Can the South Carolina Legislature Pass a Law to "Nullify" Obamacare?

By H. Christopher Bartolomucci

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Related Links:

- Thomas E. Woods, Jr., Nullification: How to Resist Federal Tyranny in the 21st Century (2012): http://www.libertyclassroom.com/nullification/
- South Carolina House Judiciary Committee, Hearing on H. 3101, South Carolina Freedom of Health Care Protection Act, March 20, 2013 (Video): http://www.scstatehouse.gov/video/videofeed.php
- Michael Boldin, Health Care Nullification and Interposition, Tenth Amendment Center (Dec. 29, 2009), http://www.tenthamendmentcenter.com/2009/12/29/health-care-nullification-and-interposition

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Introduction

Can a State enact a law that purports to "nullify" a controversial federal statute that the State firmly believes to be unconstitutional, even if the U.S. Supreme Court already has upheld the federal statute against a constitutional challenge brought by the State? That is the question presented by a bill now being considered by the South Carolina General Assembly—H. 3101, the "South Carolina Freedom of Health Care Protection Act." House Bill 3101 is a response to the Patient Protection and Affordable Care Act ("PPACA") enacted by Congress —commonly known as "Obamacare"[1]—as well as the U.S. Supreme Court's decision in *National Federation of Independent Business v. Sebelius*.[2] In *NFIB v. Sebelius*, the Supreme Court upheld the part of the PPACA known as the "individual mandate"— which requires individuals to purchase a health insurance policy providing a minimum level of coverage—against the claim that Congress lacked the constitutional authority to enact the individual mandate.

The avowed purpose of H. 3101 is to "render null and void" the PPACA, and the bill declares that the Supreme Court's decision in *NFIB v. Sebelius* itself "directly contravenes" the U.S. Constitution. This paper considers whether South Carolina, which was one of the 26 States that challenged the PPACA in *NFIB v. Sebelius,* has the power to enact a law that is inconsistent with the Supreme Court's judgment in that case.

Summary of Analysis

Under the Supremacy Clause, the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land."[3] A State may challenge in court the constitutionality of a federal statute. If the U.S. Supreme Court rejects the challenge and upholds the statute, however, the State is bound by that judgment.

In *NFIB v. Sebelius*, the Supreme Court upheld the PPACA's individual mandate against the claim that it exceeded Congress's authority. As a party to the case, the State of South Carolina is bound by that judgment. House Bill 3101 cannot "nullify" the judgment of the Supreme Court upholding the individual mandate.

I. The Doctrine of Nullification

The PPACA and its aftermath have renewed interest in the doctrine of nullification.[4] But what is the nullification doctrine? How does it differ from a State's right to challenge in court an Act of Congress believed by the State to be unconstitutional?

A leading legal dictionary defines "nullification doctrine" as "[t]he theory—espoused by southern states before the Civil War—advocating a state's right to declare a federal law unconstitutional and therefore void."[5] Commentators writing in law review articles have offered similar definitions:

> 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.[6]

> Generally, the nullification doctrine—and its close cousin "interposition"—hold that states are independent interpreters of the federal Constitution and that states can therefore declare federal laws unconstitutional and inapplicable within their respective borders.[7]

Similar to the doctrine of nullification, the doctrine of "interposition" is:

> [B]ased on the proposition that the United States

1 *See* Jose DelReal, *Barack Obama: You can call it 'Obamacare'*, Politico (Feb. 17, 2014), http://www.politico.com/story/2014/02/barack-obama-obamacare-103589.html.

2 132 S. Ct. 2566 (2012).

3 U.S. Const. art. VI, cl. 2.

4 *See*, *e.g.*, Thomas E. Woods, Jr., Nullification: How to Resist Federal Tyranny in the 21st Century (2010).

5 Black's Law Dictionary (9th ed. 2009). The same source also defines "nullification" as "[t]he act of making something void; specif., the action of a state in abrogating a federal law, on the basis of state sovereignty."

6 Robert S. Claiborne, Jr., *Why Virginia's Challenges to the Patient Protection and Affordable Care Act Did Not Invoke Nullification*, 46 U. Rich. L. Rev. 917, 924 (2012).

7 Ryan Card, *Can States "Just Say No" to Federal Health Care Reform? The Constitutional and Political Implications of State Attempts to Nullify Federal Law*, 2010 B.Y.U. L. Rev. 1795, 1796 (2010).

> is a compact of states, any one of which may interpose its sovereignty against the enforcement within its borders of any decision of the Supreme Court or act of Congress, irrespective of the fact that the constitutionality of the act has been established by decision of the Supreme Court.[8]

"In essence, the doctrine denies the constitutional obligation of the states to respect those decisions of the Supreme Court with which they do not agree."[9]

Thomas Woods, a scholar and author of a recent book on nullification, has summarized the constitutional theory underlying the nullification doctrine:

> Nullification begins with the axiomatic point that a federal law that violates the Constitution is no law at all. It is void and of no effect. Nullification simply pushes this uncontroversial point a step further: if a law is unconstitutional and therefore void and of no effect, it is up to the states, the parties to the federal compact, to declare it so and thus refuse to enforce it. It would be foolish and vain to wait for the federal government or a branch thereof to condemn its own law. Nullification provides a shield between the people of a state and an unconstitutional law from the federal government.[10]

It is important to distinguish "nullification" from other state actions, including the right of a State to test the constitutionality of a federal statute by challenging it in court. It is not nullification for a State to bring a challenge to a federal law the State believes is unconstitutional. The 26 States that challenged certain provisions of the PPACA in the litigation that culminated in the U.S. Supreme Court's decision in *NFIB v. Sebelius* clearly were not engaged in nullification. Indeed, as to Medicaid expansion, the Supreme Court, by a 6-3 vote, held that "that portion of the Affordable Care Act violate[d] the Constitution by threatening existing Medicaid funding."[11] As for the individual mandate, the Court, by a 5-4 vote, held that, although "[t]he individual mandate cannot be upheld as an exercise of Congress's power under the Commerce Clause," it was "within Congress's power to tax" because "it is reasonable to construe what Congress has done as increasing taxes on those who have a certain amount of income, but chose to go without health insurance."[12] The U.S. Supreme Court's judgment in *NFIB v. Sebelius* as to the constitutionality of the individual mandate is binding on the 26 States, just as its judgment on the unconstitutionality of Medicaid expansion binds the federal government. The Supreme Court may someday overrule its decision in *NFIB v. Sebelius*, but only the Supreme Court may do so.[13]

State laws sometimes are wrongly accused of being "nullification" laws. For example, in March 2010, the Commonwealth of Virginia enacted the "Virginia Health Care Freedom Act" which provides that, with certain exceptions, "[n]o resident of this Commonwealth . . . shall be required to obtain or maintain a policy of individual insurance coverage."[14] The Virginia law clearly was not an act of nullification.[15] To begin with, the Virginia measure actually became law before the PPACA did.[16] Furthermore, it did not declare any provision of federal law or any federal court decision to be null and void or unconstitutional. Rather, it conferred upon Virginia residents a right under state law not to obtain or maintain an individual insurance policy. Finally, at the time the Commonwealth enacted the Virginia Health Care Freedom Act, neither the Supreme Court nor any lower court had passed upon Congress's power to require individuals to purchase insurance. As soon as the PPACA was enacted, the Attorney General of Virginia promptly commenced an action in federal court seeking a declaratory ruling that

8 Bush v. Orleans Parish Sch. Bd., 188 F. Supp. 916, 922 (E.D. La. 1960) (three-judge court), *aff'd*, 365 U.S. 569 (1961).

9 *Bush*, 188 F. Supp. at 923. Section 1(5) of H. 3101 uses the language of "interposition."

10 Woods, *supra* note 4, at 3.

11 NFIB v. Sebelius, 132 S. Ct. 2566, 2608 (2012).

12 *Id.*

13 Since the Supreme Court may overrule its precedents, a State would not be engaging in "nullification" were it to urge the Supreme Court to overrule *NFIB v. Sebelius*.

14 Va. Code Ann. § 38.2-3430.1:1.

15 For a fully developed argument to this effect, *see* Claiborne, *supra* note 6, at 939-949.

16 *See* Claiborne, *supra* note 6, at 921 (noting that the Virginia statute became law on March 10, 2010, while the PPACA was signed by the President on March 23, 2010).

the PPACA's individual mandate was unconstitutional and that "[a]s a consequence" Virginia's law was "a valid exercise of state power."[17]

Some commentators criticized the Virginia law and the Virginia Attorney General's lawsuit as seeking to "nullify" the PPACA,[18] but neither should be regarded as acts of nullification. To the contrary — and consistent with the Supremacy Clause—Virginia tested the constitutionality of the PPACA's individual mandate, and its own law, in the courts.

II. Overview of H. 3101

House Bill 3101 was prefiled in the South Carolina House of Representatives on December 11, 2012. The House passed H. 3101 on May 1, 2013, by a vote of 65 to 39. The bill is now before the South Carolina Senate on special order.

The purpose of H. 3101, as recited in the bill, is to amend South Carolina law:

> [S]o as to render null and void certain unconstitutional laws enacted by the Congress of the United States taking control over the health insurance industry and mandating that individuals purchase health insurance under threat of penalty; to prohibit certain individuals from enforcing or attempting to enforce such unconstitutional laws; and to establish criminal penalties and civil liability for violating this article.[19]

The bill includes five "whereas" clauses stating that:

- "the people of the several states comprising the United States of America created the federal government to be their agent for certain enumerated purposes, and nothing more";
- "the Tenth Amendment to the United States Constitution defines the total scope of federal power as being that which has been delegated by the people of the several states to the federal government, and all power not delegated to the federal government in the Constitution of the United States is reserved to the states respectively, or to the people themselves";
- "Article I, Section 1 of the United States Constitution provides in pertinent part that 'All legislative powers herein granted shall be vested in a Congress of the United States'";
- "the judicial decision of the United States Supreme Court upholding the constitutionality of the 'Patient Protection and Affordable Care Act' directly contravenes Article I, Section I of the United States Constitution because, in upholding the law by re-characterizing the Act as a tax even though Congress specifically refused to identify it as a tax, the United States Supreme Court legislated new law in violation of Article I, Section 1 of the United States Constitution"; and
- "the assumption of power that the federal government has made by enacting the 'Patient Protection and Affordable Care Act' interferes with the right of the people of the State of South Carolina to regulate health care as they see fit and makes a mockery of James Madison's assurance in Federalist #45 that the 'powers delegated' to the federal government are 'few and defined', while those of the states are 'numerous and indefinite'."

Section 1 of H. 3101 declares that "authority for this act is the following":

(1) the Tenth Amendment to the U.S. Constitution, which authorizes the federal government "to exercise only those powers delegated to it in the Constitution";

(2) the Supremacy Clause of the U.S. Constitution, which "provides that laws of the United States are the supreme law of the land provided that they are made in pursuance of the powers delegated to the federal government in the Constitution";

(3) the "policy of the South Carolina General Assembly that provisions of [the PPACA] grossly exceed the powers delegated to the federal government in the

17 *See* Complaint for Declaratory and Injunctive Relief 6, Virginia ex rel. Cuccinelli v. Sebelius, No. 3:10CV188 (E.D. Va. Mar. 23, 2010). The District Court held that the individual mandate was unconstitutional, but the Fourth Circuit held that Virginia's Attorney General lacked standing to bring the action and the Supreme Court declined to review the Fourth's Circuit's decision. *See* Virginia ex rel. Cuccinelli v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010), *vacated*, 656 F.3d 253 (4th Cir. 2011), *cert. denied*, 133 S. Ct. 59 (2012).

18 *See* Claiborne, *supra* note 6, at 939-957 (responding to such criticisms).

19 Although H. 3101 refers to "criminal penalties," there is no provision in H. 3101 creating such penalties.

Constitution";

(4) the "provisions of [the PPACA] which exceed the limited powers granted to the Congress pursuant to the Constitution, cannot and should not be considered the supreme law of the land";

(5) the "General Assembly of South Carolina has the absolute and sovereign authority to interpose and refuse to enforce the provisions of [the PPACA] that exceed the authority of Congress"; and

(6) the Due Process Clause of the Fourteenth Amendment.

Sections 2(A) and 3 are the key operative provisions of H. 3101. Section 2(A) provides that no South Carolina agency, officer, or employee "may engage in an activity that aids any agency in the enforcement of those provisions of [the PPACA] and any subsequent federal act that amends [the PPACA] that exceed the authority of the United States Constitution." Section 2(A) does not specify what "those provisions" that "exceed the authority" of the Constitution are, although it appears to have at least the individual mandate in mind.

Section 3 provides in pertinent part that whenever the Attorney General of South Carolina "has reasonable cause to believe that a person or business is being harmed by the implementation of [the PPACA] and that proceedings would be in the public interest," the Attorney General "may bring an action in the name of the State against the person or entity causing the harm to restrain by temporary restraining order, temporary injunction, or permanent injunction the use of such method, act, or practice."

House Bill 3101 does not define the terms "harm" and "harmed." Ordinary and legal definitions of the word "harm" are broad. The Supreme Court, quoting *Webster's Dictionary*, has said that "[t]he dictionary definition of the verb form of 'harm' is 'to cause hurt or damage to: injure.'"[20] *Black's Law Dictionary* similarly defines "harm" as "[i]njury, loss, damage; material or tangible detriment."[21] Thus, if a person complained to the South Carolina Attorney General that the PPACA's individual mandate harmed her—because it required her to purchase health insurance she did not wish to buy or else pay a penalty—it appears that Section 3 would authorize a suit by the State to enjoin the mandate based on that harm.

Other provisions might be added to H. 3101. According to media reports, the sponsor of H. 3101 has indicated that the bill may be amended to "suspend[] the licenses of insurers who receive federal subsidies under the" PPACA.[22] Section 1301 of the PPACA and its implementing regulations provide that, for a health insurance issuer to offer a qualified health plan through a PPACA exchange, the issuer must be "licensed and in good standing to offer health insurance coverage" in each State in which the issuer offers health insurance coverage.[23]

III. Analysis of H. 3101 as Nullification Legislation

House Bill 3101 presents itself as a legislation that has the purpose and effect of nullifying the PPACA and the U.S. Supreme Court's decision in *NFIB v. Sebelius*. As noted above, H. 3101 states that its purposes is to amend South Carolina law "so as to render null and void certain unconstitutional laws enacted by the Congress of the United States taking control over the health insurance industry and mandating that individuals purchase health insurance." And in its fourth whereas clause, H. 3101 declares that the Supreme Court's decision in *NFIB v. Sebelius* upholding the individual mandate is itself unconstitutional: "the judicial decision of the United States Supreme court upholding the constitutionality of the [PPACA] directly contravenes Article I, Section 1 of the United States Constitution."[24]

20 Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 697 (1995) (quoting Webster's Third New International Dictionary 1034 (1966)); *see also Babbitt*, 515 U.S. at 719 (Scalia, J., dissenting) ("The verb 'harm' has a *range* of meaning: 'to cause injury' at its broadest, 'to do hurt or damage' in a narrower and more direct sense.").

21 Black's Law Dictionary (9th ed. 2009).

22 Bruce Parker, *South Carolina voting on bill to end Obamacare in state*, Daily Caller, Dec. 9, 2013, http://dailycaller.com/2013/12/09/south-carolina-voting-on-bill-to-end-obamacare-in-state/.

23 PPACA § 1301(a)(1)(C)(i); 45 C.F.R. § 156.200(b)(4).

24 The Supreme Court of South Carolina has stated that, "[i]n determining legislative intent, the Court may be guided by a statute's preamble." Ocean Winds Corp. of Johns Island v. Lane, 347 S.C. 416, 419 n.1, 556 S.E.2d 377 (2001) (citing State v.

To the extent that the purpose and effect of H. 3101 is to "nullify" that part of the PPACA upheld by the Supreme Court in *NFIB v. Sebelius*, it is clear that H. 3101 cannot actually achieve that purpose or have that effect.

The Supremacy Clause of U.S. Constitution provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."[25] A federal statute may be challenged in court, by a party with standing, on the ground that the statute is contrary to the Constitution or beyond the authority of Congress. If the court upholds the federal statute, the parties to the case are bound by the court's judgment. Although the judgment may be appealed, a judgment by the Supreme Court is both binding and final.

A State cannot nullify the judgment of a federal court rendered in a case to which the State was a party. In 1809, in the case of *United States v. Peters*, the U.S. Supreme Court held that the legislature of the Commonwealth of Pennsylvania could not annul a federal court judgment. Writing for a unanimous Court, Chief Justice Marshall stated:

> If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all; and the people of Pennsylvania, not less than the citizens of every other state, must feel a deep interest in resisting principles so destructive of the union, and in averting consequences so fatal to themselves.[26]

In a 1932 case, *Sterling v. Constantin*, the Supreme Court held that the Governor of Texas had no power to nullify a federal court order restraining the State. The Supreme Court wrote (again in a unanimous opinion) that:

> If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the state may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is obviously untenable.[27]

Thus, neither the legislature nor the executive of a state may nullify a federal court judgment.

More recently, in a 1995 case, the Supreme Court held that the final judgment of a federal court cannot be undone by an Act of Congress. In *Plaut v. Spendthrift Farm, Inc.*, the Court explained that:

> Article III [of the Constitution] establishes a "judicial department" with the "province and duty . . . to say what the law is" in particular cases and controversies. *Marbury v. Madison*, 1 Cranch 137, 177 (1803). The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject only to review by superior courts in the Article III hierarchy — with an understanding, in short, that a "judgment conclusively resolves the case" because "a 'judicial Power' is one to render dispositive judgments."[28]

While *Plaut* involved an Act of Congress that reopened certain federal court judgments, a state legislature has no more power to undo a final judgment than does Congress.

South Carolina was a party to *NFIB v. Sebelius*.

Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994)).

25 U.S. Const. art. VI, cl. 2.

26 United States v. Peters, 5 Cranch 115, 136 (1809).

27 Sterling v. Constantin, 287 U.S. 378, 397-398 (1932).

28 Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-219 (1995) (quoting Frank H. Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905, 926 (1990)).

It was one the 26 States that challenged the PPACA's individual mandate and Medicaid expansion. The Supreme Court held that it was within Congress's power to enact the individual mandate but that Medicaid expansion was unconstitutional. South Carolina is bound by the judgment upholding the individual mandate just as the federal government is bound by the judgment against Medicaid expansion. South Carolina cannot "nullify" that judgment through legislation asserting that the individual mandate is unconstitutional notwithstanding the Supreme Court's binding decision in *NFIB v. Sebelius*.[29]

The ongoing debate over "nullification" raises important questions concerning the authority of a State to interpret the U.S. Constitution. The debate also raises important questions about what constitutes nullification and what does not. This paper concludes that a State cannot enact a law to nullify that part of a federal statute which has been upheld by the U.S. Supreme Court in a case to which the State was a party. In that circumstance, the State is bound by the Court's judgment and cannot pass a law contrary to the judgment, whether or not the law is labeled "nullification."

29 The judgment in *NFIB v. Sebelius* would not bar the State from enacting Section 4 of H. 3101, which provides that a "South Carolina resident taxpayer who is subjected to a tax . . . under 26 U.S.C. Section 5000A . . . shall receive a tax deduction in the exact amount of the taxes or penalties paid the federal government." The State is also free to enact Section 5(B) of H. 3101, which prohibits the State from "establish[ing] a Health Care Exchange for the purchase of health insurance." Under the PPACA, a State is not required to establish an exchange. *See* PPACA § 1321(c); *see also* 45 C.F.R. § 155.100(a) ("Each State may elect to establish" an exchange.).