistent with the procedures of the federal courts and the Constitution.

B. The Attorney General of Virginia Did Not Nullify the Minimum Essential Coverage Provision

Some commentators similarly characterized Virginia's suit against Secretary Sebelius as Attorney General Cuccinelli's resort to nullification,²⁴⁰ but these accusations were more misplaced than those against the General Assembly. Noticeably absent from Virginia's complaint and subsequent briefs was any claim to have nullified the minimum essential coverage provision.²⁴¹ Rather than asserting nullification, Attorney General Cuccinelli pleaded the authoritative judgment of the federal Judiciary and further conceded the minimum essential coverage provision's supremacy and constitutional validity if the courts so ruled.²⁴² To seek the federal Judiciary's determination of a constitutional issue in a controversy between a state and the federal government is the traditionally accepted means of resolving such disputes,²⁴³ and the litigative process undermines a state's claim to render the ultimate decision of a federal enactment's constitutionality and validity within its own borders.²⁴⁴ Moreover, the Virginia Attorney General's role in *Virginia ex rel. Cuccinelli v. Sebelius* was readily distinguishable from that of a state litigator who expressly asserted the state's nullification as a defense. In *Bush v. Orleans*

240. *E.g.*, Dionne, *supra* note 45.

241. *See, e.g.*, Plaintiff's Memorandum in Opposition to Motion to Dismiss, *supra* note 35, at 13. Further, Attorney General Cuccinelli publicly distanced himself from nullification doctrine when discussing the proposed Repeal Amendment. Interview by Chris Matthews with Ken Cuccinelli, Att'y Gen. of Va. (Dec. 9, 2010).

242. Complaint for Declaratory and Injunctive Relief, *supra* note 34, at 2–3, 6–7; *see* Press Release, Office of Att'y Gen. Va., Virginia Attorney General to File Suit Against Federal Government over Passage of Health Care Bill: Virginia in a Unique Position to Sue (Mar. 22, 2010), available at http://www.oag.state.va.us/Media%20and%20News%20Releases/News_Releases/Cuccinelli/32210_Health_Care_Bill.html; *see also* Plaintiff's Memorandum in Opposition to Motion to Dismiss, *supra* note 35, at 13; Petition for Writ of Certiorari, *supra* note 5, at 3 ("If [ACA] is supported by an enumerated power, then it prevails under the Supremacy Clause.")

243. *New York v. United States*, 505 U.S. 144, 155–56 (1992); Petition for Writ of Certiorari, *supra* note 5, at 10–12.

244. *See supra* Part III.A.

Parish School Board, the United States and several parents' groups sought an injunction against the operation of Louisiana's Massive Resistance laws.²⁴⁵ Louisiana argued that jurisdiction was lacking because it had nullified the decision of *Brown v. Board of Education of Topeka*.²⁴⁶ Nullification also formed the basis of its defense on the merits.²⁴⁷ Louisiana claimed that its segregation laws were valid because the state "ha[d] interposed itself in the field of public education."²⁴⁸ In so doing, Louisiana purported itself to be the ultimate judge of the controversy regardless of the Supreme Court's interpretation of the Constitution.²⁴⁹ To the contrary, the Attorney General of Virginia's claim had no basis in nullification, and he pleaded his case before the federal courts seeking their grant of declaratory and injunctive relief.²⁵⁰

Nor did the court of appeals' determination of the suit as *parens patriae* suggest nullification. While there is concededly a loose analogy between the state shielding its citizenry from a federal enactment in suit as *parens patriae* and the state interposing against the operation of a federal law to protect its citizenry by nullification, the former nonetheless cedes to the federal Judiciary the authority to interpret and apply the Constitution in the controversy while the latter reserves that prerogative for the state.²⁵¹ The court of appeals fretted, however, that under the Commonwealth's theory of standing "each state could become a roving constitutional watchdog of sorts; no issue, no matter how generalized or quintessentially political, would fall beyond a state's power to litigate in federal court."²⁵² Apparently underlying

245. *Bush v. Orleans Parish Sch. Bd.*, 188 F. Supp. 916, 921 (1960).

246. *See id.* at 922.

247. *Bush v. Orleans Parish Sch. Bd.*, 364 U.S. 500, 501 (1960); *Bush*, 189 F. Supp. at 922.

248. *Bush*, 364 U.S. at 501; *see also Bush*, 188 F. Supp. at 922.

249. *Bush*, 188 F. Supp. at 922.

250. *See* Complaint for Declaratory and Injunctive Relief *supra* note 34, at 6-7; *see also* Plaintiff's Memorandum in Opposition to Motion to Dismiss, *supra* note 35, at 13.

251. *Compare* *Massachusetts v. Mellon*, 262 U.S. 447, 484-86 (1923), *with Bush*, 364 U.S. at 501.

252. *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 271-72 (4th Cir. 2011). There is another problem with the court's concern that states might act as "constitutional watchdog[s]." *Id.* at 272. The states have a role in ensuring the Constitution's proper operation, justified by the charge that all state and federal officers "shall be bound by Oath or Affirmation, to support [the] Constitution." U.S. CONST., art. VI; *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (rejecting the doctrine of nullification with reference to state officers' Article VI oath to support the Constitution); *see also* *Petition for Writ of Certiorari*, *supra* note 5, at 9-10.

this statement was a fear that the states, by mounting such suits, could upset the balance of federalism by attaining a greater role in applying and interpreting the bounds of the Constitution.²⁵³ Such cautiousness would be justified in dismissing the doctrine of nullification, but under the Commonwealth's theory of standing the authority to interpret the Constitution and issue an opinion rested with the federal courts. The standing requirements exist, in large part, to limit the federal Judiciary's interpretive power.²⁵⁴ In denying Virginia's standing, however, the court of appeals overemphasized the states' litigative power relative to the courts' interpretive power.²⁵⁵ Litigative power may be strong when advocacy is persuasive or facts are favorable, but the opinion always belongs to the Judiciary. It should have sufficed for the court of appeals to opine that Virginia's Health Care Freedom Act faced no actual or imminent threat of preemption from the minimum essential coverage provision, that the suit was actually as *parens patriae*, and that the Commonwealth failed the standing requirements.²⁵⁶ The court's additional language diminishing the states' role in upholding the Constitution was superfluous to its holding and incorrectly hinted a vague fear of state power. Properly stated, the decision of the court of appeals was not a reaction to a state's seizure of power but a limitation of its own powers,²⁵⁷ further suggesting that state nullification was not at issue in its decision.

253. See *Virginia ex rel. Cuccinelli*, 656 F.3d at 271–72.

254. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In this case, standing as a limitation on judicial, rather than litigative, power can be reinforced by an argument that a denial of Virginia's theory of state standing would leave states reliant on nullification. See A Brief of Matthew Sissel et al. as Amici Curie Supporting Plaintiff-Appellee/Cross-Appellant at 25–26, *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253 (4th Cir. Mar. 31, 2011) (Nos. 11-1057 & 11-1058). Without the ability to resolve disputes, such as Virginia's, before an impartial court, states would presumably encounter controversies where they could only find authoritative resolution through nullification. See *id.* These observations further demonstrate that the court's ruling had no implication toward nullification.

255. See *Virginia ex rel. Cuccinelli*, 656 F.3d at 272.

256. Compare *id.* at 268–72., with *Lujan*, 504 U.S. at 560–61, and *Massachusetts*, 262 U.S. at 484–86.

257. See *Virginia ex rel. Cuccinelli*, 656 F.3d at 268 (citing *Lujan*, 504 U.S. at 560); see also *Massachusetts v. EPA*, 549 U.S. 497, 535–39 (Roberts, C.J., dissenting) (“This Court’s standing jurisprudence simply recognizes that redress of grievances of the sort at issue here is the function of Congress and the Chief Executive, *not the federal courts.*”) (quoting *Lujan*, 504 U.S. at 576) (emphasis added) (internal quotations marks omitted)).

C. *Virginia's Challenges to the Minimum Essential Coverage Provision and ACA Have Been Pursued by the Same Means Prescribed by Nullification's Earliest Critics*

Historical invocations of nullification have been met with the several states' censure.²⁵⁸ Some states, however, have offered further suggestions of the legitimate means by which their fellow states may protest the federal government's alleged usurpation of the powers reserved to the states and the people.²⁵⁹ Suggested means of challenging the federal government, within the constitutional framework, have included: (1) seeking the federal Judiciary's invalidation of onerous federal acts as unconstitutional; (2) electing sympathetic parties to Congress so as to repeal the federal acts; and (3) amending the Constitution.²⁶⁰ Virginia's adherence to these prescriptions should further convince that the Commonwealth has neither nullified nor attempted to nullify the minimum essential coverage provision.

Rather than resort to an asserted finality of the General Assembly's constitutional judgment, Virginia challenged the minimum essential coverage provision in the federal courts.²⁶¹ In doing so, Virginia rejected nullification and deferred to the judicial outcome as determined by the federal courts.²⁶² Virginia, in filing suit, acknowledged and conceded the federal courts' authority to interpret the Constitution in its alleged constitutional controversy with the federal government.²⁶³ On a good-faith basis Virginia pursued a course of remedy based on the precedents of the United States Supreme Court, acknowledging the federal Judiciary's "task of ascertaining the constitutional line between Federal and State Power."²⁶⁴

Virginia also challenged the minimum essential coverage provision through the electoral process and the political safeguards of federalism.²⁶⁵ The 2010 midterm congressional elections repre-

258. See *supra* Part III.B.

259. See *Mass. to Va.*, reprinted in STATE DOCUMENTS ON FEDERAL RELATIONS, *supra* note 48, at 18–20.

260. See *id.*

261. See Complaint for Declaratory and Injunctive Relief, *supra* note 34, at 6–7.

262. See *supra* Parts IV.A.2.c, IV.B.

263. See *supra* Parts IV.A.2.c, IV.B.

264. Petition for Writ of Certiorari, *supra* note 5, at 10–12 (quoting *New York v. United States*, 505 U.S. 144, 155–56 (1992)).

265. See *Wechsler*, *supra* note 119, at 544.

sented the electorate's assessment of the national Democrats' policies and leadership over the previous two years.²⁶⁶ The unpopularity of the ACA and the minimum essential coverage provision were contributing factors to the election results, and the Republicans' opposition to these measures led to the Party's gains in Virginia.²⁶⁷ In addition to defeating a fourteen-term Democratic congressman, Virginia Republicans gained two seats held by freshmen Democrats who rode President Obama's coattails into office in 2008.²⁶⁸ Though two of the unseated congressmen voted against the ACA, their association with the Democratic Party and its congressional policies nonetheless led to their defeat.²⁶⁹ Virginia Republicans entering the 112th Congress unanimously voted to repeal the ACA and its minimum essential coverage provision.²⁷⁰ The repeal bill was submitted by Virginian and Republican House Majority Leader Eric Cantor.²⁷¹ In 2010, Virginia's voters checked what they perceived as congressional excess under Democratic leadership and made known their opposition to the ACA and other national Democratic policies.²⁷²

Virginians did not forego the possible use of constitutional amendment to combat the minimum essential coverage provision and the ACA. The Attorney General of Virginia regarded recourse to an Article V convention as the "nuclear option."²⁷³ This acknowledgement suggested that such a convention is unlikely at least until the Supreme Court has ruled on the minimum essential coverage provision's constitutionality and the public has had the opportunity to unseat President Obama and elect a Republi-

266. See Catherine Dodge & Lisa Lerer, *Republicans Claim House Majority, Gain in Senate*, BLOOMBERG (Nov. 3, 2010, 2:53 PM), <http://www.bloomberg.com/news/2010-11-03/republicans-win-u-s-house-majority-gain-in-senate-in-setback-for-obama.html>.

267. Janet Adamy, *New Governors to Target Health Law*, WALL ST. J., Nov. 5, 2010, at A5; Janet Hook & Laura Meckler, *GOP Vows to Keep Pressure on Obama*, WALL ST. J., Nov. 5, 2010, at A1.

268. Olympia Meola, *McDonnell Surprised by Size of Griffith's Win in 9th*, RICH. TIMES-DISPATCH, Nov. 5, 2010, at B1.

269. See David Sherfinski, *Va. Democrats Perriello, Nye, Boucher Fall in Re-election Bids*, WASH. EXAMINER (Nov. 1, 2010), <http://washingtonexaminer.com/news/2010/11/va-democrats-perriello-nye-boucher-fall-re-election-bids>; see also Jennifer Haber-korn, *Democrats Run Away From Health Care*, POLITICO (Sept. 7, 2010, 7:24 AM), <http://www.politico.com/news/stories/0910/41777.html>.

270. David Lightman, *GOP to Renew Effort on Health Law; After House Votes for Repeal, Hurdles Remain*, RICH. TIMES-DISPATCH, Jan. 20, 2011, at A1.

271. See H.R. 2, 112th Cong. (2011).

272. See Meola, *supra* note 268.

273. Petition for Writ of Certiorari at 10, *supra* note 5.

can Senate in the 2012 elections. Election results favorable to the Republicans would presumably signal the ACA's impending repeal.²⁷⁴ Still, Virginia's political leaders have proposed a constitutional amendment indirectly targeting the minimum essential coverage provision and the ACA.²⁷⁵ A central complaint against the legislation was that it expanded federal power at the expense of the states' respective abilities to design and implement their own innovative solutions to "expand access to, and improve the affordability of, health care coverage."²⁷⁶ The so-called repeal amendment would presumably remedy this problem by allowing the states a powerful, but limited, structural check on congressional enactments.²⁷⁷ Specifically, the amendment would permit the repeal of a federal law or regulation under a concurring vote of two-thirds of the states' legislative assemblies.²⁷⁸ The amendment would serve as an expedited version of Article V, allowing the two-thirds majority of state legislatures to repeal a federal enactment rather than merely permitting them to call a convention for constitutional amendment to effectively invalidate the targeted law.²⁷⁹ This amendment was designed to return to state legislatures a check on federal power that they formerly exercised through their appointment of Senators in the United States Congress.²⁸⁰ Presumably, with this amendment two-thirds of state legislatures would repeal the ACA and its minimum essential coverage provision.²⁸¹

Virginia's willingness to pursue all legally available and constitutionally consistent means of challenging the minimum essential

274. See Karl Rove, *The GOP's Health-Care Offensive Has Just Begun*, WALL ST. J., Jan. 20, 2011, at A15.

275. See Randy E. Barnett & William J. Howell, Op-Ed., *The Case for a 'Repeal Amendment'*, WALL ST. J., Sept. 16, 2010, at A23; see also Interview by Chris Matthews with Ken Cuccinelli, Att'y Gen. of Va., *supra* note 241 (discussing the high threshold for repeal under the Amendment and using the General Assembly's bipartisan passage of the Health Care Freedom Act to exemplify the widespread unpopularity required to achieve repeal).

276. Press Release, Taylor Thornley, *supra* note 24.

277. Barnett & Howell, *supra* note 275.

278. *Id.*

279. Compare *id.*, with U.S. CONST. art. V. See also *supra* note 241 (comparing the Repeal Amendment to the process of an Article V convention). The Attorney General of Virginia offered this comparison to dismiss the notion that the Repeal Amendment would provide a constitutional process of nullification. *Id.*

280. Barnett & Howell, *supra* note 275.

281. See Interview by Chris Matthews with Ken Cuccinelli, Att'y Gen. of Va., *supra* note 241.

coverage provision has signaled the Commonwealth's respect for the Constitution and the ordered procedures of state challenges provided therein. Had Virginia purported its own, ultimate right to judge the minimum essential coverage provision's constitutionality, through nullification, the remaining means of challenging the minimum essential coverage provision would have been moot.²⁸² Virginia's multifaceted challenges to the minimal essential coverage provision demonstrated that the Commonwealth accepted the ACA and the minimum essential coverage provision as authoritative congressional enactments until either their invalidation as unconstitutional by the federal Judiciary, their repeal by Congress, or their effective invalidation as unconstitutional by an amendment to the Constitution. Further evidence of this acknowledgement can be found in Governor McDonnell's administration of the government. While the Governor favors a judicial ruling of both the minimum essential coverage provision's and the ACA's invalidation, his administration is nonetheless working to comply with the requirements set forth in the Act.²⁸³ Conversely, nullifying states have arrested any execution of targeted federal legislation within their borders.²⁸⁴ Perhaps no more concrete evidence can be offered that Virginia has not nullified the minimum essential coverage provision and the ACA than that the Commonwealth is presently complying with the legislation.

V. CONCLUSION

While the Commonwealth of Virginia has historically voiced its disapproval of federal enactments, it has cautiously averted invocations of nullification. To characterize Virginia's Health Care Freedom Act and suit against Secretary Sebelius as exercises of nullification wrongly casts these acceptable means of state dispute as measures upsetting the balance between federal and state power and, ultimately, threatening secession and disunion. Vir-

282. See Federal Health Care Nullification Act, *supra* note 182; *cf. supra* Part III.A.

283. See Letter from Gov. Robert F. McDonnell to Speaker William J. Howell and Pres. Pro Temp. Charles Colgan (Nov. 11, 2011), available at <http://www.hhr.virginia.gov/initiatives/healthreform/docs/LetterAndHB2434Report2011.pdf> (enclosing the Report of the Secretary of Health and Human Resources); see also Press Release, Taylor Thornley, Deputy Dir. Commc'ns, Office of Gov. Va., Virginia Secretary of Health and Human Resources Dr. Bill Hazel Announces Virginia Health Reform Initiative (May 14, 2010), available at <http://www.hhr.virginia.gov/News/viewRelease.cfm?id=175>.

284. See S.C. Ordinance of Nullification, *reprinted in* STATE DOCUMENTS ON FEDERAL RELATIONS, *supra* note 48, at 170–73; see also *supra* Part III.B.4.

ginia did not invoke nullification when the General Assembly passed the Health Care Freedom Act. Noticeably absent from any legislation considered or passed by the General Assembly was any statement purporting the Commonwealth's authoritative declaration that the minimum essential coverage provision was unconstitutional, null, void, and of no effect. Rather, the General Assembly passed the Act with the purposes of defining state policy toward individual choice in the health insurance market, signaling local attitudes to the congressional delegation then considering the ACA, and satisfying the federal courts' standing requirements for a potential constitutional challenge to the minimum essential coverage provision. These purposes did not implicate nullification. Virginia did not invoke nullification when Attorney General Cuccinelli filed suit against Secretary Sebelius. By casting the fate of its constitutional challenge in the federal courts, the Attorney General of Virginia acknowledged the Supreme Court's role as the final interpreter of constitutional questions arising in controversies between a state and the federal government. Moreover, pleading the federal courts to review the constitutionality of a federal enactment is antithetical to nullification. In this forum, the federal Judiciary issues the legal opinion, and the state's role remains as a party and an advocate. Its litigative power is realized only insofar as its advocacy persuades the court. Adhering to the course of remedy proposed by nullification's earliest and most ardent critics, the Commonwealth has resorted to the system of federal courts, the protections of the political process, and the procedure of constitutional amendment to voice its complaint against the minimum essential coverage provision and to seek redress of injury.

While hyperbole is natural in political discussion, characterization of Virginia's Health Care Freedom Act and constitutional litigation as nullification is imprudent in two respects. It unwisely gives credence to a constitutionally disfavored concept of state protest, and it unfairly stigmatizes a state's legitimate claim to defend its sovereign interests. The risks are great in either circumstance. Supporters of the state challenges may be emboldened to rely more heavily on purported nullifications, while opponents may stifle cautious officials when state action is warranted and required to stem the federal usurpation of reserved powers. Virginia has challenged the minimum essential coverage provision within the constitutional framework, and the Commonwealth has not reserved to itself the final authority to decide the

constitutional validity of the federal enactment. Rather, the Commonwealth has publicly voiced its protest and advocated its challenges while acknowledging that the minimum essential coverage provision will only fall to invalidation by the federal Judiciary, congressional repeal, or constitutional amendment. The Constitution favors these procedures of state disputes over the contrary doctrine of nullification, which the Commonwealth has again averted.

*Robert S. Claiborne, Jr. **

* I thank Aminah Qureshi, Lindsey Vann, and John Dillard for their careful review, helpful suggestions, and encouragement, without which this work would not be possible. I also thank Professor Kevin C. Walsh for his advice and insight on this topic. Finally, I am most grateful for the constant support of my parents, my sister Eleanor, and my brother John Preston.