Back to the Future: The Revival of the Theory of Nullification

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Comment

Back to the Future: The Revival of the Theory of Nullification

Those who cannot remember the past are condemned to repeat it.¹

I. INTRODUCTION

American federalism, a system of dual sovereignty between the national government and state governments,² is a "tale as old as time."³ Inherent in the dual sovereignty system is the issue that has been a point of great debate since the very inception of the United States of America: Which powers should the national government have and which should belong to the states?⁴ Indeed, "[e]lections have been won and lost," "a Civil War fought," and, most recently, the federal government

1. GEORGE SANTAYANA, THE LIFE OF REASON OR THE PHASES OF HUMAN PROGRESS 284 (1920).
2. BLACK'S LAW DICTIONARY 687 (9th ed. 2009).
shut down over this timeless question. With the exponential expansion of the federal government and sharp political disunion over health care, gun rights, marijuana use, and the right to privacy, among a plethora of other issues, states' rights proponents claim there is no time like the present for states to challenge the federal government's control on issues purportedly within the states' domain.

Recently, several states have jumped on board with this sentiment of mounting a challenge, and stealing some pages from early American history's playbook, legislatures have been creating laws that declare several federal laws void within their state's boundaries. For example, Missouri recently introduced the Second Amendment Preservation Act, which sought to nullify all federal gun laws within the state as well as criminalize federal enforcement of gun laws in the state, give citizens a private right of action over officers trying to enforce federal gun laws, and outlaw publishing information about gun owners. While the Missouri bill narrowly failed to become law due to the governor's veto, nine states have passed Firearms Freedom Acts (FFAs), which nullify federal firearms laws with respect to firearms and ammunition manufactured, sold, and possessed within the state's boundaries.

Marijuana is another issue about which state defiance of federal law abounds. Since 1996, twenty states and the District of Columbia have legalized the use of marijuana for medicinal purposes. These states

6. See, e.g., Jake Grovum, Nullification: Old Arguments Against Feds Get New Life, STATELINE (Mar. 14, 2013), http://www.pewstates.org/projects/stateline/headlines/nullification-old-arguments-against-feds-get-new-life-85899459254 (stating that "[l]ately, as the number of issues spurring conflict has grown," such as gun control, health care, marijuana, gay marriage, and immigration, "so has the tenacity of the fight" for states' rights). See infra Part II (discussing historical examples of nullification).
7. See infra Part II (discussing historical examples of nullification).
9. Id.
11. Alaska, Arizona, Idaho, Kansas, Montana, South Dakota, Tennessee, Utah, and Wyoming have all passed FFAs. See State By State, FIREARMSFREEDOMACT.COM, http://firearmsfreedomact.com/state-by-state/ (last visited Feb. 8, 2014) (showing a map of states in which FFAs have passed, been introduced, or are intended to be introduced and providing links to information on each state).
permit patients with a professionally determined medical need to possess a certain amount of marijuana legally and, in some states, to cultivate a specified amount of marijuana plants at home for personal medical use, without criminal prosecution. In addition, in elections in November 2012, two states, Colorado and Washington, defied federal drug laws by passing measures to permit recreational use of marijuana within their borders. State legislation legalizing marijuana for either medical or recreational use renders a portion of the federal Controlled Substances Act (CSA) invalid within the state under certain specified circumstances.

These recent examples of states declaring specific federal laws inapplicable in their borders have spawned a revival of the theory of nullification, a state measure that declares an action of the federal government to be unconstitutional and asserts that the federal action is null, void, and of no effect within the state. First used to oppose the Alien and Sedition Acts of 1798, nullification has not been frequently employed throughout American history, primarily occurring prior to the
Civil War and then again during the Civil Rights era. However, recently the nullification doctrine has grown in popularity as political disunion reaches new heights and as states respond to the expansion of the federal government. Interestingly, many of the modern examples of nullification are tied to the enforcement of federal criminal law, a fact that implicates concerns over the traditional state police power, the doctrine of advance notice of criminal behavior, and even double jeopardy. This Comment will explore the modern revival of nullification with particular focus on criminal law. It will first discuss historical examples of nullification, as well as the development of federal criminal jurisdiction, which set the stage for nullification issues today. Finally, this Comment will examine nullification measures with respect to firearms and marijuana, assess the federal government's response to these measures, and gauge the future direction of nullification in America.

II. TO THE DELOREAN!: A LOOK AT NULLIFICATION IN AMERICAN HISTORY

Before we can grasp the importance of present-day nullification, we must examine how nullification developed and played out in American history. The nullification doctrine is "the theory—espoused by southern states before the Civil War—advocating a state's right to declare a federal law unconstitutional and therefore void." Founding father Thomas Jefferson is credited as the first to advance the idea of nullification as a state remedy to oppose unconstitutional laws enacted by Congress. In reference to the timeless debate over the division of powers between the two levels of government, the nullification doctrine asserts that the states, as the contracting parties to the Constitution that created the federal government, should be the "judges of what the [federal] government might do." At certain times throughout the

19. See infra Part II (discussing the development of nullification and its use throughout American history).
20. See supra note 6 and accompanying text.
22. BLACK'S LAW DICTIONARY 1173.
nation's history, the states have asserted power through nullification to challenge federal actions that encroached on areas of states' rights or were unconstitutional.

A. The States' Response to the Alien & Sedition Acts

The first use of the nullification doctrine came as a response to the unpopular Alien and Sedition Acts of 1798 (the Acts).

In anticipation of a war with France and fearing foreign infiltration, the Federalist-controlled Congress passed broad legislation to restrict immigration and citizenship and to silence opposition to the war from the Democratic-Republican Party. The Naturalization Act of 1798 increased the residency requirement for American citizenship from five to fourteen years, required immigrants to declare their intent to acquire citizenship five years prior to its grant, and rendered those from "enemy" nations ineligible for naturalization. Immigrants were the specific target of two other acts under this legislation. One authorized the deportation of immigrants deemed "dangerous to the peace and safety of the United States," and another allowed the President the power to detain or expel immigrants from enemy territories by executive order in wartime. The Sedition Act specifically targeted American citizens by prohibiting assembly "with intent to oppose any measure . . . of the government" and by making it illegal to "print, utter or publish . . . any false, scandalous and malicious writing" against the government. The Acts were a stark violation of the First Amendment's protections and gave unprecedented power to the federal government.

Unsurprisingly, the Acts garnered a very negative response from the American people. Because Marbury v. Madison post-dated the Acts, judicial review had yet to be established, and thus, was not a viable option to challenge the federal laws. As a result, opponents

25. Id. at 18, 58-65.
27. Act to Establish an Uniform Rule of Naturalization, ch. 54, 1 Stat. 566-69 (1798).
28. Id.
32. See Powell, supra note 24, at 60 (stating that the Acts were measures of "dangerous usurpation" and dealt a "death-blow to freedom of speech and of the press").
33. Id. at 62-63.
34. 5 U.S. (1 Cranch) 137 (1803).
resorted to the state legislatures to combat the overreaching nature of the Acts.\textsuperscript{36} Recognizing the Acts as unconstitutional, Thomas Jefferson, then Vice President of the United States, and James Madison secretly assisted Kentucky and Virginia, respectively, to declare the Acts invalid within their borders.\textsuperscript{37}

The Kentucky legislature passed Jefferson's resolutions first on November 10, 1798.\textsuperscript{38} In the Kentucky Resolutions, Jefferson used strong language to assert the states' unquestionable rights as sovereignies to judge laws that violate the Constitution.\textsuperscript{39} Jefferson opened by emphasizing the country's division over the role of the federal government; he wrote that "the several states composing the United States of America, are not united on the principle of unlimited submission to their General Government."\textsuperscript{40} Drawing upon contractual imagery, Jefferson noted that in the federal compact, of which the individual states are parties, the states agreed to the creation of a federal government with certain enumerated powers, and each state reserved for itself "the residuary mass of right to their own self Government."\textsuperscript{41} When the federal government acted outside the realm of delegated powers, its actions were "unauthoritative, void, and of no force."\textsuperscript{42} Jefferson argued that the federal government could not decide for itself what those delegated powers would be because "that would have made its discretion, and not the [C]onstitution, the measure of its powers."\textsuperscript{43} Rather, Jefferson proclaimed that each state, being a sovereign and a party to the Constitutional compact, "has an equal right to judge for itself" the extent of the federal government's powers, its infractions, and the appropriate redresses.\textsuperscript{44} Emphasizing the Tenth Amendment, the First Amendment, and natural law, the Kentucky Resolutions declared each of the Acts to be unconstitutional, void, and of no force and strongly urged other states to follow suit.\textsuperscript{45} Jefferson championed a "powerful form of redress," whereby "the states had a natural right to nullify," or declare null and void, any federal act that was unauthorized under the

\textsuperscript{36} Id.

\textsuperscript{37} BURSTEIN & ISENBERG, supra note 26, at 337-38.

\textsuperscript{38} The Kentucky Resolutions of 1798, reprinted in 30 THE PAPERS OF THOMAS JEFFERSON 529 (Barbara B. Oberg ed., 2003).

\textsuperscript{39} Id. at 536.

\textsuperscript{40} Id. at 550.

\textsuperscript{41} Id.

\textsuperscript{42} Id.

\textsuperscript{43} Id.

\textsuperscript{44} Id.

\textsuperscript{45} Id. at 550-53.
Constitution. To Jefferson, "[n]ullification was a form of veto power" that "belonged to each of the individual states and was to be exercised solely within its jurisdiction."

Shortly thereafter on December 21, 1798, the Virginia legislature passed Madison’s resolutions, which espoused a more subdued redress than Jefferson’s nullification. Madison used much of Jefferson’s contractual language to declare the Acts unconstitutional and to call for interposition by the states. He wrote:

[In case of a deliberate, palpable, and dangerous exercise of other powers not granted by the said compact, the States, who are the parties thereto, have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights, and liberties appertaining to them.]

Rather than nullification, Madison proposed that states should interpose, or mediate, over issues of constitutional violations on behalf of their citizens, “open[ing] the door to negotiation.” Madison hoped that the states would collectively decide and implement the appropriate action to combat federal overreaching, such as that demonstrated by the Acts.

However, the other state legislatures were not cooperative and either ignored the Resolutions or touted them as incendiary. Nevertheless, the unpopularity of the Acts helped to solidify the Democratic-Republican Party, which ultimately beat out the Federalists for control of the federal government in the 1800 elections. With the war threat
passing and the Democratic-Republican Party assuming control, the Acts were repealed or allowed to expire during the following two years, with the exception of the Enemy Alien Act.\textsuperscript{55}

While not directly successful in achieving their goals, the Kentucky and Virginia Resolutions had a lasting impact on national ideology with the concept of states as parties to a constitutional compact and the vision of the nation as a league of sovereign states.\textsuperscript{56} These principles served as the foundation for other nullification movements and later the secession of southern states in the Civil War.\textsuperscript{57}

\textbf{B. The Nullification Crisis of 1832}

Just as the American Revolution was sparked by taxation, so too was the next major use of nullification. The growth of industrialization in America following the War of 1812 caused a shift in the national economy;\textsuperscript{58} "the north was becoming increasingly industrialized," while "the south . . . remain[ed] predominately agricultural."\textsuperscript{59} In 1828 and 1832, Congress passed tariffs to protect American manufacturing\textsuperscript{60} and in doing so, infuriated the southern states who believed that the tariffs were only beneficial to the industrialized northern states.\textsuperscript{61} Consequently, southerners referred to these acts as the "Tariff of Abominations."\textsuperscript{62} The high taxes on imports caused the cost of British textiles
to increase drastically, benefitting American cloth producers in the North. However, the tariffs burdened the agricultural South because England's demand for raw materials produced in the South greatly decreased, and consequently, the final cost of finished goods to American buyers increased.

In this second historical example, yet another Vice President was instrumental in calling for the remedy of nullification to challenge federal action. Southerners relied on Vice President John C. Calhoun from South Carolina for leadership and support against the tariffs. While some felt so strongly about the tariffs that they called for dissolution of the Union, Calhoun argued for the less drastic approach of nullification, borrowing the concept from Jefferson. Because the federal government existed only "at the will of the states," Calhoun advanced that a state finding a federal law "detrimental to its sovereign interests" had a right to nullify the law, declaring it void within its borders.

Although Congress's 1832 tariff bill lowered the 1828 tariffs, southerners were still displeased and believed the tariffs were too high. Because states' rights and nullification were increasingly popular with southerners, a majority of states' rights and nullification proponents won the South Carolina State House by 1832 and quickly called for the meeting of a popular convention to discuss the constitutionality of, and possible resolutions to, the tariffs. On November 24, 1832, the South Carolina Nullification Convention reacted swiftly in enacting an ordinance declaring that the 1828 and 1832 tariffs were "unauthorized by the Constitution" and "null, void, and no law, nor binding upon this State, its officers or citizens." The ordinance proclaimed that "it shall not be lawful for any of the constituted authorities, whether of this State, or of the United States, to enforce the payment of duties imposed by the said acts within the limits of this State." In declaring the tariffs null and void within South Carolina's borders, the ordinance was

63. Id.
64. Id.
65. Id.
66. Id.
67. Id.
68. Id.
69. Id.; Whittington, supra note 56, at 72-73.
71. Id. at 29.
essentially an ultimatum to the federal government to repeal the tariffs and they even threatened secession. Indeed, South Carolina raised over twenty-five thousand volunteer militiamen to prepare for federal resistance. The ordinance and what ensued as a result, dubbed the Nullification Crisis of 1832, has been characterized as "[t]he most serious constitutional crisis faced by the American republic between the adoption of the Constitution and the Civil War."

Initially, South Carolina thought President Andrew Jackson might support its nullification, as he had supported the state's Negro Seamen Law and Georgia's defiance of the Cherokees' treaty rights, "both of which might well be considered forms of nullification." However, Jackson proved the proponents of nullification wrong, feeling that "nullification [was] a patriotic and personal challenge." In his proclamation against the nullification ordinance, Jackson responded with firmness, warning the people of South Carolina that nullification was "a course of conduct in direct violation of their duty as citizens of the United States, contrary to the laws of their country, subversive of its Constitution, and having for its object the destruction of the Union." To Jackson, "nullification was tantamount to secession." He dispelled the validity of nullification, characterizing the practice as "absurd," "impracticable," and "destructive" of the very purpose of the Constitution. Jackson argued that nullification would essentially revert the nation to its state under the confederation because the federal government would be powerless to enforce any laws on states and their citizens that were not favorable to local interest. Jackson's duty as President

72. Id. at 30-31.
74. Id. at 405.
76. HOWE, supra note 73, at 404.
77. Id.
78. Proclamation by the President of the United States of America (Dec. 10, 1832) [hereinafter Proclamation of 1832], reprinted in STATE PAPERS ON NULLIFICATION, supra note 70, at 76.
79. HOWE, supra note 73, at 405; see also Proclamation of 1832, supra note 78, at 85 (charging that the nullification ordinance proposed by South Carolina's leaders was really a pretense for their main objective of secession).
80. Proclamation of 1832, supra note 78, at 80-81.
81. Id. at 79-80.
was undoubtedly to execute the law, and South Carolina was making it clear that execution of the tariffs would require force. Jackson refuted Calhoun's characterization of nullification as a peaceful state remedy; he warned, "be not deceived by names; disunion by armed force is treason."

Regarding South Carolina's challenge as a serious threat, Jackson asked Congress to pass a law to permit his use of federal troops to enforce the tariffs in response to nullification. Congress granted Jackson's wish by enacting The Force Act in January 1833, which South Carolina also nullified. In the end, armed confrontation was avoided when Congress, supported by Jackson's willingness to compromise on tariffs and his desire to maintain the loyalty of the South, revised the tariff with a compromise bill of drastic reductions. Much like Kentucky and Virginia's nullification attempts of the Alien and Sedition Acts, South Carolina failed to gather support from any other state to nullify the tariffs. South Carolina decided to call the compromise a win and repealed its nullification ordinance of the tariffs.

While South Carolina's attempt at nullification also failed to reach its objective and establish nullification as a viable measure, the ordinance did have some practical effects in contributing to the federal govern-

82. Howe, supra note 73, at 405; Proclamation of 1832, supra note 78, at 94 ("The laws of the United States must be executed—I have no discretionary power on the subject—my duty is emphatically pronounced in the Constitution . . . opposition must be repelled.").
83. Proclamation of 1832, supra note 78, at 94.
84. See The South Carolina Nullification Controversy, supra note 59.
86. 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 Papers on Nullification, supra note 70, at 373-75.
87. Howe, supra note 73, at 406-07; An Act to Modify the Act of the Fourteenth of July, One Thousand Eight Hundred and Thirty-Two, and All Other Acts Imposing Duties on Imports, ch. 55, 4 Stat. 629-31. The compromise cut the former tariffs in half. Howe, supra note 73, at 406.
88. See Howe, supra note 73, at 406-07 (explaining that other southern states condemned South Carolina's nullification attempt because they fared better than South Carolina under the tariffs and favored protectionism); see generally State Papers on Nullification, supra note 70, at 101-331 (providing the negative responses of numerous states to South Carolina's nullification of the tariffs).
89. Howe, supra note 73, at 408; Ordinance of the Convention, repealing the Ordinance to nullify the Tariff Laws (Mar. 15, 1833), reprinted in in State Papers on Nullification, supra note 70, at 352. Interestingly, South Carolina did not repeal its nullification ordinance of the Force Bill. Howe, supra note 73, at 408 (stating that nullifying the "now moot" Force Bill was the Nullification Convention's "final gesture of defiance").
ment's willingness to compromise. However, many argue that South Carolina's nullification was less about protesting the tariffs than about protecting the institution of slavery. Consequently, when hostilities between the North and South reached a head and the Civil War soon appeared inevitable, the southern states opted for the more drastic measure of secession over nullification, which had not been successful with the tariffs.

C. Slavery, Segregation, and the Modern Era of Nullification

While nullification has received a negative connotation from its connection to proponents of slavery, abolitionists also employed the doctrine to resist slavery prior to the Civil War. Several northern states passed laws, dubbed "personal liberty laws," to thwart federal enforcement of the Fugitive Slave Acts of 1793 and 1850, which had granted slave owners the right to recapture slaves that escaped to the North in an extradited process and assessed heavy penalties for interference with the law's execution. Pennsylvania's law directly challenged enforcement of the Fugitive Slave Acts by making the removal of an escaped slave from the state back into slavery a felony within its borders. These state measures borrowed ideas from Jefferson and Madison's Resolutions, which proclaimed that the federal government was not the final judge of its laws and that the independent, sovereign states had a right and a duty to defy unconstitutional federal

90. See supra notes 87 & 89 and accompanying text.
91. Howe, supra note 73, at 402-03 (discussing how Calhoun and his supporters "wanted to try out nullification" as a tactic to protect slavery, an issue that South Carolina had grown apprehensive about since the Missouri Compromise). See also John C. Calhoun Statement on Nullification, ANDREW JACKSON: GOOD, EVIL AND THE PRESIDENCY, PBS, http://www-tc.pbs.org/kcet/andrewjackson/edu/calhounonnullification.pdf (last visited Jan. 20, 2014) (providing an excerpt from a letter in which Calhoun candidly explained "that the doctrine of nullification aimed, above all else, at protecting the institution of slavery").
92. Howe, supra note 73, at 410; see also Ryan S. Hunter, Sound and Fury, Signifying Nothing: Nullification and the Question of Gubernatorial Executive Power in Idaho, 49 IDAHO L. REV. 659, 679 (2013) (stating that "nullification sowed the seeds of secession, a bitter fruit that would become ripe little more than a quarter century later" in the Civil War).
93. See Hunter, supra note 92, at 679-86 (discussing the use of nullification by northern states against the Fugitive Slave Acts of 1793, infra note 94, and 1850, infra note 95).
94. Act Respecting Fugitives From Justice, and Persons Escaping From the Service of Their Masters (Fugitive Slave Act of 1793), ch. 7, 1 Stat. 302 (1793).
95. Act to Amend, and Supplementary to, the Fugitive Slave Act of 1793 (Fugitive Act of 1850), ch. 60, 9 Stat. 462 (1850).
96. Hunter, supra note 92, at 680-81.
97. Id. at 680.
action.98 Indeed, the Wisconsin Supreme Court became a big player in the nullification efforts against the Fugitive Slave Acts by declaring the Acts unconstitutional, asserting the sovereignty of the states, and ordering the release of an offender of the Acts within the state.99 This was the first time a state court had upheld nullification as a viable state remedy against federal action.100 However, in Ableman v. Booth,101 the Supreme Court of the United States denied the states’ right to nullify the Fugitive Slave Acts and aggressively upheld the Court’s right under the Constitution to be the final judge of the nation’s laws.102 The ruling did not quell the northern resistance to the Fugitive Slave Acts though, and soon the issue fell from discussion as the Civil War began.103

While slavery met its demise after the Civil War, the integration of African-Americans into society became the next big battleground for nullification. Unsurprisingly, some southern states found comfort in their old friend, the nullification doctrine, when they sought to resist federal action to end segregation in the 1950s and 1960s.104 Several southern states passed resolutions declaring the Supreme Court’s two decisions in Brown v. Board of Education105 unconstitutional as a usurpation of the states’ power to operate schools and deeming the decisions null, void, and of no effect in their borders.106 The terms nullification and interposition were used interchangeably by segregation-

99. In re Booth, 3 Wis. 1 (1854); see also Hunter, supra note 92, at 682-83 (discussing the role of the Wisconsin Supreme Court in nullifying the Fugitive Slave Acts).
100. See Hunter, supra note 92, at 680.
101. 62 U.S. 506 (1858).
102. Id. at 518, 526.
103. See Hunter, supra note 92, at 685-86 (discussing Wisconsin's nullification of the Supreme Court's decision and continued resistance of the Fugitive Slave Acts up until the Civil War).
106. See Hagley, supra note 104, at 190-91 (discussing Virginia’s resolution to this effect, which relied on the language of Jefferson, Madison, and Calhoun and which sparked a domino effect of nullification resolutions across the South).
ist states in the text of these measures and in their vocal support of defying federal desegregation orders. In Martin Luther King Jr.'s famous "I Have a Dream" speech, he proclaimed:

I have a dream that one day in Alabama, with its vicious racists, with its governor having his lips dripping with the words of interposition and nullification, one day right there in Alabama little black boys and black girls will be able to join hands with little white boys and white girls as sisters and brothers.

In 1958, the United States Supreme Court explicitly rejected the use of nullification to ignore desegregation in Cooper v. Aaron. Unlike the historical examples of the Alien and Sedition Acts and the Tariff Acts, violence erupted from pro-segregation riots as the federal government would not compromise over segregation, and armed enforcement headed by the federal government was required in some states to implement desegregation.

For the next forty years, nullification was largely non-existent, until 1996 when the modern nullification movement began with California defying federal drug laws in permitting the use of medical marijuana within the state. The modern nullification movement has seen efforts by states to combat the REAL ID Act of 2005, federal firearms legislation, the Patient Protection and Affordable Care Act of 2010, and federal laws against marijuana use. While the states

107. Id. at 191-92 & n.175.
109. Id.
111. See Hagley, supra note 104, at 203-04 (discussing the Little Rock Crisis and the widespread violence associated with desegregation attempts after Brown II).
112. See infra Part IV.A.1 (discussing the modern medical marijuana nullification movement).
113. Pub. L. No. 109-13, 119 Stat. 302 (2005); see also Card, supra note 57, at 1823-24 (discussing state attempts to nullify the Real ID Act of 2005 by passing legislation to prohibit the law's implementation within its borders). But see Hunter, supra note 92, at 691-92 (refuting the characterization of states' defiance of the Real ID Act as nullification, instead deeming the resistance as "uncooperative federalism").
114. See infra Part IV.B (discussing the nullification movement with respect to federal firearms legislation).
116. See infra Part IV.A. (exploring the nullification movements regarding marijuana).
declare the federal government is overreaching in each of these issues, with respect to marijuana and firearms, defiant states assert that the federal government has encroached on the state's police power within the realm of criminal law in violation of the Constitution.\textsuperscript{117}

III. SETTING THE STAGE FOR MODERN NULLIFICATION: THE EXPANSION OF FEDERAL CRIMINAL JURISDICTION

The expansion of federal criminal jurisdiction is key to understanding the modern nullification movement concerning areas of criminal law. Federal criminal jurisdiction has increased exponentially since the adoption of the Constitution.\textsuperscript{118} Originally, the scope of federal criminal jurisdiction was very narrow, and the states were largely left to combat criminal activity within their borders.\textsuperscript{119} As the role of the federal government has evolved drastically over America's history, so too has its expansion into criminal law.\textsuperscript{120}

A. American Independence, the Articles of the Confederacy, and the Constitution

Federalism was the main point of controversy in early American independence and played a central role in the Framers' decision over whether the new national government would have criminal law authority.\textsuperscript{121} The colonists were inherently wary of central authority, an instinct that was "justified by the [English] Crown's long history of abuse of the criminal justice system to serve political ends."\textsuperscript{122} Consequently, criminal regulation by the federal government was a particularly sensitive issue of that period.\textsuperscript{123}

At an even broader level, concerns of mistrust of the federal government were central to the great debate over the decision to ratify the Constitution.\textsuperscript{124} At the heart of this debate was the worry that powers given to the national government would correlate with a loss of

\textsuperscript{117} See infra Part IV.A. & B.


\textsuperscript{119} \textit{Id.}

\textsuperscript{120} \textit{Id.}


\textsuperscript{122} \textit{Id.} at 21.

\textsuperscript{123} \textit{Id.} at 21-22.

\textsuperscript{124} \textit{Id.} at 22.
individual liberty. Concerned with allocating too much power to the new national government, the states first adopted the Articles of Confederation, which provided for a limited national government. The Articles of Confederation denied the new national government the ability to act directly upon individual state citizens, even in criminal law matters. As a result, the new Constitution did not provide for general federal courts, except for admiralty courts, and did not establish any federal criminal-law authority.

Although admiralty courts were well-established by common law, the new national admiralty court “was highly controversial and was met with extreme reluctance.” Ultimately, the Continental Congress granted admiralty jurisdiction back to the states through an ordinance allowing state governors to commission state court judges to try piracy offenses. Although the Continental Congress made recommendations to the states on piracy laws, this approach lacked the uniformity needed to combat a nation-wide problem. Later, in the development of the Constitution, the Framers would expressly grant federal jurisdiction over admiralty crimes.

Under the Articles of Confederation, the national government lacked the power to handle issues of national importance. Alexander Hamilton complained that the Articles failed to give any teeth to the nation’s laws because the nation had “no power to exact obedience, or punish disobedience to their resolutions.” Thus, when drafting the Constitution, the Framers wanted to create a stronger national government, while still providing restrictions and balances on its power.

125. Id.
127. Kurland, supra note 121, at 23.
128. Id.
129. Id.
130. Id. at 23-24.
131. Id. at 24.
132. Id.
133. Id.; U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction.”).
The Constitution provided for federal courts to have jurisdiction over cases arising under the Constitution, laws, and treaties of the United States, cases in which the United States is a party, cases affecting ambassadors and consuls, cases concerning federally-owned land, admiralty cases, and diversity cases.\textsuperscript{137} This jurisdiction was not solely for civil cases; Article III, Section 2, Paragraph 3 instructs that all criminal trials, except those for impeachment, should be by jury in the state where the criminal conduct occurred.\textsuperscript{138} Article III also established the federal crime of treason.\textsuperscript{139} The Constitution left the business of creating the laws up to Congress; thus, the great source of federal criminal jurisdiction lies within the powers enumerated to Congress.\textsuperscript{140} In addition, the Constitution and the laws and treaties made under its authority were declared to be the supreme law of the land and binding on the states.\textsuperscript{141}

The majority of the provisions in the Bill of Rights also pertain to criminal law. The Fourth Amendment provides protections against unreasonable search and seizure.\textsuperscript{142} The Fifth Amendment requires indictment by a grand jury in capital cases, prohibits double jeopardy, protects against self-incrimination, and provides for due process of the law.\textsuperscript{143} The Sixth Amendment ensures the right to a public and speedy trial by an impartial jury, drawn from the place where the crime was committed, in criminal prosecutions.\textsuperscript{144} The Sixth Amendment also provides the right to be informed of the nature and cause of the accusation, to be confronted by opposing witnesses, to compel favorable witnesses, and to the assistance of counsel.\textsuperscript{145} The Eighth Amendment provides protections against excessive fines and cruel and unusual punishment.\textsuperscript{146} Every other aspect of criminal law was to reside with the states, as protected by the Tenth Amendment, which provided that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."\textsuperscript{147}

\begin{itemize}
\item \textsuperscript{137} U.S. Const. art. III, § 2.
\item \textsuperscript{138} Id. art. III, § 2, ¶ 3.
\item \textsuperscript{139} Id. art. III, § 3.
\item \textsuperscript{140} Id. art. I, § 8, ¶ 18.
\item \textsuperscript{141} Id. art. VI, ¶ 2.
\item \textsuperscript{142} Id. amend. IV.
\item \textsuperscript{143} Id. amend. V.
\item \textsuperscript{144} Id. amend. VI.
\item \textsuperscript{145} Id.
\item \textsuperscript{146} Id. amend. VIII.
\item \textsuperscript{147} Id. amend. X.
\end{itemize}
B. Federal Criminal Jurisdiction Prior to the Civil War

Prior to the Civil War, only a few federal criminal offenses existed, and these generally consisted of crimes against the federal government, such as injury to, or interference with, the federal government and its programs.\(^{148}\) These mainly included such offenses as treason, theft of government property, bribery of federal officials, perjury in federal court, and revenue fraud.\(^{149}\) At this time in history, the federal government was small and operated very few programs.\(^{150}\) Consequently, the list of actions that constituted offenses for the protection of federal interests was very limited.\(^{151}\)

Generally, federal jurisdiction did not reach crimes against the person, such as murder, rape, robbery, arson, and fraud.\(^{152}\) The only major exception to this was where the federal government necessarily held exclusive jurisdiction, such as in the District of Columbia and the federal territories.\(^{153}\) Rather, states held domain over crimes against the person, as state law dictated and defined what actions would be criminal, and state or local officials were responsible for prosecuting these offenses in state courts.\(^{154}\)

C. Expansion of the Criminal Frontier: Mail and Mobility

The first federal criminal legislation came as a response to exponential postwar growth in interstate transportation and commerce following the Civil War.\(^{155}\) In 1872, Congress enacted the first federal legislation dealing with crimes affecting private citizens—the mail fraud statute.\(^{156}\) This legislation was a response to fraudulent schemes using the mail, which jilted large numbers of victims over a broad geographic area spanning multiple states.\(^{157}\)

Congress also enacted new statutes to respond to transportation and commerce through the railroads.\(^{158}\) Initially, these provisions were narrowly tailored to a specific problem that local enforcement could not
handle, such as a provision deeming illegal the interstate transport of diseased cattle, and gradually became much broader in nature with the development of comprehensive regulatory schemes, such as the Sherman Antitrust Act of 1890\textsuperscript{159} and the Interstate Commerce Act of 1887.\textsuperscript{160}

These new, broader federal statutes were highly controversial because the federal government was encroaching into areas that had traditionally been the exclusive province of the states. In the 1903 case \textit{Champion v. Ames} (Lottery Case),\textsuperscript{161} a sharply divided Supreme Court upheld the constitutionality of a federal law criminalizing the interstate transportation of lottery tickets.\textsuperscript{162} The Court reasoned that Congress's power to regulate interstate commerce allowed it to enact this statute to assist the states and supplement state law, which might otherwise be overwhelmed.\textsuperscript{163}

\textbf{D. Prohibition, the Great Depression, and the New Deal}

Prohibition, the Great Depression, and the New Deal brought more expansion to the area of federal criminal jurisdiction.\textsuperscript{164}

The Eighteenth Amendment prohibited the sale or distribution of liquor and explicitly granted "concurrent power" of enforcement to the states and the federal government.\textsuperscript{165} An extraordinary increase in federal prosecutions in the 1920s and 1930s resulted, with 65,960 Prohibition-related criminal cases in the federal courts in 1932.\textsuperscript{166}

Despite the repeal of Prohibition in 1933, the expanded federal criminal jurisdiction was here to stay.\textsuperscript{167} One reason for this lasting effect was that, at the time, the nation was in the midst of the Great Depression.\textsuperscript{168} As people were faced with extreme desperation, criminal activity ran rampant, and the states were ill-equipped to handle the situation.\textsuperscript{169} Congress responded to this nation-wide crisis by enacting numerous federal crimes that targeted violence against private individuals and businesses.\textsuperscript{170} Among these new federal offenses were bank robbery, extortion and robbery affecting interstate commerce,
interstate transmission of extortionate communications, interstate flight to avoid prosecution, and interstate transportation of stolen property. As the New Deal brought with it federal social and economic legislation, Congress became more willing to assume jurisdiction over an increasingly broad range of conduct traditionally within the ambit of the states' police powers.

During this time, Congress also increased its comprehensive regulatory acts, which included criminal penalties. As the government became more involved in enacting federal regulations, the scope of federal criminal laws expanded and reached a wide range of new areas, such as "occupational health and safety and air and water pollution."

In upholding New Deal legislation, the Supreme Court broadly interpreted Congress's commerce power, extending it to local activities that affect interstate commerce, and set the precedent for even broader criminal statutes.

E. The New Age: Criminal Jurisdiction and Congress's Commerce Power

The 1960s and 1970s began the new age of federal criminal jurisdiction. Congress began to rely heavily upon its commerce power to enact criminal statutes dealing with organized crime, illegal drugs, and violence, while continuing to impose criminal sanctions regulating other social concerns.

When organized crime emerged as an issue of national concern, many believed that the federal government should help in combating it. In 1961, Congress enacted the first organized crime statute, which reached persons who traveled interstate in connection with racketeering activity. After a congressional finding that loan-sharking provided a major source of funds for organized crime, Congress next criminalized all loan-sharking in a statute so broad that it "could reach even the

171. Id.
172. Id.
173. Id.
174. Id.
175. Id.
176. Id.
177. Id.
178. Id.
179. Id.
smallest local loan-sharking transaction." Congress also invoked the commerce power when it enacted the Racketeer Influenced and Corrupt Organizations Act (RICO), which provides heavy criminal and civil penalties.

In 1970, Congress passed a comprehensive drug-control statute, so broad in nature that it reached all controlled substances, even those possessed or distributed exclusively intrastate. Congress reasoned that this broad scope was necessary because intrastate control was essential to interstate control of drug trafficking. Subsequently, Congress added new drug crimes, such as possession near a school zone, and increased the penalties for existing offenses. Congress enacted criminal statutes dealing with currency reporting, money laundering, drugs, and tax laws in the 1980s and 1990s.

F. Violent Crimes and Other New Garden-Variety Federal Offenses

With increased public concern over violent crimes, Congress passed numerous criminal statutes in the 1980s and 1990s in the name of its commerce power, such as carjacking and new firearms offenses. During this time, Congress also passed legislation targeting violent career criminals and penalty-enhancement provisions with increased mandatory minimum prison sentences. In addition, a crime bill in 1994 "authorized the death penalty for more than sixty federal offenses."

Congress also reached its hand into garden-variety crime to combat other social ills of the day by enacting new federal offenses for odometer tampering, failing to pay child support, computer fraud, and disrupting animal research laboratories. Because Congress simply added each new statute to those already on the books, over 3,000 federal crimes are now estimated to be scattered throughout the fifty titles of the United States Code. This modern trend is a complete reversal of the limited

180. Id. at 42-43.
182. Beale, supra note 118, at 43.
183. Id.
184. Id.
185. Id.
186. Id.
187. Id.
188. Id.
189. Id.
190. Id.
191. Id. at 43-44.
federalization of crime in the first century of the nation.\textsuperscript{192} Now, the majority of the federal criminal code concerns conduct that is also subject to regulation under the states' general police powers.\textsuperscript{193} Because the 'federal law generally supplements state law, creating concurrent jurisdiction between the state and federal government, conduct proscribed by both federal and state law “may be prosecuted by federal authorities, state authorities, or both.”\textsuperscript{194}

This overlap in criminal jurisdiction between the federal government and the state government invokes a host of issues, such as creating the possibility of double jeopardy and disparate treatment for similarly situated offenders, preventing the states from exerting the discretion to respond to local concerns, and opening up the door for other potential abuses.\textsuperscript{195} However, studies of the types of cases heard in federal courts show that federal courts typically stick to their traditional role of prosecuting crimes that implicate federal interests or that have interstate components.\textsuperscript{196} Thus, some critics dispel the overfederalization argument by purporting that “[t]he ‘explosion’ in the federal criminal law . . . is largely irrelevant to actual practice in the federal criminal justice system.”\textsuperscript{197} While concurrent jurisdiction over the same crimes is “generally benign,” the overlap becomes cause for concern “when the federal government criminalizes behavior that some states regard as morally neutral or beneficial,”\textsuperscript{198} such as in the modern examples of marijuana for medicinal and recreational use as well as the less restrictive use of firearms.

IV. BACK TO THE PRESENT: MODERN NULLIFICATION OF FEDERAL CRIMINAL LAW

States are developing new norms in the arena of criminal law and as a result are tying modern nullification issues to federal criminal law enforcement, a departure from the majority of the historical nullification examples.\textsuperscript{199} In these modern episodes, the federal government has declared as criminal an activity that the states have decided shall be

\begin{itemize}
\item \textsuperscript{192} \textit{Id.} at 44.
\item \textsuperscript{193} \textit{Id.}
\item \textsuperscript{194} \textit{Id.}
\item \textsuperscript{195} \textit{Kurland, supra} note 121, at 2-3 & n.6, 9 & n.30.
\item \textsuperscript{196} \textit{Susan R. Klein & Ingrid B. Grobey, Overfederalization of Criminal Law? It's A Myth, 28 CRIM. JUST. 23, 26 (2013).}
\item \textsuperscript{197} \textit{Id.} at 25.
\item \textsuperscript{198} \textit{Id.} at 28.
\item \textsuperscript{199} \textit{See supra} Part II (discussing the historical examples of nullification).
\end{itemize}
nullification is legal within their borders. Consequently, overlap in criminal jurisdiction on these issues of division creates the scene for "a clash between state and federal democratic processes." The issues promulgated from these differences in criminality are readily apparent: What law do the states' citizens look to in conducting themselves? The doctrine of fair notice becomes completely convoluted when a citizen is notified by the federal government that his actions may jeopardize his life and liberty and simultaneously assured by the state that he is at liberty to so act without fear of criminal consequence. In addition, enforcement causes chaos, as cooperation and pooling of resources among state and federal agencies will necessarily be strained by each government's respective allegiance to uphold its respective laws. In criminal law, arguably more so than any other legal field, the ramifications of conflicting state and federal laws have the potential to be great. Thus, the response from the federal government regarding this resurgence of nullification in criminal law is imperative to the states, their citizens, and the continuing relationship between the federal and state governments.

A. Puff, Puff, Pass: Marijuana Gets the Green Light from States and Feds

1. The Only Prescription is More Green: Medicinal Marijuana. The medical use of marijuana has become widely accepted across the nation in the past two decades, as research has shown the drug has a significant medicinal benefit in treating chronic pain associated with terminal illness and in alleviating the side effects of standard treatments.

200. Compare 21 U.S.C. § 844 (a) (2012) (criminalizing the simple possession of marijuana, a controlled substance), with COLO. CONST. art. XVIII, § 16(3)(a) (2012) (declaring that possession of one ounce or less of marijuana by persons at least twenty-one years old is not a criminal offense in the state).

201. Klein & Grobey, supra note 196, at 29.

202. See, e.g., David S. Schwartz, High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States, 35 CARDOZO L. REV. 567, 569-70 (2013) (discussing the mass confusion caused by such a conflict in the law for law-enforcement personnel, the courts, and state leaders).

203. The fair notice, or fair warning, doctrine is "[t]he requirement that a criminal statute define an offense with enough precision so that a reasonable person can know what conduct is prohibited." BLACK'S LAW DICTIONARY 676.


205. Klein & Grobey, supra note 196, at 31-32.
for non-terminal illnesses. Several states have legalized the cultivation and use of marijuana, subject to numerous restrictions, when a physician recommends such treatment for a serious condition. This has been accomplished mainly through popular voter initiatives in earlier years and with direct legislation later in the reform movement. In recognizing the medicinal quality of marijuana and implementing its legality, states are at odds with federal drug laws, which still classify marijuana as a Schedule I drug—defined as one of the most dangerous and addictive drugs in existence and as having little or no medical value.

Medical marijuana laws work mainly to exempt people who use, recommend, or administer marijuana for an approved medicinal purpose from arrest, criminal prosecution, and civil penalties. While some exemptions vary, the states use “a common framework for determining who qualifies for them.” With the emphasis on medicinal purpose, first, a prospective medical marijuana user must undergo a medical examination and be diagnosed by a physician with having a debilitating medical condition. Conditions appearing on the list typically include cancer, glaucoma, AIDS (or HIV), multiple sclerosis, and other chronic diseases that produce symptoms like severe pain, nausea, seizures, or persistent muscle spasms. Many states also allow patients or doctors to petition to have new conditions added, and California’s list includes any condition for which, in the physician’s opinion, marijuana may provide relief.

In addition to a qualifying diagnosis, all states require that a physician recommend, rather than prescribe, the use of marijuana as an appropriate course of treatment. This standard is generally easy to satisfy, as all that is required is a physician’s conclusion that among

207. Id.
208. See Mikos, supra note 13, at 1433 & n.49 (internal citations omitted) (“To give some perspective on the seriousness of this classification, consider some of the other notable drugs that have been placed on Schedule I—heroin, Ecstasy, LSD, GHB, and peyote—and a few that have not—cocaine, codeine, OxyContin, and methamphetamine (all on Schedule II”).
209. Id. at 1430-31.
210. Id. at 1428.
211. Id.
212. Id.; see also Zitter, supra note 206.
213. Mikos, supra note 13, at 1428 n.19.
214. Id. at 1428.
treatment options, marijuana may benefit the patient. Almost all the states require the physician's recommendation to be in writing, with the exception of California, where oral recommendation is sufficient.

Before lighting up, a majority of the states that have legalized medical marijuana also require medicinal users, and sometimes caregivers and suppliers, to register with the state. Failing to register usually bars the person from claiming the medical marijuana exemption in a later criminal prosecution, despite otherwise satisfying all the requirements for medical marijuana use. Registering involves providing forms signed by a physician attesting to examining the patient, diagnosing a qualifying condition, and recommending marijuana as treatment, in addition to providing contact information for the user, the physician, and the designated caregiver. After the state has reviewed the registration application and confirmed the user's eligibility, the state will issue a registry identification card, similar to a driver's license, for the user and the user's designated caregiver. Users are required to renew their registration cards periodically, usually every year, and are required to report changes in their eligibility.

Medical marijuana laws are not without limitations for qualified users. Restrictions on the amount of marijuana qualified users may possess or cultivate at a given time are included in these measures and vary from state to state. In addition, these laws include restrictions on where or in what context a qualified user may possess or use marijuana, such as in public places, schools, work environments, or while operating an automobile.

In legalizing marijuana for certain medical use, these state measures provide legal protection to qualified users, their physicians, and their caregivers for possessing, cultivating, using, administering, and recommending marijuana. Participating states not only exempt qualified users from arrest and prosecution for drug offenses connected with this approved use, but many also exempt them from other civil

215. Id.
216. Id.
217. Id.
218. Id. at 1428-29.
219. Id. at 1429.
220. Id.
221. Id. at 1429-30.
222. Id. at 1430.
223. Id.
224. Id.
225. Id. at 1430-31.
sanctions, such as forfeiture, included in state drug laws. Designated caregivers typically receive protection from state-imposed sanctions for possessing, administering, and even cultivating marijuana for a qualified patient. These laws also shield physicians from sanction by government or private entities, like employers and licensing boards, for making marijuana recommendations.

Many might hesitate to classify medical marijuana laws as examples of nullification, because none of these state measures assert that the federal laws banning the use of drugs are unconstitutional nor do they declare the CSA null, void, and of no effect in their state. Thomas Jefferson’s aggressive and righteous language does not resonate in the language of these laws. For instance, the Vermont legislature used passive language in its law, stating a preference for the federal government to change the law to permit medical marijuana use. Despite asserting its intent to join the efforts of other states in legalizing the use of medical marijuana in clear defiance of existing federal law, the Vermont legislature failed to legalize the drug’s sale for medical purposes, declaring that “[p]atients will be forced to procure medical marijuana illegally until the federal government removes marijuana from its list of schedule I substances or allows states to permit the medical use of marijuana without violating federal law.

However, some states are more assertive in their laws. Rhode Island asserted its authority to enact its medical marijuana law “pursuant to its police power to enact legislation for the protection of the health of its citizens, as reserved to the state in the Tenth Amendment of the United States Constitution.” Regardless of the lack of explicit nullification language, these state measures indicate that the state government has the authority to except and legalize a provision of the CSA, essentially rendering the federal law void with respect to medical use of marijuana within the state.

226. Id. at 1430.
227. Id. at 1431.
228. Id.
229. See e.g., John Dinan, Contemporary Assertions of State Sovereignty and the Safeguards of American Federalism, 74 ALB. L. REV. 1637, 1639-40, 1647-51 (2011) (arguing that recent state laws legalizing medical marijuana “fall short of invoking the clearly discredited doctrine of nullification” used throughout American history).
230. Id.
232. Id. § 1(e).
Interestingly, federal response as of late to this growing trend in medical marijuana has been largely laissez-faire, which has not always been the case.\textsuperscript{235} Initial response to marijuana reform was staunch opposition and included threats by the Department of Justice (DOJ) and the Department of Health and Human Services (DHHS) to revoke Drug Enforcement Agency (DEA) registration and exclude any physicians recommending marijuana from Medicare and Medicaid reimbursement.\textsuperscript{236} From 2001 to 2005, the Supreme Court made its stance clear in ruling against the permissibility of the medical necessity defense and by upholding Congress’s commerce clause power to prohibit the cultivation and use of marijuana in compliance with state law, even if contained intrastate, and asserting the federal triumph of the Supremacy Clause.\textsuperscript{237} Despite these federal roadblocks by the Supreme Court, states have not backed down from their medical marijuana legislation, and even more states have since joined in legalizing medical marijuana within their own borders.\textsuperscript{238}

Early on in the current administration, President Barack Obama declared that he would not “be using [DOJ] resources to try to circumvent state laws” allowing medical marijuana use.\textsuperscript{239} While President Obama has received some negative press for recent raids on medical marijuana dispensaries, “almost uniformly, these recent crackdowns have targeted dispensaries that were out of compliance with both federal law and [state law].”\textsuperscript{240} In an interview with \textit{Rolling Stone}, President Obama qualified his early vows to not interfere with state medical marijuana laws:

I never made a commitment that somehow we were going to give carte blanche to large-scale producers and operators of marijuana—and the reason is, because it’s against federal law. I can’t nullify congressional

\textit{Federal Government}, 11 WYO. L. REV. 201, 232 (2011) (stating that even though state marijuana laws do not assert to protect citizens from federal prosecution for marijuana use, the simple act of passing a law that conflicts with a federal statute is a form of passive nullification).


236. \textit{Id.} at 429-30.


238. \textit{See id.} at 435.


law. I can't ask the [DOJ] to say, "Ignore completely a federal law that's on the books." What I can say is, "Use your prosecutorial discretion and properly prioritize your resources to go after things that are really doing folks damage." As a consequence, there haven't been prosecutions of users of marijuana for medical purposes.\footnote{241}

Rather, President Obama claimed that there is a "murky area" in which "large-scale, commercial operations . . . supply[ing] medical marijuana users" are "in some cases . . . also . . . supplying recreational users," to which prosecutors cannot turn a blind eye.\footnote{242} Thus, for now, medical marijuana use in compliance with state laws generally seems poised to continue without interference from the federal government.\footnote{243} However, as there is much federal resistance to change the CSA to permit marijuana use, states face the possibility that practical acceptance may be frustrated by defiant federal prosecutors or may come and go with the changing administrations.\footnote{244}

2. Let the Good Times Roll: Recreational Use. In November 2012, voters in Colorado and Washington made history when they approved the legalization of recreational marijuana use in their states.\footnote{245} Similar in form, these two initiatives repealed state laws criminalizing adult possession of up to one ounce of marijuana and provided a one-year period for state legislatures to create regulations for the licensing and taxing of retail marijuana stores.\footnote{246} In Colorado, private cultivation of up to six marijuana plants, with no more than three being mature, was also deemed lawful.\footnote{247} Both state measures expressed a desire to treat and regulate marijuana in the same way states do with regard to alcohol and clearly provided for the legal sale

\footnotetext{242}{Id.}
\footnotetext{243}{Klein & Grobey, supra note 196, at 30.}
\footnotetext{244}{See Sam Kamin & Eli Wald, Marijuana Lawyers: Outlaws or Crusaders?, 91 OR. L. REV. 869, 880 (2013) (stating that one of the biggest consequences of the state of marijuana legalization is "the ever-present threat of federal prosecution"); see also Berkey, supra note 235, at 450 (explaining that the federal-state dynamic on the issue of medical marijuana creates uncertainty and dependence on the mercy of government); Reiman, supra note 239 (discussing this problem in the context of the raids on dispensaries in California).}
\footnotetext{245}{See Healy, supra note 14, and accompanying text.}
\footnotetext{246}{Kamin & Wald, supra note 244, at 879 (citing COLO. CONST. art. 18, § 16(3) and WASH. REV. CODE § 69.50.4013 (2012)).}
\footnotetext{247}{COLO. CONST. art. XVIII, § 16(3).}
of marijuana,248 which many of the medical marijuana laws problematically failed to do.249 Both state measures contained restrictions on what context in which adults may legally use marijuana, confining legal use to private property and out of the eye of the general public.250

Nullification language is not readily apparent in these recreational marijuana laws, just as such language is absent in medical marijuana laws. However, the implications of these laws, even more so than in the medical marijuana context, include nullifying an even broader portion of the CSA with respect to the use and sale of marijuana.251 The intent and purposes sections of these two initiatives are supportive of this conclusion as well. For instance, Colorado's measure stated that legalization was "[i]n the interest of the efficient use of law enforcement resources, enhancing revenue for public purposes, and individual freedom" and that regulation of marijuana was in the interest of the "health and public safety of our citizenry," evoking illusions of the state's police power.252 Washington's initiative asserted its intentions to "stop treating adult marijuana use as a crime," refocus law-enforcement resources on "violent and property crimes," and "[t]ake[] marijuana out of the hands of illegal drug organizations" through tightly regulated state licensing.253

In a surprising and "historic step back from its long-running drug war," the federal government claimed that it will follow the same approach to recreational marijuana state laws as it does in the medical marijuana context, remaining hands-off except in cases where individuals or organizations are acting out of compliance with state law.254 In a memorandum sent to provide United States Attorneys with guidance on marijuana enforcement, Deputy Attorney General James M. Cole instructed prosecutors and law-enforcement officers to set their priority for enforcement of marijuana laws on the following:

248. Id. art. XVIII, § 16(1); 2013 Wash. Legis. Serv. Ch. 3, § 1 (West).
249. See supra note 232 and accompanying text (discussing Vermont's failure to provide for the legal sale of marijuana to qualified medical users).
250. See Klein & Grobey, supra note 196, at 29 (stating that "smoking will not be permitted in public" by either Colorado or Washington).
251. Id. (discussing the conflict of these state measures with portions of the CSA); see also Balloun, supra note 234, at 232 (advocating a broad definition of nullification that includes the passage of state laws that directly conflict with federal statutes).
252. COLO. CONST. art. XVIII, § 16(1).
[1] Preventing the distribution of marijuana to minors;
[2] Preventing revenue from the sale of marijuana from going to
criminal enterprises, gangs, and cartels;
[3] Preventing the diversion of marijuana from states where it is
legal under state law in some form to other states;
[4] Preventing state-authorized marijuana activity from being used
as a cover or pretext for the trafficking of other illegal drugs or other
illegal activity;
[5] Preventing violence and the use of firearms in the cultivation
and distribution of marijuana;
[6] Preventing drugged driving and the exacerbation of other
adverse public health consequences associated with marijuana use;
[7] Preventing the growing of marijuana on public lands and the
attendant public safety and environmental dangers posed by marijuana
production on public lands; and
[8] Preventing marijuana possession or use on federal property.

Cole expressed that outside of these eight priorities, “the federal
government has traditionally relied on states and local law enforcement
agencies” to combat marijuana crimes under state law. He further
stated that “the [DOJ] has not historically devoted resources to
prosecuting individuals whose conduct is limited to possession of small
amounts of marijuana for personal use on private property.” He claimed that this type of “lower-level or localized activity” has and will
continue to be left to state and local law enforcement. Importantly,
Cole asserted an expectation that these states will “implement strong
and effective” methods for addressing any threats posed by the new laws,
qualifying this hands-off approach against hastily designed and
inadequate legalization schemes. While the plastic covering has yet
to come off these new measures, time will tell whether the federal
government will continue to be supportive of this growing trend of
marijuana legalization. Based on what has happened with medical
marijuana, large commercial sellers and dispensaries would most likely
be the ones subject to the brunt of any federal action, while individual

255. Memorandum from Deputy Attorney General James M. Cole to all United States
3052013829132756857467.pdf.
256. Id. at 2.
257. Id.
258. Id.
259. Id. at 2-3.
users acting under state law generally would be free from federal consequence.\textsuperscript{261}

B. \textit{Click, Click, Boom!: States Up in Arms as Feds Shoot Down Firearms Freedom}

With the recent growth in public shooting massacres, such as those in Aurora, Colorado, and Newtown, Connecticut, there has been a push for tighter gun control legislation by the federal government.\textsuperscript{262} In response to the threat of federal action, several states have gone on the preemptive attack and have passed legislation nullifying federal gun laws within their borders.\textsuperscript{263} Nine states have passed laws, known as Firearms Freedom Acts (FFAs) or Second Amendment Preservation Acts (SAPs), which render federal laws regarding firearms inapplicable to firearms and ammunition produced, sold, and used exclusively within state borders.\textsuperscript{264} The language of these laws underscores the states’ belief that Congress does not have the authority under its commerce power to pass laws on strictly intrastate firearms production, sales, and possession. For instance, Wyoming’s FFA states:

A personal firearm, a firearm accessory or ammunition that is manufactured commercially or privately in Wyoming and that remains exclusively within the borders of Wyoming is not subject to federal law, federal taxation or federal regulation, including registration, under the authority of the United States Congress to regulate interstate commerce. It is declared by the Wyoming legislature that those items have not traveled in interstate commerce.\textsuperscript{265}

As support for the defiance of federal law, these FFAs typically cite the Second and Tenth Amendments and use much of the contractual language from the Kentucky and Virginia Resolutions, further indicating

\textsuperscript{261} See id. at 30-31 (correctly predicting the issuance of a memorandum on federal prosecution priorities based on the historical treatment of medical marijuana and the recent federal attitude of permitting state experimentation with marijuana).


\textsuperscript{264} See \textit{State by State}, supra note 11. FFAs have been introduced in over twenty other states. Id.

the intent to invoke nullification. Some FFAs provide for defense by the state attorney general in cases where the federal government brings criminal enforcement against individuals complying with state FFAs, but they generally do not require such representation. A few states made a bold move in their FFAs by even providing for criminal prosecution of federal officers who attempt to enforce federal gun laws and regulations on intrastate firearms. Missouri's attempted gun bill, touted as "the most far-reaching states' rights endeavor in the country," if passed, would have made it a crime for federal agents to enforce federal gun laws and would have allowed Missourians arrested under federal gun laws to sue their arresting officer.


(1) The Tenth Amendment to the United States Constitution guarantees to the states and their people all powers not granted to the federal government elsewhere in the Constitution and reserves to the state and people of Idaho certain powers as they were understood at the time that Idaho was admitted to statehood in 1890. The guaranty of those powers is a matter of contract between the state and people of Idaho and the United States as of the time that the compact with the United States was agreed upon and adopted by Idaho and the United States in 1890. . . .

(3) The regulation of intrastate commerce is vested in the states under the Ninth and Tenth Amendments to the United States Constitution, particularly if not expressly preempted by federal law. Congress has not expressly preempted state regulation of intrastate commerce pertaining to the manufacture on an intrastate basis of firearms, firearms accessories, and ammunition.

(4) The Second Amendment to the United States Constitution reserves to the people the right to keep and bear arms as that right was understood at the time that Idaho was admitted to statehood in 1890, and the guaranty of the right is a matter of contract between the state and people of Idaho and the United States as of the time that the compact with the United States was agreed upon and adopted by Idaho and the United States in 1890.

Id.

267. See, e.g., WYO. STAT. ANN. § 6-8-405(c) (2010). Specifically, "[t]he attorney general may defend a citizen of Wyoming who is prosecuted by the United States government for violation of a federal law relating to the manufacture, sale, transfer or possession of a firearm, a firearm accessory or ammunition manufactured and retained exclusively within the borders of Wyoming." Id.

268. See WYO. STAT. ANN. § 6-8-405(b) (making federal enforcement a misdemeanor subject to one year's imprisonment and a fine of up to $2,000); KANSAS STAT. ANN. § 50-1207 (2013) (making federal enforcement a felony).

The federal laws affected by FFAs and SAPs include the Gun Control Act of 1968, which amended the Federal Firearms Act of 1938, and the National Firearms Act of 1934. Under federal law, no person may engage in the business of manufacturing or selling firearms, either inter- or intra-state, unless licensed by the federal government. Federal law mandates that all interstate firearms transfers occur between federally-licensed dealers, restricts the types of firearms that nonresidents of a state may purchase, and requires manufacturers and dealers to keep records of purchasers’ identification. In addition, federal law restricts the types of firearms that may be possessed by requiring the registration of short-barreled guns and silencers, taxing such weapons upon transfer, and requiring every firearm to bear a serial number. Lastly, certain classes of people are prohibited from possessing firearms under federal law, including users of controlled substances, illegal aliens, persons dishonorably discharged from the military, persons under a restraining order, persons convicted of domestic violence, and persons convicted of, or merely under indictment for, a felony. Because FFAs render these federal laws null, the states are left to govern the manufacture, purchase, and possession of firearms intrastate, which typically equates to fewer registration and reporting requirements, fewer prohibitions on classes of people who may own firearms, and fewer restrictions on types of firearms.

From the beginning, federal response to FFAs has been resoundingly negative. In 2009, shortly after FFAs passed in Montana and Tennessee, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATFE) sent letters to local firearms manufacturers in the states explaining that the state measures were invalid and that federal laws and regulations

270. Pub. L. No. 90-618, 82 Stat. 1213 (1968) (restricting the ability to sell firearms to registered Federal Firearms Licensees (FFLs), requiring interstate purchases and transfers of firearms to occur through FFLs, and requiring retail purchasers and interstate transferees to register their purchases with the federal government).
275. 26 U.S.C. §§ 5811, 5841, 5845(a) (2012); see 18 U.S.C. § 922(m) (criminalizing the failure to keep proper records of transfers under the restrictions of 26 U.S.C. §§ 5811, 5841, 5845(a)).
277. See, e.g., Balloun, supra note 234, at 204-05 (discussing the differences in federal firearms laws and Wyoming’s state laws and FFA).
would still be applicable. In response to Kansas's FFA enactment in 2013, United States Attorney General Eric Holder wrote a letter to Kansas Governor Sam Brownback, in which he asserted that the measure was "unconstitutional" under the Supremacy Clause, stated that federal agencies would continue to enforce federal firearms laws, and even threatened litigation for interference with federal enforcement.

Unsurprisingly, the federal courts have not been supportive of state law attempts to nullify federal gun legislation either. In 2013, the United States Court of Appeals for the Ninth Circuit held that Montana's FFA was "preempted and invalid." An appeal to the Supreme Court in that case was filed, but the Court recently denied certiorari, declining the opportunity to limit the reach of Congress in regulating firearms. At any rate, the conservative stare decisis in this field seems heavily poised against any such limitation from the Supreme Court any time soon. Nevertheless, based on what has happened with medical marijuana, negative federal response is unlikely to deter state legislatures from continuing to uphold and pass FFAs.

V. FUTURE FORECAST: WHAT IS AHEAD FOR THE NULLIFICATION MOVEMENT?

The future for the modern nullification examples of marijuana and firearms seems set for two very different courses. Because acceptance of marijuana has become widespread, at least regarding medical use, and the federal government has asserted a willingness for state experimentation in this field, state laws legalizing marijuana in defiance of the federal CSA will likely continue to receive a more accepting, hands-off approach from the federal government. On the other


280. Mont. Shooting Sports Ass'n v. Holder, 727 F.3d 975, 982-83 (9th Cir. 2013).


282. See Bailoun, supra note 234, at 230 (discussing the likely fate of Wyoming's FFA given the uncertain and historically conservative judicial review of Congress's ability to regulate firearms under the Commerce Clause).

283. See supra Part IV.A.1 (discussing the resilience of states in upholding and passing nullification measures regarding medical marijuana use in spite of federal backlash).

284. See supra notes 260-61 and accompanying text.
hand, the federal government appears unlikely to bend on its denial of state legislation attempting to nullify federal firearms legislation, based on the administration's steadfast history of unacceptance and the growing pressure for gun control in light of nation-wide public shooting tragedies.285

Many factors contribute to the different projections of these modern-day nullification examples moving forward. First, time and experience are vastly different in these contexts, as state marijuana laws have had nearly two decades to develop and gain acceptance, whereas FFAs have been on the scene for less than five years.286 Second, the scope of the nullification is more favorable for the marijuana issue, as the marijuana measures only seek to carve out a small portion of the CSA, whereas FFAs invalidate all federal laws and regulations relating to firearms, accessories, and ammunition.288 Another factor contributing to this disparate treatment may be the tone of the state measures.289 For instance, state marijuana laws are generally much more subtle about their nullification—stating a preference for federal action, asserting a duty to the welfare of the state's citizens, and attempting to offer a rational and reasonable approach to drug enforcement in areas of real harm.290 Conversely, FFAs are much more confrontational—asserting that Congress's regulation of intrastate firearms is an adamant overreach, directly stating that federal law will not apply, and even criminalizing federal enforcement.291 While the Author does not suggest that gentler words could cause an about-face for the FFA movement, being directly confrontational and making felons out of federal officers for doing their jobs is not going to merit a favorable response from the federal government and “demands the state[s] decide

285. See supra notes 278-82 and accompanying text.
286. See Balloun, supra note 234, at 233-34 (stating that the DOJ has been known to abandon federal enforcement when several states have acted contrary to federal law for “over a decade and a half” and arguing that “[p]atience may be the virtue necessary” for FFAs to succeed).
287. See supra notes 16, 208 & 251 and accompanying text (discussing the scope of medical and recreational marijuana nullification measures).
288. See supra notes 270-72 and accompanying text (discussing the scope of gun nullification measures).
289. See Balloun, supra note 234, at 234 (comparing the “hornet’s nest” tone of FFAs to the passive interposition of other nullification measures like those regarding the REAL ID Act and medical marijuana).
290. See supra notes 230-32 and accompanying text.
291. See supra notes 265-69 and accompanying text.
ahead of time what [they] will do when faced with a serious potential conflict."\(^2\)

The nullification movement's effects on federal legislation concerning marijuana and firearms will also be pertinent to how these areas of the law move forward. If the modern nullification movement can generate a change in the federal laws that it is declaring inapplicable, then the problems posed by federal supremacy will become moot. As of yet, no big push for changing these federal laws has come, and many believe that this will remain the case. Consequently, the federal government wields the ultimate power to choose whether it will enforce federal laws that are in conflict with these state nullification laws. Although currently the federal government has acquiesced in allowing states to implement and police their legal marijuana use laws with little interference, this system stands on shaky ground. Nothing restricts the next administration from coming in and reversing this trend of lax federal enforcement in states where marijuana use is legal. Susceptible to the whim of administrative attitudes and policies, citizens in states with legal marijuana laws may find their activities legal in one term and illegal in the next. Confusion about legality, particularly when serious criminal consequences are at stake, rather than clear, fair notice, is not how criminal law is supposed to function. In addition, this method of allowing the executive branch to determine at will what federal laws will and will not be enforced, especially on a state-by-state basis, dilutes the fundamental concept of federalism.

Interestingly, the marijuana and gun trends demonstrate that norms at the state level are shifting towards increasing acceptance of behavior formerly characterized as dangerous to society.\(^3\) The nullification movement portrays the federal government as the old grandfather who has not, and likely will not, catch up with the times. However, current headlines point to a more welcoming view of marijuana by government leaders. A news frenzy erupted when President Obama, who has candidly admitted to using marijuana as a young adult, was quoted in a recent interview saying, "I don't think [marijuana] is more dangerous than alcohol."\(^4\) On the other side of the political spectrum, Texas

\(^2\) See Balloun, supra note 234, at 234, 237 (discussing the ramifications of FFAs different, confrontational tone and advocating "a more subtle approach" for the success of Wyoming's FFA).

\(^3\) See Klein & Grobey, supra note 196, at 28-32 (discussing the concern of concurrent federal and state criminal jurisdiction where "the federal government criminalizes behavior that some states regard as morally neutral or beneficial").

Governor Rick Perry made headlines when he made remarks supporting the decriminalization of marijuana use.\textsuperscript{295} Such remarks by national leaders supporting an already growing movement can have a "long-lasting effect[]" on the movement's vitality.\textsuperscript{296}

Nevertheless, the Author believes in large part this dynamic between the state and federal government regarding the shifting of norms is a direct reflection of why the states, rather than the federal government, were instilled with the general police power. State governments are more localized and have a closer connection to their particular citizens and the specific needs and problems of their distinct regions. In addition, federal agencies typically rely heavily on states to aid in criminal enforcement due to a lack of resources. Because states are better able to gauge the needs and concerns of the citizens and are mainly responsible for policing their regions, the states should be allowed to implement changes in norms of behavior pertaining to intrastate matters freely, especially in the criminal-law arena where states have historically been in charge.

VI. CONCLUSION

As norms regarding criminality of certain conduct continue to shift at the state level, state legislatures will likely turn to nullification to achieve federal acceptance. While critics and constitutional scholars have stated that the nullification doctrine is illegitimate, history has shown that the practical effects of nullification movements, despite their technical invalidity, have been instrumental in alleviating clashes between the federal and state governments. Although American legal study would tend to agree with the statement that "[o]ur Constitution is not some cheap Chinese buffet where we get to pick the parts we like and ignore the rest,"\textsuperscript{297} the recent nullification movement on criminal-law issues has had the practical effect of giving the states a measure of autonomy in deciding what will and will not be enforced within their state boundaries.

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\textsuperscript{297} See Schwartz, supra note 269 (quoting Missouri State Representative Jay Barnes in his opposition of his state's FFA).
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The federal government has shown acceptance of changing state law norms by relaxing federal enforcement rather than reflecting compromise by changing federal laws, leaving the experimental state laws vulnerable to administrative changes of heart. As the state is turned into a playground for testing out new norms in the criminal arena, the citizens must play at their own risk in defying contradictory federal laws.

Keely N. Kight