

# The New State Sovereignty Movement

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*In the past decade, states across the country have enacted a flood of legislation to resist perceived federal encroachments on their sovereignty. These opposition statutes assume a variety of forms: some, for instance, merely prohibit state officers from assisting in the enforcement of federal law, while others purport to nullify particular federal regulations. In the fields of controlled substances, immigration, and healthcare, among others, state acts of protest have stimulated the national debate and influenced legal obligations in important ways.*

*This Article provides the first comprehensive overview of this nascent state sovereignty movement. It categorizes opposition enactments according to the legal and political purposes they are designed to advance, analyzes the likelihood of preemption, and explores the functions they may serve despite the existence of conflicting federal law. It then proceeds to identify the structural features these laws share as a class, before concluding with an assessment of their normative implications.*

*The increasing polarization of national politics will only amplify the importance of state resistance efforts. The paucity of scholarship addressing this issue therefore represents a major gap in academic efforts to grasp the changing dynamics of inter-sovereign conflict in the United States. This Article begins to remedy that blind spot. The concepts it articulates represent valuable tools not only for exploring state legislative resistance to federal policy, but also for addressing the range of issues arising from federal discord and geographical polarization more broadly.*

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## INTRODUCTION

In 2010, President Obama signed into law the Patient Protection and Affordable Care Act (ACA) amidst a circus of fanfare and acrimony.<sup>1</sup> The ACA inspired deep economic, cultural, and constitutional disputes. It also raised important questions of federal power and state autonomy. States governed by conservative blocs did not accept the statute's requirements passively. In addition to filing lawsuits, they enacted a host of legislative measures ostensibly designed to obstruct implementation of the new law.<sup>2</sup> Virginia's bill, for example, declared that "[n]o resident of this Commonwealth . . . shall be required to obtain or maintain a policy of individual insurance coverage except as required by a court."<sup>3</sup> The precise function of such opposition statutes was unclear: some appeared to be merely expressive, others jurisdictional, and still others mimicked historical nullification measures.<sup>4</sup> Critics condemned the laws as divisive relics of an earlier era, while proponents viewed them as a last resort to counteract an overreaching federal leviathan.<sup>5</sup>

Often overlooked is the fact that the states' response to the ACA was not an isolated event. Instead, it was indicative of a much broader trend that has swept statehouses across the country over the course of the past decade.<sup>6</sup> Federal policy subject to regional unpopularity has increasingly been met with affirmative

1. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

2. See, e.g., ARIZ. CONST. art. XXVII, § 2(A)(1) ("A law or rule shall not compel, directly or indirectly, any person, employer or health care provider to participate in any health care system."); IDAHO CODE ANN. § 39-9003(2) (2011) ("It is hereby declared that the public policy of the state of Idaho . . . is that every person within the state of Idaho is and shall be free to choose or decline to choose any mode of securing health care services without penalty or threat of penalty by the federal government . . ."); UTAH CODE ANN. § 63M-1-2505.5(3)(a) (LexisNexis 2011) ("The state shall not require an individual in the state to obtain or maintain health insurance . . .").

3. VA. CODE ANN. § 38.2-3430.1:1 (2014).

4. See *infra* Part II.A; *infra* Part III.B; *infra* Part II.E–F.

5. See, e.g., Ben Jacobs, *Exclusive: GOP Senate Candidate Caught Saying States Can Nullify Federal Laws*, DAILY BEAST (July 28, 2014), <http://www.thedailybeast.com/articles/2014/07/28/exclusive-gop-senate-candidate-caught-saying-states-can-nullify-laws.html> (rejecting nullification as unconstitutional and linking it to antebellum proponents of slavery); William F. Jasper, *Sheriffs and Legislators Are Acting To Nullify Obama Gun Controls*, NEW AMERICAN (Feb. 4, 2013), <http://www.thenewamerican.com/usnews/constitution/item/14394-sheriffs-and-legislators-are-acting-to-nullify-obama-gun-controls> (characterizing nullification as a valid tool to resist "unconstitutional overreach" by the federal government).

6. "An Associated Press analysis found that about four-fifths of the states now have enacted local laws that directly reject or ignore federal laws on" various subjects. David A. Lieb, *Federal Nullification Efforts Mounting in States*, THE BIG STORY (June 21, 2013, 4:31 AM), <http://bigstory.ap.org/article/federal-nullification-efforts-mounting-states>.

legislative resistance of various stripes. In the fields of controlled substances,<sup>7</sup> immigration,<sup>8</sup> and gun rights,<sup>9</sup> among others, state acts of protest have stimulated the national debate and influenced legal obligations in important ways. As a substantive matter, these opposition statutes take a variety of forms: some, for instance, merely prohibit state officers from assisting in the enforcement of federal law,<sup>10</sup> while others purport to nullify particular federal regulations.<sup>11</sup> Such resistance efforts originate from across the political spectrum and are used to advance a host of diverse policy preferences. Notwithstanding the threat of preemption, they are capable of generating significant effects in a variety of spheres, from federal enforcement policy to constitutional doctrine.

Although their ramifications are most salient in the political arena, opposition statutes also raise a host of delicate legal questions. These issues lie at the intersection of several disparate domains of scholarship, including cooperative federalism, constitutional construction, and even substantive areas like the Fourth and Second Amendments. Although these various fields are useful in illuminating certain facets of state opposition, none is capable of capturing the full range of normative and conceptual issues such defiance generates. This Article marshals a diverse array of scholarship to provide the first comprehensive portrait of state legislative resistance to federal policy.<sup>12</sup> It situates this nascent movement within the existing literature

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7. See, e.g., CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007).

8. See, e.g., Support Our Law Enforcement and Safe Neighborhoods Act, ch. 113, Ariz. Sess. Laws 450 (2010) (codified as amended in scattered sections of ARIZ. REV. STAT. ANN. tits. 11, 13, 23, 28, and 41 (2010)).

9. See, e.g., WYO. STAT. ANN. § 6-8-404(a) (2013).

10. See *infra* Part II.C.

11. See *infra* Part II.E.

12. Several well-developed fields shed light on the phenomenon of state resistance without fully explaining it. The literature on constitutional construction, for instance, illuminates certain political ramifications of opposition statutes. See, e.g., KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION* (1999); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65 (2011); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323 (2006). Articles assessing departmentalism and judicial review highlight the pitfalls and benefits of decentralized constitutional interpretation. See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217 (1994). Scholarship examining opportunistic federalism illustrates the complex motives underlying state resistance efforts. See, e.g., Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304 (1999); John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89 (2004). Other federalism literature serves to explore the dynamics of intersovereign friction more generally. See, e.g., Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813 (1998); cf. Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987) (cataloguing the benefits of competitive federalism). At the micro level, several articles have explored state resistance in the context of a single subject matter. See, e.g., Ann Althouse, *The Vigor of the Anti-Commandeering Doctrine in Times of Terror*, 69 BROOK. L. REV. 1231 (2004); Elizabeth

and imposes a measure of analytical structure on what is, at least facially, an extraordinarily diverse phenomenon. The discussion that follows is both descriptive and normative. It includes a taxonomy of the legal and political purposes these enactments are designed to serve, an assessment of their shared structural features, and a tentative evaluation of their costs and benefits.

Part I sketches a brief history of state legislative and executive resistance to national policy. Historically, such efforts were classed under the heading of “nullification.” Although nullification statutes have, at various intervals since the Founding, prominently been enlisted in the service of besmirched causes (such as Massive Resistance),<sup>13</sup> their full pedigree reveals substantial ideological variance. Furthermore, as this Article will illustrate, the term “nullification” embraces only a narrow segment of the broad class of modern statutes enacted to obstruct or curtail federal law.

Part II provides a detailed taxonomy of recent state laws<sup>14</sup> intended to thwart federal programs, arranged according to their declared purposes. Each of the six sections of the taxonomy is accompanied by a brief preemption discussion. The most innocuous category includes statutes that serve purely expressive functions; these laws express opposition to federal policy but decline to create any legal rights or obligations. Tenth Amendment resolutions, for instance, merely reaffirm state sovereignty without purporting to have any direct legal effect.<sup>15</sup> The second category features statutes that explicitly refrain from penalizing, as a matter of state law, conduct that is prohibited under federal law. Medical (and recreational) marijuana statutes provide a pertinent example.<sup>16</sup> The third category encompasses those statutes that prohibit state officials from participating in the enforcement of a particular federal law (e.g., the Patriot Act), while the fourth category includes state

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Weeks Leonard, *Rhetorical Federalism: The Value of State-Based Dissent to Federal Health Reform*, 39 HOFSTRA L. REV. 111 (2010); David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power To Regulate States*, 35 CARDOZO L. REV. 567 (2013). Finally, certain authors have begun to conceive of resistance efforts as representative of a unified movement, though none has examined it with the depth and scope of this Article. See, e.g., THOMAS E. WOODS, JR., NULLIFICATION: HOW TO RESIST FEDERAL TYRANNY IN THE 21ST CENTURY (2010); John Dinan, *Contemporary Assertions of State Sovereignty and the Safeguards of American Federalism*, 74 ALB. L. REV. 1637 (2010–11); Keely N. Kight, Comment, *Back to the Future: The Revival of the Theory of Nullification*, 65 MERCER L. REV. 521 (2014). In this vein, a recent Arkansas Law Review symposium explored, from historical and theoretical perspectives, the reemergence of the doctrines of secession and nullification in twenty-first century America. Symposium, *Cooper’s Shadow: Secession, Nullification, and States’ Rights*, 67 ARK. L. REV. 1 (2014).

13. Ryan Card, Note, *Can States “Just Say No” to Federal Health Care Reform? The Constitutional and Political Implications of State Attempts To Nullify Federal Law*, 2010 BYU L. REV. 1795, 1800.

14. The vast majority of state resistance efforts involve statutes, which thus serve as the focus of this Article. Nevertheless, alternative forms of opposition—such as executive orders and constitutional amendments—are also occasionally employed. See, e.g., Ryan S. Hunter, Note, *Sound and Fury, Signifying Nothing: Nullification and the Question of Gubernatorial Executive Power in Idaho*, 49 IDAHO L. REV. 659, 705 (2013). For the most part, these alternative modes of resistance raise the same legal and political issues as their statutory counterparts.

15. See, e.g., S.C.R. 3, 2010 Gen. Sess. (Utah 2010).

16. See, e.g., CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007).

supplementation of federal law enforcement efforts. Arizona's controversial immigration laws exemplify this latter category.<sup>17</sup>

The more contentious opposition statutes, however, not only establish state policies with respect to *state* officers but actually purport to nullify federal law within the territorial boundaries of the complaining state. The fifth category in the taxonomy includes statutes that specifically declare federal law void or that outlaw certain substantive policies adopted by the federal government. The sixth and final category embraces statutes that not only purport to nullify federal law but also provide criminal penalties for state or federal agents who attempt to enforce federal law in contravention of state policy.

Part III builds on the analysis in Part II by exploring the primary purposes that opposition statutes may advance, apart from those expressed in their text and despite any constraints imposed by federal law. Almost all opposition laws serve an expressive function by empowering national minorities to effectively voice their dissent. The expressive character of these laws may also be effective in directly shaping social norms and public opinion. For instance, a statute that removes state penalties for conduct prohibited at the national level may reduce the public stigma attached to the proscribed activity, despite the fact that the federal prohibition remains in force.

Second, opposition laws are capable of influencing the judicial process in myriad ways. For example, a nullification statute that purports to invalidate federal policy may serve as a catalyst for private citizens to bring lawsuits challenging federal regulatory regimes. At a more substantive level, the constitutional principles endorsed by opposition statutes can exert a gravitational effect on the legal reasoning utilized by courts engaged in constitutional adjudication. These bills may also contribute to the formation of enforceable constitutional understandings outside the courts. Both of these latter avenues of influence reflect the role opposition measures play in the process of constitutional politics.

Finally, opposition laws may have an impact on national policy. State decisions to refrain from penalizing conduct prohibited at the federal level, for instance, may encourage the national government to reallocate its enforcement resources to those activities proscribed under both state and federal law. Marijuana policy represents a prime example of this effect. Relatedly, statutes that bar state officials from implementing a particular federal program may spur changes in national substantive policy. The federal government relies heavily on state manpower to realize its policy goals and thus may be willing to tweak those goals in order to obtain state assistance.

Part IV makes several transsubstantive observations pertaining to state opposition statutes as a class. Perhaps the most significant unifying characteristic of these laws is their tendency to phrase objections to federal policy, or assertions of state authority, in constitutional terms.<sup>18</sup> This feature not only imparts an aura of

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17. See Support Our Law Enforcement and Safe Neighborhoods Act, ch. 113, Ariz. Sess. Laws 450 (2010) (codified as amended in scattered sections of ARIZ. REV. STAT. ANN. tits. 11, 13, 23, 28, 41 (2010)).

18. The Idaho Health Freedom Act, for example, states:

The power to require or regulate a person's choice in the mode of securing health care services, or to impose a penalty related thereto, is not found in the Constitution of the United States of America, and is therefore a power reserved

legitimacy to a potentially suspect enterprise but also represents a form of constitutional politics. Constitutional revolutions often crystallize outside the context of formal adjudication. Opposition statutes thus enable states to participate in the nonjudicial process of constitutional construction.

A second permeating characteristic of this body of law is its variable political orientation. Resistance measures serve a broad range of purposes originating from across the political spectrum. State sovereignty is invoked not only to protect traditionally right-wing causes, such as free trade in firearms, but also stereotypically left-wing causes, such as access to medical marijuana. Political diversity in what is essentially a states' rights movement bears out, at least in part, a theory of opportunistic federalism, which posits that invocations of federalism tend to be spurred by specific substantive concerns, rather than by an interest in protecting the federal structure *per se*.

A third ubiquitous feature of these statutes is their territorialism. Even bills that explicitly nullify federal law only purport to extinguish its effect within the physical borders of the complaining state.<sup>19</sup> Nullification and related tactics—both historically and today—are limited, defensive mechanisms designed merely to neutralize federal policy as it applies to state residents.

Part V addresses the normative aspects of the state sovereignty movement and tentatively concludes that this phenomenon is desirable insofar as it promotes the purposes of federalism within the bounds of law. This verdict is necessarily conditional; the primary function of this Part is merely to identify the conceptual tools necessary to conduct meaningful analysis in this area. Traditional nullification efforts posed serious threats to national unity to the extent that they involved state assertions of interpretive supremacy on constitutional issues. The modern recasting of these efforts, however, accepts judicial supremacy in actually litigated cases while still enabling interpretive pluralism on subject matters that remain in legal flux. Certain problems—such as the tendency to produce legal uncertainty—continue to plague even this modern incarnation. In general, though, contemporary opposition statutes advance important federalism values without fomenting the divisive sectionalism that marred earlier nullification attempts. To facilitate the analysis, this Part introduces the concept of “vertical departmentalism,” or the exercise of independent interpretive authority over the Constitution by state actors. Vertical departmentalism serves to supplement its horizontal counterpart by further decentralizing the interpretive task.

The nature and extent of state power are recurring and important leitmotifs in the American constitutional project. Nullification, in particular, has historically provided a flashpoint for debate over the limits of state autonomy. State legislative opposition to federal policy therefore provides an apt vehicle for exploring deep themes of federalism and sovereignty. The modern manifestation of this tradition, although it

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to the people pursuant to the Ninth Amendment, and to the several states pursuant to the Tenth Amendment.

IDAHO CODE ANN. § 39-9003(1) (2011).

19. The Virginia Healthcare Freedom Act, for instance, provides that “[n]o *resident of this Commonwealth* . . . shall be required to obtain or maintain a policy of individual insurance coverage.” VA. CODE ANN. § 38.2-3430.1:1 (2014) (emphasis added).

enjoys a rich lineage, is a distinctive and novel phenomenon that warrants a comprehensive treatment of its own.

If current trends persist, the importance of this movement will only increase with time. American politics are marked by escalating polarization, both geographical and political.<sup>20</sup> This development likely has its roots in certain structural features of modern American democracy and is therefore unlikely to recede for the foreseeable future.<sup>21</sup> Geographical polarization ensures that federal programs and regulations frequently garner intense resistance in discrete areas of the country. These conditions provide fertile ground for state opposition efforts, which track local disenchantment with federal policy. To the extent polarization continues to intensify,<sup>22</sup> such efforts can be expected to accelerate correspondingly.

Opposition statutes thus potentially signify a new paradigm for state-level politics, one in which state legislatures operate as fundamentally reactive institutions that serve to mediate the relationship between the federal government and state citizens. As this Article shows, such state-level politics can have an enormous effect on national policy. The paucity of scholarship addressing this issue therefore represents a major gap in academic efforts to grasp the changing dynamics of state and federal relationships. This Article begins to remedy that blind spot, providing a research agenda and the conceptual tools necessary to assess not only the burgeoning sovereignty movement but also the gamut of issues arising from geographical polarization and federal discord more broadly.

#### I. A BRIEF HISTORY OF NULLIFICATION

Historically, overt forms of state resistance to federal policy were grouped under the heading of “nullification.” Nullification takes place when a state declares that a particular federal law is unconstitutional and therefore inoperative.<sup>23</sup> Nullification

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20. See, e.g., William A. Galston, *Political Polarization and the U.S. Judiciary*, 77 UMKC L. REV. 307, 312–15 (2008); PEW RES. CENTER, *PARTISAN POLARIZATION SURGES IN BUSH, OBAMA YEARS* (2012).

21. See, e.g., Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 332 (2011) (“[O]ur radically polarized politics . . . reflect long-term structural and historical changes in American democracy that are likely to endure for some time to come.”).

22. Steven Strauss, *Six Reasons American Political Polarization Will Only Get Worse*, HUFFINGTON POST (Oct. 14, 2012, 4:24 PM), [http://www.huffingtonpost.com/steven-strauss/megatrend-six-reasons-ame\\_b\\_1965182.html](http://www.huffingtonpost.com/steven-strauss/megatrend-six-reasons-ame_b_1965182.html). It might do so, for instance, if voters drift geographically towards other like-minded voters, thereby sorting themselves into ideological enclaves. See Galston, *supra* note 20, at 312–15.

23. H. Newcomb Morse, *The Foundations and Meaning of Secession*, 15 STETSON L. REV. 419, 420 (1986). Senator John Calhoun defined nullification as “declaring null an unconstitutional act of the General Government, as far as the State is concerned.” *Id.* (quoting W. STEPHENSON, *A BASIC HISTORY OF THE OLD SOUTH* 167 (1959)). Although the terms “nullification” and “interposition” originally had different connotations, their contemporary meanings have largely converged. Robert S. Claiborne, Jr., Comment, *Why Virginia’s Challenges to the Patient Protection and Affordable Care Act Did Not Invoke Nullification*, 46 U. RICH. L. REV. 917, 924 & n.49 (2012). 24. See *infra* notes 43, 47, 65, and accompanying text.

traditionally has been used as a defensive measure designed primarily to neutralize the impact of federal policy within the territorial borders of the nullifying state.<sup>24</sup> Direct nullification, obviously, does not exhaust the wide variety of opposition efforts examined in this Article.<sup>25</sup> For instance, state statutes that provide for enhanced enforcement of federal law plainly do not qualify as nullification measures in the traditional sense.

A concise historical summary can nevertheless be illuminating for several reasons. Despite the important dissimilarities between the two classes of laws, many commentators have explicitly analogized contemporary antifederal enactments to their historical predecessors.<sup>26</sup> The following account thus provides relevant context for the debate. Furthermore, the normative inquiry contained in Part V attempts to demonstrate that modern opposition efforts are less divisive and potentially destructive than their forebears. The summary that follows sets the stage for this later discussion. It also introduces many of the themes and ideas that continue to characterize opposition statutes, including political opportunism and the use of constitutional rhetoric.

The first and most famous treatment of the nullification doctrine occurred with the passage of the Virginia and Kentucky Resolutions of 1798 and 1799.<sup>27</sup> The Resolutions were drafted by James Madison and Thomas Jefferson, respectively, in response to the Alien and Sedition Acts, which generally prohibited speech critical of the national government.<sup>28</sup> The Resolutions were deeply influenced by contemporary political strife; Republicans, including Jefferson and Madison, believed that the Federalist-sponsored Acts were specifically designed to silence Republican dissent.<sup>29</sup> The key strategic decision made by the authors was to cast their political opposition in constitutional terms, asserting that the Alien and Sedition Acts were not only unwise but also unconstitutional. The authority to issue the Resolutions purportedly stemmed from a state prerogative to nullify unconstitutional laws.<sup>30</sup>

Jefferson's drafts were noticeably more combative than Madison's<sup>31</sup> and constitute the more revealing portrait of the nullification doctrine.<sup>32</sup> Relying on a

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24. See *infra* notes 43, 47, 65, and accompanying text.

25. See Dinan, *supra* note 12, at 1641.

26. See, e.g., Jeff Taylor, *States' Fights*, AM. CONSERVATIVE, July 2010, at 32. These analogies, obviously, cast modern opposition efforts in a distinctly unflattering light. See, e.g., Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2734 (2003) (noting that the "terms 'interposition' and 'nullification' are practically constitutional profanities these days"); Sean Wilentz, *States of Anarchy*, NEW REPUBLIC, Apr. 29, 2010, at 5 (arguing that the "current rage for nullification is nothing less than another restatement, in a different context, of musty neo-Confederate dogma").

27. See Paulsen, *supra* note 26, at 2735.

28. Card, *supra* note 13, at 1801.

29. Robert B. McKay, *"With All Deliberate Speed": A Study of School Desegregation*, 31 N.Y.U. L. REV. 991, 1025 (1956).

30. Thomas Jefferson, *The Kentucky Resolutions of 1799*, reprinted in WOODS, *supra* note 12, at 167, 169 (declaring nullification to be the "rightful remedy" for unconstitutional acts by the federal government). The precise scope of this remedy, however, was subject to dispute. See *infra* notes 32, 36.

31. Card, *supra* note 13, at 1803.

32. The Virginia Resolution does not explicitly assert the right to nullify federal



compact theory of the Constitution—which views that document as a contract between individual sovereigns<sup>33</sup>—the first of the two Kentucky Resolutions contended “that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force.”<sup>34</sup> Independent state interpretive authority originated from the simple proposition that “this government, created by this compact, was not made the exclusive or final judge of the extent of the powers delegated to itself, since that would have made its discretion, and not the Constitution, the measure of its powers.”<sup>35</sup> The second resolution, characterized by an even more strident tone, proclaimed that “the several states who formed that [compact], being sovereign and independent, have the unquestionable right to judge of its infraction; . . . a nullification, by those sovereignties, of all unauthorized acts done under colour of that instrument, is the rightful remedy.”<sup>36</sup>

The confrontation engendered by the Alien and Sedition Acts abated when the Federalists lost power in the landslide election of 1800, rendering the Resolutions moot.<sup>37</sup> Ironically, however, nullification was invoked soon thereafter by the Federalists in response to the conduct of the Jefferson administration.<sup>38</sup> The subject of the furor was the Embargo Acts,<sup>39</sup> a series of bills enacted with the ostensible purpose of imposing economic hardship on England and France.<sup>40</sup> The Embargo Acts not only severely suppressed maritime commerce but also authorized a host of intrusive enforcement mechanisms;<sup>41</sup> these features converged to outrage merchants and delegates across the Northeast.<sup>42</sup> The Massachusetts House of Representatives, for instance, issued a report that declared the fourth Embargo Act “in many respects unjust, oppressive and unconstitutional, and not legally binding on the citizens of this

legislation, though it does claim that states “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.” James Madison, Virginia Resolution, reprinted in WOODS, *supra* note 12, at 147, 148.

33. See Wayne D. Moore, *Reconceiving Interpretive Autonomy: Insights from the Virginia and Kentucky Resolutions*, 11 CONST. COMMENT. 315, 319 (1994); Stephen C. Neff, *Secession and Breach of Compact: The Law of Nature Meets the United States Constitution*, 45 AKRON L. REV. 405, 413–15 (2012).

34. Thomas Jefferson, The Kentucky Resolutions of 1798, reprinted in WOODS, *supra* note 12, at 157, 157.

35. *Id.* at 157–58.

36. Jefferson, *supra* note 30, at 169 (emphasis omitted). Whether Jefferson believed that a single state could engage in nullification, or that nullification required collective action, is a matter of continuing debate. See Moore, *supra* note 33, at 320.

37. See Card, *supra* note 13, at 1804.

38. O. Shane Balloun, *The Disarming Nature of the Wyoming Firearms Freedom Act: A Constitutional Analysis of Wyoming’s Interposition Between Its Citizens and the Federal Government*, 11 WYO. L. REV. 201, 209 n.60 (2011).

39. Act of Apr. 25, 1808, ch. 66, 2 Stat. 499; Act of Mar. 12, 1808, ch. 33, 2 Stat. 473; Act of Jan. 8, 1808, ch. 8, 2 Stat. 453; Act of Dec. 22, 1807, ch. 5, 2 Stat. 451.

40. Bradley D. Hays, *A Place for Interposition? What John Taylor of Caroline and the Embargo Crisis Have to Offer Regarding Resistance to the Bush Constitution*, 67 MD. L. REV. 200, 210 (2007).

41. See *id.* at 211–12.

42. See WOODS, *supra* note 12, at 61.

state.”<sup>43</sup> The Connecticut General Assembly passed a special resolution that not only declared the Embargo Acts unconstitutional but also explicitly prohibited state officers from assisting in their enforcement.<sup>44</sup> In the face of widespread popular resistance, Jefferson relented and the Republicans repealed the offensive legislation.<sup>45</sup>

The Nullification Crisis of 1832 illustrated both the deep theoretical complexity and practical importance of nullification. In 1828, Congress passed what became popularly known as the “Tariff of Abominations,” which was widely perceived by those in the South as detrimental to their own agricultural interests and disproportionately favorable to Northern manufacturing concerns.<sup>46</sup> South Carolina responded by passing an ordinance declaring the tariff “null, void, and no law, nor binding upon this State, its officers or citizens.”<sup>47</sup> The ordinance also threatened secession in the event that any efforts were made to enforce the tariff.<sup>48</sup> The federal government responded swiftly and ferociously; President Andrew Jackson issued a proclamation explicitly declaring nullification unconstitutional,<sup>49</sup> and Congress enacted the Force Bill to compel compliance.<sup>50</sup> The Crisis was only narrowly averted when Congress adopted a compromise tariff and South Carolina responded by withdrawing its nullification statute.<sup>51</sup>

The history of the Nullification Crisis, as well as much of the intellectual baggage associated with nullification as an instrument of practical politics, is heavily intertwined with the writings and political machinations of then-Vice President John Calhoun. Calhoun radically expanded the principles articulated in the Virginia and Kentucky Resolutions.<sup>52</sup> According to Calhoun, nullification suspended the operation of a federal statute until a nationwide convention either rejected or ratified the proposed nullification.<sup>53</sup>

Like Jefferson, Calhoun rested his views on a compact theory of the Constitution: as an equal and sovereign party to the constitutional compact, each state retained the authority to suspend its consent to national rule when the federal government overstepped its delegated powers.<sup>54</sup> A state’s right to judge whether federal action

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43. Hays, *supra* note 40, at 213.

44. *Id.* at 214.

45. *Id.*

46. See Card, *supra* note 13, at 1804.

47. S.C., Ordinance To Nullify Certain Acts of the Congress of the United States, Purporting To Be Laws Laying Duties and Imposts on the Importation of Foreign Commodities (Nov. 24, 1832), available at [http://avalon.law.yale.edu/19th\\_century/ordnull.asp](http://avalon.law.yale.edu/19th_century/ordnull.asp); see also Morse, *supra* note 23, at 421. Interestingly, Madison argued that South Carolina’s nullification efforts were not constitutionally justified. Claiborne, *supra* note 23, at 936.

48. Morse, *supra* note 23, at 421.

49. Card, *supra* note 13, at 1806.

50. Claiborne, *supra* note 23, at 936.

51. McKay, *supra* note 29, at 1036.

52. See WHITTINGTON, *supra* note 12, at 80.

53. See John Bryan Williams, *How To Survive a Terrorist Attack: The Constitution’s Majority Quorum Requirement and the Continuity of Congress*, 48 WM. & MARY L. REV. 1025, 1043 n.62 (2006); see also James H. Read, *Madison’s Response to Nullification*, in JAMES MADISON: PHILOSOPHER, FOUNDER, AND STATESMAN 269, 270 (John R. Vile, William D. Pederson & Frank J. Williams eds., 2008).

54. *Nullification*, in 2 CYCLOPEDIA OF POLITICAL SCIENCE, POLITICAL ECONOMY, AND OF

transgressed the terms of the compact was “an essential attribute of sovereignty”; to deny this right amounted to reducing the states “to a subordinate corporate condition.”<sup>55</sup> Vesting a branch of the federal government with ultimate authority to determine the scope of federal power would, according to this theory, effectively eradicate any limit on that power.<sup>56</sup> For Calhoun, nullification was implicit in the structure of American government itself and a necessary check on majoritarian excess.<sup>57</sup>

Following the Nullification Crisis, the political valence of nullification switched yet again, when it was invoked by Northern abolitionists to protect the rights of escaped slaves. In 1850, Congress passed the Fugitive Slave Act amidst intense controversy.<sup>58</sup> A host of states immediately enacted measures to impede its enforcement.<sup>59</sup> The Supreme Court of Wisconsin nullified the Act,<sup>60</sup> as did the legislatures of Massachusetts and Vermont.<sup>61</sup> The Virginia and Kentucky resolutions were referenced repeatedly by abolitionists agitating for interposition.<sup>62</sup> Antislavery states also sought to hamper the law’s effectiveness by prohibiting state officers from assisting in its enforcement and denying federal officials the use of local jails.<sup>63</sup>

The most recent invocation of the doctrine occurred during the Massive Resistance campaign undertaken by Southern states in response to the Supreme Court’s decision in *Brown v. Board of Education*.<sup>64</sup> Protesting states characterized *Brown* as an unlawful judicial amendment to the Constitution and retaliated with a wave of nullification statutes designed to neutralize its impact. Mississippi’s response, which was typical, labeled *Brown* “unconstitutional, invalid and of no lawful effect within . . . Mississippi.”<sup>65</sup> Supporters of Massive Resistance frequently cited the Virginia and Kentucky Resolutions, as well as the theoretical arguments articulated by Calhoun.<sup>66</sup> The Supreme Court definitively rejected nullification during this period, establishing judicial hegemony as a broad matter in *Cooper v. Aaron*<sup>67</sup> and dismissing nullification specifically in *United States v. Louisiana*.<sup>68</sup> According to the *Louisiana* Court, “The conclusion is clear that interposition is not

THE POLITICAL HISTORY OF THE UNITED STATES 1050, 1051 (John J. Lalor ed., 1883).

55. JOHN C. CALHOUN, *Exposition and Protest*, in UNION AND LIBERTY 311, 348 (Ross M. Lence ed., 1992).

56. *Id.*

57. See WHITTINGTON, *supra* note 12, at 81.

58. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462; see also Morse, *supra* note 23, at 422.

59. See generally THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1861, at 166–85 (1974) (describing Northern responses to the Fugitive Slave Act).

60. *In re Booth*, 3 Wis. 1 (1854).

61. Morse, *supra* note 23, at 422–23.

62. WOODS, *supra* note 12, at 81–83.

63. Taylor, *supra* note 26. These forms of sub-nullification resistance are echoed in many of today’s opposition efforts. See *infra* Part II.C.

64. 347 U.S. 483 (1954).

65. Card, *supra* note 13, at 1807 (quoting William G. Ross, *Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail*, 50 BUFF. L. REV. 483, 493 (2002)).

66. *Id.*

67. 358 U.S. 1 (1958).

68. 364 U.S. 500 (1960).

a constitutional doctrine. If taken seriously, it is illegal defiance of constitutional authority.”<sup>69</sup>

## II. TAXONOMY OF STATE OPPOSITION LAWS

Contemporary state efforts to resist or derail federal policy take a variety of forms. This Part categorizes state opposition laws according to the specific purposes they are facially designed to serve.<sup>70</sup> Each subpart summarizes a particular category of legislation, provides concrete examples of statutes exemplifying the class, and concludes with a brief preemption analysis.

### *A. Statutes that Express an Opinion on Federal Policy*

Opposition statutes often do no more than simply express the state’s position on a particular issue. In some cases, these laws merely reassert, as a general matter, the state’s exclusive jurisdiction over those subject matters not explicitly delegated to the federal government by the Constitution. In other instances, they serve as vehicles for a state (or state subdivision, such as a locality) to express its views on a particular federal policy. Regardless of the tenor or specificity of the enactment, however, the statutes in this category are uniformly intended to be merely expressive in nature. They neither create rights or obligations in state citizens nor affect the operation of any regulatory apparatus.<sup>71</sup>

Many expressive statutes simply reaffirm the policy of state autonomy embodied in the Tenth Amendment.<sup>72</sup> Utah’s Tenth Amendment Resolution, which exemplifies this type of enactment, provides in part:

[T]he Legislature of the state of Utah, the Governor concurring therein, acknowledge and reaffirm residuary and inviolable sovereignty of the state of Utah under the Tenth Amendment to the Constitution of the United States over all powers not otherwise enumerated and granted to the federal government by the Constitution of the United States.<sup>73</sup>

The Utah bill concludes by “strongly” urging the repeal of certain national legislation and calling for its own transmission to both the federal government and sister states.<sup>74</sup>

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69. *Id.* at 501 (quoting *Bush v. Orleans Parish Sch. Bd.*, 188 F. Supp. 916, 926 (E.D. La. 1960)).

70. The Tenth Amendment Center provides legislative tracking on opposition efforts nationwide. *The 10th Amendment Nullification Movement*, TENTH AMENDMENT CENTER, <http://tenthamendmentcenter.com/the-10th-amendment-movement/comment-page-9/>.

71. Some statutes, of course, comprise a mixture of expressive and functional components. This subpart pertains not only to statutes that are entirely expressive but also to those purely expressive clauses embedded in otherwise functional legislation.

72. The text of the Tenth Amendment states 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.” U.S. CONST. amend. X.

73. S.C.R. 3, 2010 Gen. Sess. (Utah 2010).

74. *Id.*

Other expressive resolutions target a particular national policy for criticism. Following the enactment of the National Defense Authorization Act of 2012, for instance, the Board of Commissioners of Fremont County, Colorado, issued a resolution condemning several of the bill's provisions.<sup>75</sup> In similar fashion, following passage of the Patriot Act, the City of Austin, Texas, issued a resolution criticizing elements of the bill and reaffirming its commitment "to the protection of civil rights and civil liberties for all of its residents . . ."<sup>76</sup> The resolution further stated that certain provisions of the Act "threaten fundamental rights and liberties" and requested Texas representatives to actively seek their repeal.<sup>77</sup>

Expressive pronouncements of this nature are not subject to federal preemption. They do not interfere with the operation of any federal law;<sup>78</sup> indeed, they do not purport to have any legal effect whatsoever. They represent nothing more than formalized expressions of protest against allegedly unconstitutional national policies. This type of purely expressive enactment may even be affirmatively protected from preemption by the First Amendment.<sup>79</sup>

#### *B. Statutes that Exempt Federally Prohibited Conduct from State Law Penalties*

States often choose to permit, as a matter of state law, conduct prohibited at the federal level. This choice can take one of two forms. First, the state may simply decline to penalize certain conduct under state law, regardless of its status under federal law. This situation, which is often evidenced by statutory silence, occurs with remarkable frequency. Since federal and state criminal laws are not congruent, there exists a wide swath of behavior subject to federal but not state prosecution. In this respect, a state's mere failure to prohibit particular activities criminalized at the federal level does not necessarily bespeak disapproval of national policy.

In some instances, however, a state's decision to refrain from criminalizing conduct may represent a form of resistance to federal law. Such opposition is signified when the state ostentatiously decriminalizes a federally prohibited activity,<sup>80</sup> or goes even further and affirmatively legitimizes that activity by providing various regulatory and legal protections to those who engage in it. In these cases, although the federal prohibition remains in effect, the more permissive state regime exists as a background rule that operates to the extent the federal government fails to enforce its own laws. This regulatory approach, which conspicuously

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75. Carie Canterbury, *County Passes Due Process Resolution*, CANON CITY DAILY REC. (Jan. 25, 2012), [http://www.canoncitydailyrecord.com/ci\\_19814522](http://www.canoncitydailyrecord.com/ci_19814522).

76. CITY OF AUSTIN, TEX., RES. NO. 030807-37 (2003), available at <http://www.aclu.org/national-security/austin-tx-resolution>.

77. *Id.*

78. See *infra* notes 125–126 and accompanying text.

79. See Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 STAN. J. INT'L L. 1, 2–3 (1999).

80. A state's decision to decriminalize may be "ostentatious," for instance, if it occurs in the midst of a national debate on the issue. See, e.g., Keith Coffman & Nicole Neroulias, *Colorado, Washington First States To Legalize Recreational Pot*, REUTERS, Nov. 7, 2012, available at <http://www.reuters.com/article/2012/11/07/us-usa-marijuana-legalization-idUSBRE8A602D20121107>.

signifies the state's preferred alternative to national prohibition, constitutes a form of passive dissent to federal policy.<sup>81</sup>

Medical marijuana laws<sup>82</sup> are arguably the most widespread, politically salient, and practically significant example of this genus of statutes. Under the federal Controlled Substances Act (CSA), the cultivation, possession, and distribution of marijuana are prohibited.<sup>83</sup> In *Gonzales v. Raich*, the Supreme Court, faced with a more permissive state law regime, categorically upheld the application of the CSA to medical marijuana.<sup>84</sup> Nevertheless, several states have persisted in declining to criminalize—as a matter of state law—medical marijuana and have instead promulgated detailed regulations to govern its use.<sup>85</sup> These states typically provide a list of qualifying conditions, require the patient to obtain a doctor's recommendation, and regulate the amount of marijuana that may be possessed as well as the places in which it may be consumed.<sup>86</sup> Some states even grant patients the right to recover any marijuana that has been wrongfully seized by state law enforcement officers,<sup>87</sup> while others provide special legal protections to registered users of the drug. Oregon, for instance, prohibits landlords from terminating a tenant's lease on the basis of the tenant's use of medical marijuana in accordance with state law.<sup>88</sup>

The preemption analysis for this class of statutes is heavily informed by the anticommandeering rule established by the Supreme Court in *New York v. United States*.<sup>89</sup> According to the *New York* Court, “[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.”<sup>90</sup> Consequently, the federal government may not oblige a state to criminalize—or preclude it from decriminalizing—marijuana use.<sup>91</sup> Regulatory provisions attendant upon state

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81. See Balloun, *supra* note 38, at 232 (describing state medical marijuana laws as a form of “passive” state interposition).

82. Recreational marijuana laws obviously raise similar issues. This Article focuses on medical marijuana statutes for the simple reason that they are more common and thus provide a greater number of data points.

83. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, 1247, 1249, 1260. This prohibition is subject to certain minor exceptions not relevant here.

84. 545 U.S. 1 (2005).

85. The list of states with medical marijuana statutes continues to evolve. Between 1996 and 2011, sixteen states legalized the use of marijuana for medical purposes. Dinan, *supra* note 12, at 1647.

86. Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power To Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1428–30 (2009).

87. *Id.* at 1430.

88. OR. REV. STAT. § 90.396(1)(f)(B)(i) (2013).

89. 505 U.S. 144, 166 (1992). For a comprehensive analysis of the intersection of preemption doctrine and the anticommandeering rule in this context, see generally Schwartz, *supra* note 12.

90. *New York*, 505 U.S. at 166.

91. See Mikos, *supra* note 86, at 1423–24; see also *Conant v. Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring) (“[P]reventing the state from repealing an existing law is no different from forcing it to pass a new one; in either case, the state is being forced to regulate conduct that it prefers to leave unregulated.”).

decriminalization, such as the requirement of doctor recommendations, are similarly exempt from preemption insofar as they function merely to separate legal from illegal conduct under state law.<sup>92</sup> Mechanisms of this variety simply define the contours of the state regime that operates as the background rule to federal prohibition.

State laws that provide affirmative protections to marijuana users, however, are more susceptible to invalidation.<sup>93</sup> The CSA expressly disclaims field preemption but does mandate that a state statute be preempted if “there is a positive conflict between [the state and federal laws] so that the two cannot consistently stand together.”<sup>94</sup> Thus, a state law that insulates a marijuana user from eviction may be preempted to the extent the statute aids and abets a violation of the CSA.<sup>95</sup> Similarly, a requirement that a state officer return wrongfully seized marijuana to its original owner may be preempted because it requires law enforcement to “distribute” a controlled substance.<sup>96</sup> None of these observations, however, trenches on the fundamental principle that a state may legalize, as a matter of state law, conduct otherwise prohibited at the federal level.

### C. Statutes that Bar State Officials from Implementing Federal Law

Statutes that bar state officials from implementing federal law are conceptually analogous to the statutes described in the previous subpart: both simply decline to employ the state enforcement apparatus against particular activities. By explicitly prohibiting its officers from assisting in the enforcement of a specific federal law, a state unmistakably codifies its objection to national policy. These statutes possess a substantial historical pedigree; many Northern states, for instance, barred their officers from assisting in the implementation of the Fugitive Slave Act.<sup>97</sup>

A paradigmatic example of this class of laws is the Wyoming Firearms Freedom Act.<sup>98</sup> The Act provides that any firearm manufactured in Wyoming that remains

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92. See *Conant*, 309 F.3d at 646 (Kozinski, J., concurring) (“By precluding doctors, on pain of losing their DEA registration, from making a recommendation that would legalize the patients’ conduct under state law, the federal policy makes it impossible for the state to exempt the use of medical marijuana from the operation of its drug laws. In effect, the federal government is forcing the state to keep medical marijuana illegal.”); *San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d 461, 482 (Ct. App. 2008); Mikos, *supra* note 86, at 1455–56.

93. See, e.g., Dana Kelly, *Bringing the Green to Green: Would the Legalization of Marijuana in California Prevent the Environmental Destruction Caused by Illegal Farms?*, 18 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 95, 111–12 (2012).

94. 21 U.S.C. § 903 (2012).

95. Mikos, *supra* note 86, at 1456–57. The likelihood of aiding and abetting liability being imposed on these facts is subject to dispute. Cf. *United States v. Zafiro*, 945 F.2d 881, 887–88 (7th Cir. 1991) (exploring the contours of aiding and abetting liability in the context of the War on Drugs).

96. Mikos, *supra* note 86, at 1459.

97. See *supra* note 63 and accompanying text; see also *supra* note 44 and accompanying text (similar state legislation enacted in opposition to the Embargo Acts).

98. WYO. STAT. ANN. § 6-8-404 to 6-8-406 (2013). Another example is a recent wave of proposed bills that would bar state officials from implementing the ACA. See Jacob Gershman, *Bills Proposed in Several States Would Nullify Affordable Care Act*, WALL ST. J. L. BLOG (Jan. 17, 2014, 10:53 AM), <http://blogs.wsj.com/law/2014/01/17/bills-proposed-in-several-states>

within the physical borders of the state is not subject to federal gun regulations.<sup>99</sup> Wyoming's asserted authority over domestic firearms is predicated on a narrow reading of the Commerce Clause: the Act explicitly declares that locally manufactured guns that remain exclusively within the state have not moved in "interstate commerce."<sup>100</sup> As relevant here, the Act prohibits state officers from violating its provisions by assisting in the enforcement of contrary federal law.<sup>101</sup>

Statutes of this variety occasionally qualify their scope with constitutional language, prohibiting state participation in federal enforcement efforts only where those efforts, in the judgment of the state, would be unconstitutional. Virginia's response to the National Defense Authorization Act (NDAA)—which arguably authorizes the indefinite detention of American citizens<sup>102</sup>—exemplifies this particular variant. Virginia's statute provides that no state officer

shall knowingly aid . . . in the detention of any citizen pursuant to 50 U.S.C. § 1541 as provided by the [NDAA] . . . if such aid would knowingly place [the officer] in violation of the United States Constitution, the Constitution of Virginia, any provision of the Code of Virginia, any act of the General Assembly, or any regulation of the Virginia Administrative Code.<sup>103</sup>

The inclusion of the federal Constitution as an independent basis for refusing to assist in the detention of citizens implies that, at least in some circumstances, the state's judgment of whether an enforcement effort complies with the Constitution will diverge from the judgment made by the federal government.<sup>104</sup> In other words, the statute implicitly deems certain actions sanctioned by the NDAA unconstitutional.<sup>105</sup>

Like the statutes examined in the previous subpart, these laws are protected from preemption by the anticommandeering rule recognized in *New York*.<sup>106</sup> In *Printz v. United States*, the Court elaborated on the *New York* doctrine in the enforcement context, declaring that "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."<sup>107</sup>

-would-nullify-affordable-care-act/.

99. WYO. STAT. ANN. § 6-8-404(a). The implications of this particular aspect of the statute—which purports to nullify federal law—are addressed in more detail in Part II.E.

100. § 6-8-404(a).

101. *Id.* § 6-8-405(a).

102. See Natasha Lennard, *Obama Signs NDAA 2014, Indefinite Detention Remains*, SALON (Dec. 27, 2013, 7:38 AM), [http://www.salon.com/2013/12/27/obama\\_signs\\_ndaa\\_2014\\_indefinite\\_detention\\_remains/](http://www.salon.com/2013/12/27/obama_signs_ndaa_2014_indefinite_detention_remains/).

103. VA. CODE ANN. § 2.2-614.2:1 (2014).

104. *Cf.* Althouse, *supra* note 12, at 1255 (noting that a local resolution which limits local police participation in Patriot Act enforcement constitutes "a robust interpretation of the meaning of constitutional rights that implicitly denounces the central purpose of the PATRIOT Act").

105. *Id.* (making a similar argument with respect to laws passed in opposition to the Patriot Act).

106. For an argument that the implications of the anticommandeering rule here are not as clear as this Article suggests, see generally Schwartz, *supra* note 12.

107. 521 U.S. 898, 925 (1997). Even prior to the formulation of the anticommandeering rule, the Supreme Court in the 1850s reached a similar conclusion regarding Northern laws that prohibited state officers from assisting in the enforcement of the Fugitive Slave Act.



Although state officers may not interfere with a federal agent's performance of his official duties, Congress cannot require state officers to affirmatively assist in the execution of federal law.<sup>108</sup> Importantly, the *Printz* rule is categorical: the Court made clear that in this context "a 'balancing' analysis is inappropriate."<sup>109</sup> "It is the very *principle* of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect."<sup>110</sup>

The federal government's inability to commandeer the states, however, does not necessarily indicate that a state may decline to provide assistance for any reason it chooses. Racially or religiously motivated refusals to aid federal law enforcement may be subject to constitutional constraints, for instance.<sup>111</sup> Most modern prohibitions on assistance, however, do not implicate the Constitution's equality guarantees. These statutes are instead typically predicated on expansive readings of constitutional rights or narrow constructions of federal power.<sup>112</sup> The former almost certainly constitute a permissible basis for withholding state assistance; it is widely accepted that federal rights constitute a floor rather than a ceiling with respect to state conduct.<sup>113</sup>

The latter also likely fall within the purview of the *Printz* doctrine—even if the Supreme Court fails to endorse (or even rejects) the constitutional position adopted by the state. Unlike a racially or religiously motivated law, a statute of this variety does not contravene any constitutional prohibition. In the absence of constitutional infirmity, the categorical nature of the *Printz* rule suggests that a state's motivation for declining to participate in a federal program is irrelevant. Consequently, states are probably justified in withholding assistance on the basis of constitutional objections that would not succeed in federal court.<sup>114</sup> The anticommandeering rule

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Mikos, *supra* note 86, at 1449 n.107.

108. It is a separate question whether the federal government could preempt state laws constraining the ability of state officers to assist in enforcing federal laws, thereby freeing willing state officers to provide assistance without compelling them to do so. For a discussion of this issue, see Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law To Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201, 1211–13 (1999).

109. *Printz*, 521 U.S. at 932.

110. *Id.* (emphasis in original).

111. State action (or inaction) that is unobjectionable on its face may be constitutionally suspect if motivated by an impermissible purpose. *See, e.g.*, *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968) (invalidating, on the grounds that it was religiously motivated, a state law prohibiting the teaching of evolution in public school).

112. *See, e.g.*, IDAHO CODE ANN. § 39-9004 (2011) (effectively barring, on the basis of a narrow construction of federal power, state employees from assisting in the enforcement of the ACA); VA. CODE ANN. § 2.2-614.2:1 (2014) (precluding state employees from assisting in the implementation of the NDAA when doing so would violate a suspect's constitutional rights).

113. *See, e.g.*, *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (recognizing "the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution"); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986) ("As is well known, federal preservation of civil liberties is a minimum, which the states may surpass so long as there is no clash with federal law.").

114. *See* Althouse, *supra* note 12, at 1256.

thus effectively permits a degree of autonomy on the part of state officials in interpreting the federal constitution.<sup>115</sup>

*D. Statutes that Provide for Enhanced Enforcement of Federal Law*

Many state statutes incorporate federal substantive standards but establish enforcement mechanisms more strenuous than those approved by the President or Congress. These enactments often include provisions that expand the discretion of state officers to enforce federal law or attach additional state penalties to federal violations. Consequently, these statutes reflect a degree of dissatisfaction with the effectiveness of federal enforcement policy rather than with federal substantive policy per se.

Statutes of this variety are prevalent in the immigration context. Arizona's Support Our Law Enforcement and Safe Neighborhoods Act<sup>116</sup> represents the most salient recent example. Arizona's bill, which relied on federal law for its definition of alienage, was intended to augment federal efforts to curtail illegal immigration.<sup>117</sup> Section 3 of the Act rendered it a state misdemeanor to fail to comply with federal registration requirements.<sup>118</sup> Section 5(C) prohibited undocumented aliens from working or seeking employment in the state.<sup>119</sup> Section 6 authorized state officers to make warrantless arrests of individuals the officer had probable cause to believe had committed an offense that rendered them removable.<sup>120</sup> Finally, Section 2(B) required an officer who lawfully detained an individual to make a reasonable attempt to determine the person's immigration status if the officer had reasonable suspicion that the person was an undocumented alien.<sup>121</sup>

In *Arizona v. United States*, the Supreme Court evaluated the validity of these provisions and determined that federal law preempted Sections 3, 5(C), and 6, but that 2(B) survived.<sup>122</sup> The instructiveness of the ruling is limited, however, by its heavy reliance on the national government's "exclusive authority over foreign affairs."<sup>123</sup> As a result, the opinion's reasoning is probably of minimal relevance outside the immigration context.<sup>124</sup>

The preemption of state efforts to augment federal enforcement in other circumstances will depend on one of two legal standards. Although certain state schemes may be field preempted, this category of preemption analysis is rarely invoked by the modern Court.<sup>125</sup>

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115. *See id.* at 1259–60.

116. Support Our Law Enforcement and Safe Neighborhoods Act, ch. 113, 2010 Ariz. Sess. Laws 450 (codified as amended in scattered sections of ARIZ. REV. STAT. ANN. tits. 11, 13, 23, 28, 41).

117. ARIZ. REV. STAT. ANN. § 11-1051 note (2012 & Supp. 2013).

118. *Id.* at § 13-1509.

119. *Id.* at § 13-2928(C).

120. *Id.* at § 13-3883(A)(5).

121. *Id.* at § 11-1051(B).

122. 132 S. Ct. 2492, 2503, 2505, 2507, 2510 (2012).

123. *The Supreme Court, 2011 Term—Leading Cases*, 126 HARV. L. REV. 327, 330 (2012).

124. An increasing number of states have adopted statutes modeled after or related to Arizona's approach. *See* Lauren Gilbert, *Immigrant Laws, Obstacle Preemption, and the Lost Legacy of McCulloch*, 33 BERKELEY J. EMP. & LAB. L. 153, 157 n.14 (2012).

125. *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 227 (2000) ("The Court has

Preemption will instead typically turn on whether, in the canonical language of conflict preemption, state action “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>126</sup>

Under this standard, the Court has repeatedly invalidated state penalties attached to federal violations, especially when the additional state remedy upsets the particular balancing of costs and benefits enshrined by the federal statute.<sup>127</sup> State efforts simply to enforce federal law, however—without the provision of any additional remedies—occupy less certain legal terrain. Modern case law fails to provide a definitive, transsubstantive rule for addressing this particular issue.<sup>128</sup> The status of these state efforts likely depends on the rationale underlying the particular federal enforcement policy they are intended to supplement. When federal enforcement levels stem merely from resource constraints, it is entirely possible that state assistance will pose no obstacle to achieving congressional purposes. If federal “underenforcement” is a result of careful policy calibration by the President or Congress, however, state supplementation may disrupt that balance and therefore be preempted.<sup>129</sup>

#### *E. Statutes that Purport to Nullify Federal Law*

Many opposition statutes declare that a particular federal law, or one of its applications, is unconstitutional and therefore void. Other statutes implicitly nullify federal law by outlawing the specific policy choice that it enshrines. Both variations tend to phrase their objections in the language of reserved and enumerated powers. Although statutes of this variety occasionally include a mechanism for preventing the enforcement of federal law, those that do are reserved for later consideration. The laws addressed in this subpart, which lack affirmative enforcement provisions, merely purport to provide a rule of decision for courts.

Utah’s Firearms Freedom Act is a prototypical example of a statute designed to nullify a particular application of federal law. The Utah Act, echoing historical

grown increasingly hesitant to read implicit field-preemption clauses into federal statutes.”).

126. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The other form of conflict preemption—triggered when “compliance with both federal and state regulations is a physical impossibility,” *Boggs v. Boggs*, 520 U.S. 833, 844 (1997) (quoting *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992)) (internal quotation marks omitted)—typically will not be implicated by statutes that merely seek to supplement federal enforcement efforts.

127. See, e.g., *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 353 (2001) (holding that states may not provide supplemental remedies for fraud committed against the Food and Drug Administration); *Wis. Dep’t of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 288 (1986) (holding that supplemental state remedies to the National Labor Relations Act are preempted).

128. James A. Kraehenbuehl, *Lessons from the Past: How the Antebellum Fugitive Slave Debate Informs State Enforcement of Federal Immigration Law*, 78 U. CHI. L. REV. 1465, 1491 (2011) (noting that “modern preemption case law does not address the specific enforcement question asked by jurisdictions of overenforcement like Arizona: To what extent can a state overenforce a federal law by using state resources to arrest, detain, and prosecute people in violation of the federal law?”).

129. *Cf. Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373–74 (2000) (finding that sanctions adopted by Massachusetts targeting Myanmar were preempted on the ground that they upset the careful policy calibration made by Congress in enacting sanctions at the federal level).

theorists, explicitly characterizes the Constitution as a contract between the federal government and the sovereign states.<sup>130</sup> With this constitutional vision<sup>131</sup> as its foundation, the Act provides:

In reviewing any matter covered by this chapter, a court shall consider the following: . . . A personal firearm, a firearm action or receiver, a firearm accessory, or ammunition that is manufactured commercially or privately in the state to be used or sold within the state is not subject to federal law or federal regulation, including registration, under the authority of congress to regulate interstate commerce.<sup>132</sup>

As a result, the regulation of such firearms is reserved to the state under the Tenth Amendment.<sup>133</sup> Although the Utah Act does not explicitly reference any particular federal statute, such as the National Firearms Act,<sup>134</sup> its unmistakable intention is to nullify legislation that infringes state control of the intrastate gun trade.

Virginia's response to the ACA exemplifies those statutes that outlaw a particular substantive policy adopted by the federal government. The Virginia Healthcare Freedom Act provides that "[n]o resident of this Commonwealth . . . shall be required to obtain or maintain a policy of individual insurance coverage except as required by a court or the Department of Social Services where an individual is named a party in a judicial or administrative proceeding."<sup>135</sup> Although it does not reference the ACA, the plain purpose of the Virginia Act is to nullify the individual mandate provision of that law.<sup>136</sup> As the related litigation indicates, Virginia's bill is predicated on a constitutional claim that the individual mandate exceeds Congress' authority under the Commerce Clause.<sup>137</sup>

The juxtaposition of the Utah and Virginia bills illustrates an important analytical point. On its face, the Utah legislation is purely declaratory: it does not endeavor to create any legal rights or obligations but merely recognizes certain constraints on federal power (allegedly) imposed by the Constitution. In contrast, the Virginia law purports to create an immunity<sup>138</sup>: it is intended to supply, by its own force, a rule of decision for state courts. The difficulty, of course, is that states are incapable of limiting federal power by edict. The immunity created by the Virginia bill will only be operative if the Constitution renders conflicting federal law invalid. In that case, the bill would be superfluous, insofar as an unconstitutional federal law fails to supply a rule of decision regardless of whether the state says as much.

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130. UTAH CODE ANN. § 53-5b-102 (LexisNexis 2010).

131. See, e.g., Timothy Sandefur, *State Standing To Challenge Ultra Vires Federal Action: The Health Care Cases and Beyond*, 23 U. FLA. J.L. & PUB. POL'Y 311, 322–25 (2012) (discussing and criticizing the compact theory of the Constitution).

132. § 53-5b-102.

133. *Id.*

134. National Firearms Act, ch. 757, 48 Stat. 1236 (1934).

135. VA. CODE ANN. § 38.2-3430.1:1 (2014).

136. Timothy S. Jost, *Can the States Nullify Health Care Reform?*, 362 NEW ENG. J. MED. 869, 869 (2010).

137. See *Virginia v. Sebelius*, 702 F. Supp. 2d 598, 601 (E.D. Va. 2010).

138. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 55 (1913) (explaining the concept of an immunity).

Thus, despite their differing formal structures, neither piece of legislation is capable of establishing immunity from federal obligations. The effect of each is ultimately reducible to the viability of its constitutional arguments. Although the two statutes are analytically distinct, they are addressed together in this subpart because they are identical in both functional and rhetorical effect.<sup>139</sup> They are not included in subpart II.A., which encompasses purely expressive laws, because their plain text does purport to alter the legal relations that exist under current federal law.

Statutes that declare federal law invalid represent the modern incarnation of classic nullification measures.<sup>140</sup> If the federal legislation they target is itself constitutional, these statutes will be uniformly preempted under the Supremacy Clause.<sup>141</sup> Because their operative effects are largely congruent with their constitutional claims, such statutes cannot survive judicial decisions that reject the constitutional interpretations upon which they are predicated. In this context it is important to note that a state or federal court engaged in determining the validity of federal law will not be bound by the nullifying legislature's judgment of constitutionality.<sup>142</sup>

#### *F. Statutes that Hinder Federal Law Enforcement*

The most combative efforts to oppose the enforcement of federal law take the form of statutes threatening federal executive officers with criminal punishment for acts taken contrary to state policy. Statutes in this class typically nullify federal law and further provide that any officer who attempts to enforce the nullified law will be subject to state penalties. Although several such statutes have been proposed in recent years,<sup>143</sup> their actual passage is relatively rare.

The Wyoming Firearms Freedom Act represents one of the few enacted statutes penalizing federal agents simply for fulfilling their official responsibilities. It provides that any official “who enforces or attempts to enforce” any federal law upon a firearm that “is manufactured commercially or privately in Wyoming and that remains exclusively within the borders of Wyoming shall be guilty of a misdemeanor and, upon conviction, shall be subject to imprisonment for not more than one (1) year, a fine of not more than two thousand dollars (\$2,000.00), or both.”<sup>144</sup>

The Wyoming provision is predicated on a narrow reading of Congress' power under the Commerce Clause, which the state contends does not authorize regulation

139. The rhetorical tenor of a nullification statute is important because it is instrumental in shaping the statute's tendency to promote divisive sectionalism and undermine national unity. *See infra* notes 331–343 and accompanying text.

140. *See generally supra* Part I.

141. Leonard, *supra* note 12, at 117.

142. The Oath Clause requires both federal and state judges to uphold the Constitution faithfully: “all . . . judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.” U.S. CONST. art. VI, cl. 3.

143. *See, e.g.*, S.B. 1178, 50th Leg., 1st Reg. Sess. (Ariz. 2011) (declaring that goods produced and sold exclusively within the state are beyond the authority of the federal commerce power and providing that any federal agent attempting to enforce federal law in contravention of the statute will be guilty of a felony).

144. WYO. STAT. ANN. § 6-8-405(b) (2013).

of the intrastate manufacture and transfer of firearms.<sup>145</sup> According to this theory, any federal law that justifies a violation of the Act is itself unconstitutional. A federal officer seeking to enforce such a law is therefore acting *ultra vires*. Consequently, the state is (allegedly) entitled to respond to the federal agent's conduct in the same manner it would respond to the actions of a private lawbreaker.

As the previous subpart noted, statutes that purport to nullify federal law will be preempted insofar as the targeted legislation is itself deemed constitutional.<sup>146</sup> Similarly, statutes that actively interfere with the enforcement of a valid federal law "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and thus will be invalidated under standard conflict preemption principles.<sup>147</sup>

This latter conclusion is arguably buttressed by the doctrine of Supremacy Clause immunity, recognized in *In re Neagle*,<sup>148</sup> which immunizes a federal officer from state prosecution if his allegedly criminal conduct was both authorized by federal law and necessary and proper to the performance of his official duties.<sup>149</sup> It is unclear, however, whether *Neagle* shields an officer from criminal liability if his conduct was authorized by what is later determined to be an *unconstitutional* federal law. A court faced with this scenario might draw an analogy to qualified immunity in the § 1983 context and grant the officer immunity unless he violated a clearly established constitutional prohibition.<sup>150</sup> The precedents and scholarship on the scope of Supremacy Clause immunity, however, are notoriously sparse.<sup>151</sup> For purposes of subsequent analysis, it is sufficient merely to recognize that most statutes in this category will be overridden by federal law.

### III. PURPOSES SERVED BY STATE OPPOSITION LAWS

This Part provides a taxonomy of the various purposes that opposition statutes may serve, apart from those expressed in their text and despite any constraints imposed by federal law. Both preempted and nonpreempted statutes, for instance, may produce significant political ramifications, as well as a host of indirect legal consequences. The chief purposes furthered by opposition statutes fall into three main

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145. *Id.* at § 6-8-404(a). This narrow reading, obviously, is in tension with the broad reading given to the Clause by the Supreme Court. *See, e.g.,* *Gonzalez v. Raich*, 545 U.S. 1, 22 (2005) (concluding that the intrastate manufacture and possession of marijuana does fall within the scope of the Commerce Clause).

146. *See* Balloun, *supra* note 38, at 222 ("[T]he main thrust of any argument Wyoming raises before the federal judiciary must be that the federal law in conflict with the Act is illegal and void."); Jost, *supra* note 136, at 869.

147. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

148. 135 U.S. 1 (1890).

149. Seth P. Waxman, *Federalism, Law Enforcement, and the Supremacy Clause: The Strange Case of Ruby Ridge*, 51 U. KAN. L. REV. 141, 145-46 (2002).

150. *See id.* at 150; Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2239-42 (2003).

151. *See* Waxman & Morrison, *supra* note 150, at 2200.

classes: expressing dissent, influencing adjudication, and affecting federal policy.<sup>152</sup> Each class can be further subdivided into a cluster of related functions. The subparts below explore the three major categories and their various permutations in detail.

### A. Expressing Dissent

One of the primary aims advanced by opposition statutes is the expression of dissent. Purely declaratory resolutions obviously serve this purpose. Laws that exempt federally prohibited conduct from state penalties, as well as legislation that bars state officers from enforcing federal law,<sup>153</sup> also communicate disapproval. Even many preempted statutes, however—such as those that declare federal law void—remain capable of fulfilling a similar expressive function.<sup>154</sup> Communicating dissent is one of the most pervasive and important purposes served by the modern generation of sovereignty laws.

States, like other political organizations, serve as effective institutions for rallying and channeling opposition. In enacting statutes condemning federal policy, states are capable of uniting disparate groups and providing a concrete, unified platform for resistance.<sup>155</sup> These efforts frequently provide a voice to dissenters who might otherwise be silenced<sup>156</sup> and bring public salience to issues that might otherwise be submerged.<sup>157</sup> As Alexander Hamilton observed, the states “will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if anything improper appears, to sound the alarm to the people, and . . . to be the VOICE . . . of their discontent.”<sup>158</sup>

State acts of protest generate a wealth of ripple effects. They serve to codify dissent and thus provide Congress with valuable information on the geographical

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152. These categories are obviously permeable: the expression of dissent, for instance, may impact federal policy. Nevertheless, they represent a useful, functional tool for analyzing the real-world effects of state resistance.

153. The anticommandeering rule, which enables states to withhold assistance from federal enforcement efforts, may serve as the federalism analog of the First Amendment rule against compelled speech: the former protects the right of states to decline to express support for federal positions that they oppose, just as the latter protects the right of individuals to decline to express support for governmental positions they oppose. Hills, *supra* note 12, at 906–15.

154. Leonard, *supra* note 12, at 167.

155. See Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1285 (2004); Hays, *supra* note 40, at 205–06.

156. Leonard, *supra* note 12, at 164; see also Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 403–04 (1997); Elizabeth Weeks Leonard, *The Rhetoric Hits the Road: State Challenges to the Affordable Care Act Implementation*, 46 U. RICH. L. REV. 781, 785 (2012).

157. Card, *supra* note 13, at 1826; see also Leonard, *supra* note 12, at 167–68.

158. THE FEDERALIST NO. 26 (Alexander Hamilton). Like committees of correspondence during the Revolutionary War, states may “open a correspondence and generally overcome collective action problems that might otherwise hinder opposition to federal policies through such mechanisms as hortatory resolutions and coordination of plans of resistance.” Hills, *supra* note 12, at 915 (internal quotation marks omitted). In this sense, states will be “so many sentinels” over the activities of the federal government. THE FEDERALIST NO. 84 (Alexander Hamilton).

popularity of certain policies.<sup>159</sup> They may also help to educate the public regarding both the implementation process associated with complicated federal programs and the particular issues of federalism and personal liberty that those programs raise.<sup>160</sup> Finally, opposition statutes may pressure the state's congressional representatives to adopt a political stance similar to that taken by the state legislature.<sup>161</sup> As a result, state dissent occasionally exerts a gravitational effect on national discussion: during reauthorization hearings for the Patriot Act, for example, representatives repeatedly cited state resolutions opposing the bill.<sup>162</sup>

Opposition statutes also provide an important expressive outlet for constituencies defeated at the national level.<sup>163</sup> Antifederal resolutions and other state-level projects offer "near-term, feasible targets and the possibility of occasional victories," even if national success is doubtful.<sup>164</sup> States' rights activists, for instance, are far more likely to secure passage of an anti-ACA nullification resolution in their state than to achieve repeal of the ACA in Congress.<sup>165</sup> Plausible objectives of this variety enable ongoing mobilization of political opposition despite bleak prospects nationally.<sup>166</sup> Such state-level efforts functionally expand the opportunity for political participation: a state's willingness to enter a national debate provides constituents with an alternative forum for voicing their opinions on issues of federal policy.<sup>167</sup>

State laws keyed to national controversies provide potential benefits not only to disaffected voters but also to dissenting politicians. By maintaining the public salience of divisive federal programs like healthcare reform, politicians in minority states are able to effectively capitalize on their own opposition to those policies.<sup>168</sup> Voting for a sovereignty bill enables a state politician to derive political capital from a national debate in which he plays no direct role, while simultaneously signaling his ideological commitments to constituents.<sup>169</sup> By positioning the state as a figure in the national conversation, the state politician is equally able to portray *himself* as a figure in the national conversation, thereby attracting the votes of constituents who share his views on that particular issue.<sup>170</sup>

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159. Leonard, *supra* note 12, at 165–66.

160. *Id.* at 162–63.

161. *See* Card, *supra* note 13, at 1824–25.

162. Bulman-Pozen & Gerken, *supra* note 12, at 1280 n.85. *See infra* Part III.C for a comprehensive discussion of the effect of state resistance on federal policymaking.

163. *Cf.* Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1081 (2014) (arguing that states "check the federal government by channeling partisan conflict through federalism's institutional framework").

164. Christopher W. Schmidt, *The Tea Party and the Constitution*, 39 HASTINGS CONST. L.Q. 193, 218 (2011).

165. *Id.* at 219.

166. *Id.* at 219, 221; *see also* Hunter, *supra* note 14, at 720.

167. *See* Elizabeth Weeks Leonard, *Rhetorical Federalism: The Role of State Resistance in Health Care Decision-Making*, 39 HOFSTRA L. REV. 111, 112 (2011).

168. Card, *supra* note 13, at 1826.

169. *Cf.* Bulman-Pozen, *supra* note 163, at 1090 ("Instead of representing distinctively state interests against the distinctively national interests of the federal government, states may participate in substantive controversies that are national in scope.").

170. Leonard, *supra* note 12, at 165. Recent scholarship indicates that local politics, in part as a result of voter ignorance, frequently operates largely in the shadow of national politics.



The final and arguably most significant expressive function served by opposition statutes is the modification of social norms. Resolutions that denounce federal policy galvanize and amplify dissent, thereby shaping public opinion. Statutes that exempt federally prohibited conduct from state penalties, however, operate on a more fundamental level by altering the public's moral and social perceptions of certain primary conduct. Social norms are the product of a confluence of complex forces, including law,<sup>171</sup> which is capable of both communicating nascent norms and simultaneously entrenching those norms.<sup>172</sup> Law is an important element in fashioning the public's perception of the desirability and propriety of certain types of conduct.<sup>173</sup> When a state sanctions a particular activity, it implicitly asserts that the activity is at least tolerable both from the perspective of the authorities and other citizens.<sup>174</sup> As a result, state statutes that permit conduct otherwise prohibited by federal law have the capacity to lessen the social stigma such conduct normally invites.<sup>175</sup>

Changing mores in the medical marijuana context exemplify this effect. Permitting the use of marijuana as a palliative has had a significant impact on public perceptions of its morality and social acceptability: "Simply by allowing their residents to use marijuana for medical purposes, the states have arguably fostered more tolerant attitudes toward the practice, making it seem more compassionate, less dangerous, and less wicked, thereby removing or softening the personal and societal reproach that once suppressed medical use of the drug."<sup>176</sup>

Statutes of this variety also interact with norms regarding obedience to law. State legalization reduces the moral dissonance experienced by those who desire to use marijuana for medical purposes but also desire to obey legal commands.<sup>177</sup> This is particularly true if, as some have argued, citizens perceive the state as a more

David Schleicher, *All Politics Is National*, ATLANTIC (July 13, 2012, 12:13 PM), <http://www.theatlantic.com/politics/archive/2012/07/all-politics-is-national/259789/> ("Most votes in state legislative elections turns [sic] on impressions we develop about national politics—we punish and reward state officials largely for what Congress and the president do, rather than for what they do themselves.").

171. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2026 (1996).

172. Whether law primarily communicates or creates norms is a matter of ongoing debate. See Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1627 (2000) (noting that "whether norms are created or modified as a result of a legal rule is context-dependent and, under the current state of our understanding, unknown").

173. See, e.g., Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 2 (1990) (exploring the preference-shaping capacity of criminal laws).

174. Mikos, *supra* note 86, at 1476 (noting that "citizens demand laws that comport with community norms, and lawmakers, subject to constraints such as majority rule, respond by supplying such laws").

175. *Id.* at 1475 ("On one view of the legislative process, lawmakers can shape social norms by manipulating whether society condemns or condones a given behavior, similar to the way they can shape personal beliefs about that behavior.").

176. *Id.* at 1424–25; see also Sunstein, *supra* note 171, at 2032 (noting that laws "have an important effect in signaling appropriate behavior and in inculcating the expectation of social opprobrium and, hence, shame in those who deviate from the announced norm").

177. Mikos, *supra* note 86, at 1472–74.

legitimate repository of authority than the federal government and thus are more willing to accept state directives as indicative of their true legal obligations.<sup>178</sup> State leniency may thus enable citizens to engage in federally prohibited activities without sacrificing their sense of legal duty.

### B. Influencing Adjudication

Sovereignty laws can also have a significant effect on constitutional adjudication, at all stages of the judicial process: they may catalyze private lawsuits, trigger standing for purposes of federal jurisdiction, and even influence the content of substantive doctrine. As with the expressive functions described in the previous subpart, federal preemption will not preclude a statute from serving this purpose. The following analysis explores the potential impact of sovereignty laws at each stage of litigation.

As a threshold matter, opposition statutes may encourage state residents to bring suits challenging the offensive federal law. State legislation condemning a particular enactment implicitly suggests to potential plaintiffs that they will enjoy the support of the state should they choose to challenge that enactment in court. Some states even make this promise of support explicit. Idaho's Healthcare Freedom Act, for instance, declares that "every person within the state of Idaho is and shall be free to choose or decline to choose any mode of securing health care services without penalty"<sup>179</sup> and requires the attorney general to take action "in the defense or prosecution of rights protected under this act."<sup>180</sup> In other cases, backers of a bill may work behind the scenes to select an appropriate plaintiff.<sup>181</sup>

Functionally, these statutes thus spur state citizens to violate federal law (thereby generating a constitutional lawsuit) by implicitly or explicitly vouching the support of the state in the ensuing litigation.<sup>182</sup> They further attempt to frame the conceptual scope of such litigation by codifying the constitutional basis for the state's objections. A provision of the Idaho anti-ACA statute, for instance, espouses an enumerated powers argument against federal healthcare reform.<sup>183</sup> Provisions of this variety provide a strategic plan of attack to guide plaintiffs once litigation commences.<sup>184</sup>

Sovereignty statutes can also influence the jurisdictional analysis of federal courts in two ways.<sup>185</sup> First, by implicitly sanctioning illegal activity—such as the manufacturing of firearms in violation of federal regulations—opposition laws

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178. *Id.* at 1474.

179. IDAHO CODE ANN. § 39-9003(2) (2011).

180. *Id.* at § 39-9004 (2).

181. *See infra* note 187 and accompanying text.

182. *See Montana Fires a Warning Shot over States' Rights*, NBCNEWS.COM (Apr. 29, 2009, 4:54 PM), [http://www.msnbc.msn.com/id/30482736/ns/us\\_news-life/t/montana-fires-warning-shot-over-states-rights/#.UPmcm2faK-0](http://www.msnbc.msn.com/id/30482736/ns/us_news-life/t/montana-fires-warning-shot-over-states-rights/#.UPmcm2faK-0) (discussing the Montana Firearms Freedom Act and noting that the "drafters of the law hope to set off a legal battle").

183. IDAHO CODE ANN. § 39-9003 (2011).

184. *Cf. Dinan, supra* note 12, at 1656 (describing litigation under the Montana Firearms Freedom Act).

185. The analysis here focuses on the ramifications of opposition statutes for Article III standing, and thus its conclusions are limited to federal courts. The jurisdictional analysis for state courts in this context will vary by state.

arguably contribute to the existence of a justiciable controversy. This was the approach endorsed by proponents of the Montana Firearms Freedom Act, which purports to exempt from federal regulation those firearms that are produced in Montana and remain in-state.<sup>186</sup> Drafters of the bill publicly admitted that they intended to locate an ideal plaintiff to threaten to manufacture firearms in compliance with state law (and therefore in violation of federal law) in order to generate a controversy ripe for judicial resolution.<sup>187</sup>

In accordance with this strategy, following passage of the statute, a Montana gun manufacturer filed suit in federal court, seeking an injunction against the enforcement of contrary federal regulations.<sup>188</sup> Consistent with its implicit promise of support, Montana intervened in the suit to defend its statute.<sup>189</sup> Plaintiff's standing arguments centered on the existence of the state enactment: he contended that hundreds of potential customers were only willing to purchase his firearms if they were manufactured pursuant to the Montana bill.<sup>190</sup> Federal law prevented him from taking advantage of this market, thus allegedly creating a ripe controversy.<sup>191</sup> The district court dismissed the claim on jurisdictional grounds.<sup>192</sup> On appeal, the Ninth Circuit reversed on the standing issue—finding that plaintiff had demonstrated the existence of economic injury—but dismissed on the merits.<sup>193</sup> As this episode illustrates, the effectiveness of opposition statutes in helping to generate jurisdiction will typically be highly fact-dependent.

The second avenue by which these statutes may trigger federal jurisdiction is through the fabrication of injury-in-fact for state standing purposes. Virginia's opposition to federal healthcare reform exemplifies this strategy. The Virginia Healthcare Freedom Act, which purported to nullify the ACA,<sup>194</sup> was specifically intended to render justiciable Virginia's challenge to the constitutionality of the ACA's individual mandate provision.<sup>195</sup> Since the individual mandate imposes no duties on the states themselves, Virginia was forced to rely on the conflict between federal law and its nullification statute to establish standing.<sup>196</sup> According to the state, the "collision between the state and federal schemes . . . creates an immediate, actual controversy involving antagonistic assertions of right."<sup>197</sup>

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186. MONT. CODE ANN. § 30-20-104 (2009).

187. *Montana Fires a Warning Shot over States' Rights*, *supra* note 182 (noting that proponents of the law "plan to find a 'squeaky clean' Montanan who wants to send a note to the ATF threatening to build and sell about 20 . . . rifles without federal dealership licensing").

188. Dinan, *supra* note 12, at 1657.

189. *Id.* at 1658.

190. *Mont. Shooting Sports Ass'n v. Holder*, No. CV-09-147-DWM-JCL, slip op. at 5 (D. Mont. Aug. 31, 2010) (Findings and Recommendation of U.S. Mag. J.).

191. *Id.* at 5–6.

192. *Mont. Shooting Sports Ass'n v. Holder*, No. CV 09–147–M–DWM–JCL, slip op. at 8 (D. Mont. Oct. 18, 2010).

193. *Mont. Shooting Sports Ass'n v. Holder*, 727 F.3d 975 (9th Cir. 2013).

194. *See supra* notes 135–136 and accompanying text.

195. Dinan, *supra* note 12, at 1663.

196. *Virginia v. Sebelius*, 656 F.3d 253, 267 (4th Cir. 2011).

197. Complaint for Declaratory and Injunctive Relief at 2, *Virginia v. Sebelius*, 702 F. Supp. 2d 598 (E.D. Va. 2010) (No. 3:10CV188–HEH).

States are permitted to litigate as *parens patriae* to protect the collective interests of their citizens, but *Massachusetts v. Mellon* bars states proceeding under this doctrine from challenging federal law.<sup>198</sup> The *Mellon* bar does not apply, however, to suits where a state seeks merely to protect its own sovereign interests against federal intrusion.<sup>199</sup> Sovereign interests include, among other things, “the power to create and enforce a legal code.”<sup>200</sup> Thus, the crucial question in the Virginia litigation was whether the state sought to vindicate a sovereign interest or instead to litigate as *parens patriae*. The suit could proceed only in the former circumstance.<sup>201</sup>

Virginia contended that federal preemption of its nullification statute infringed its power to establish and administer a legal code.<sup>202</sup> The Fourth Circuit, however, focused on the conjunctive language of the relevant formulation: “only when a federal law interferes with a state’s exercise of its sovereign power ‘to create *and enforce* a legal code’ does it inflict on the state the requisite injury-in-fact.”<sup>203</sup> Since the Virginia Healthcare Freedom Act was not enforceable in any meaningful sense—“Virginia lacks the sovereign authority to nullify federal law”<sup>204</sup>—federal preemption of that statute did not interfere with the exercise of Virginia’s sovereign prerogatives.<sup>205</sup>

The Fourth Circuit thus concluded that Virginia’s actual purpose in pursuing a constitutional challenge was to protect its residents from the effects of the ACA.<sup>206</sup> The suit therefore constituted an improper *parens patriae* proceeding and was consequently dismissed for lack of standing.<sup>207</sup> In the panel’s view, a state cannot simply manufacture a federal constitutional case by passing a statute in opposition to federal law.<sup>208</sup> State standing is a notoriously complex field, however, and the case law on this issue is mixed.<sup>209</sup> Nevertheless, the Fourth Circuit’s analysis represents a plausible interpretation of existing precedent.<sup>210</sup>

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198. 262 U.S. 447, 485–86 (1923) (“It cannot be conceded that a State, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof . . . it is no part of its duty or power to enforce their rights in respect of their relations with the federal government.”).

199. See, e.g., Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 492 (1995); Katherine Mims Crocker, Note, *Securing Sovereign State Standing*, 97 VA. L. REV. 2051, 2053, 2072–73 (2011).

200. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982).

201. *Virginia*, 656 F.3d at 269.

202. *Id.* at 268. This proposition finds some support in the case law. See *Wyoming v. United States*, 539 F.3d 1236, 1242 (10th Cir. 2008) (noting that “[f]ederal regulatory action that preempts state law creates a sufficient injury-in-fact” to the state’s sovereign interest in creating and enforcing a legal code).

203. *Virginia*, 656 F.3d at 269 (quoting *Snapp*, 458 U.S. at 601) (emphasis in original).

204. *Id.* at 270.

205. *Id.* at 269–70. This reasoning is, of course, subject to debate. For an argument that the court reached the wrong result altogether, see Crocker, *supra* note 199, at 2096–97. For an argument that the court reached the right result for the wrong reasons, see Stephen I. Vladeck, *States’ Rights and State Standing*, 46 U. RICH. L. REV. 845, 870 (2012).

206. *Virginia*, 656 F.3d at 271.

207. *Id.* at 272–73.

208. *Id.* at 271–72; see also Vladeck, *supra* note 205, at 870.

209. See *supra* note 202.

210. See *supra* note 205.

Lastly, state opposition may influence adjudication by shaping the content of substantive doctrine. A growing body of scholarship acknowledges that Supreme Court decisions frequently reflect popular consensus.<sup>211</sup> Specifically, public opinion often plays an important role “in guiding judicial interpretation of the open-textured language” of the Constitution.<sup>212</sup> This effect is unsurprising: judges “are influenced by changes in constitutional culture” for the simple reason that “they live in this culture . . . and absorb its assumptions and presuppositions.”<sup>213</sup> The Court’s awareness of its own fragile institutional position may also prompt sensitivity to public opinion.<sup>214</sup> For these reasons, among others, a social movement that promotes certain constitutional understandings in the political realm may induce the Court to memorialize its viewpoint in formal opinions.<sup>215</sup>

The impact of political movements on constitutional adjudication is evidenced by a number of significant historical episodes.<sup>216</sup> Supporters of the Equal Rights Amendment, for instance, ultimately failed in their quest to formally amend the Constitution but arguably succeeded as a functional matter when the primary tenets of their platform were incorporated into the Supreme Court’s equal protection jurisprudence.<sup>217</sup> Similarly, the contours of the Second Amendment right recognized in *District of Columbia v. Heller*<sup>218</sup> potentially reflect a constitutional consensus reached outside the courts in the late twentieth century.<sup>219</sup>

The specific effect of opposition statutes on judicial reasoning may take one of two forms. First, such statutes can confer prominence on a formerly obscure interpretation of a constitutional provision. Successful public mobilization in favor of a self-defense-oriented reading of the Second Amendment represents a conspicuous example of this phenomenon.<sup>220</sup> Second, they can provide an important framing device for constitutional objections to a newly announced federal policy. Nullification resolutions targeting the ACA, for instance, were premised on the argument that the bill was not justified as a legitimate exercise of Congress’ enumerated powers.<sup>221</sup> States could have taken an alternative route, however, by contending that the ACA infringed

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211. See, e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 4 (2009); see also Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 6–7 (1996) (arguing that many major constitutional transformations were “congruent with and dependent upon the broad sweep of historical forces”).

212. Siegel, *supra* note 12, at 1338.

213. JACK M. BALKIN, *LIVING ORIGINALISM* 91 (2011).

214. See FRIEDMAN, *supra* note 211, at 14 (“The justices recognize the fragility of their position . . . and for the most part . . . their decisions hew rather closely to the mainstream of popular judgment about the meaning of the Constitution.”).

215. See Siegel, *supra* note 12, at 1323.

216. See Rebecca E. Zietlow, *Popular Originalism? The Tea Party Movement and Constitutional Theory*, 64 FLA. L. REV. 483, 495–96 (2012).

217. See Siegel, *supra* note 12, at 1338–39, 1368.

218. 554 U.S. 570 (2008).

219. See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 194 (2008).

220. See *id.*

221. See, e.g., Leonard, *supra* note 156, at 783 (noting that states tend to frame objections to the ACA in terms of the values of federalism); *supra* note 183 and accompanying text.

certain due process rights in liberty of contract or the doctor-patient relationship.<sup>222</sup> By choosing to criticize the legislation on federalism grounds, states played an important role in shaping the ensuing debate.<sup>223</sup>

The impact of these laws on constitutional doctrine is not limited to the context of formal adjudication. They can also contribute to the formation of enforceable constitutional understandings outside the courts.<sup>224</sup> Keith Whittington has famously referred to this process—that is, the crystallization of extrajudicial constitutional norms—as “constitutional construction.”<sup>225</sup> In Whittington’s view, these norms may give flesh to areas of textual indeterminacy<sup>226</sup> or even reorder the fundamental ground rules of a constitutional system.<sup>227</sup> Constitutional constructions, although typically not ratified by formal judicial opinions, nevertheless achieve a degree of permanence that binds future politicians.<sup>228</sup> “Even while operating from the inside of politics, . . . constructions perform the role that constitutions are supposed to perform—they structure and constrain future political debate and government action.”<sup>229</sup> Because these norms are nonjudicial, political and social mobilizations are integral in determining their content.<sup>230</sup>

Opposition statutes have the capacity to play an important role in the formation of new constitutional constructions. The majority of these bills are fairly recent, and thus their impact in this sphere is not yet fully discernible. Their observed effect on public opinion, however, indicates their potential significance. State laws legalizing medical marijuana, for example, may eventually contribute to a constitutional settlement that places the use of medical marijuana beyond federal regulation as a matter of the Tenth Amendment, or beyond all regulation as a matter of substantive due process.<sup>231</sup> Whether this outcome will occur is, of course, speculative—the

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222. See Jamal Greene, *What the New Deal Settled*, 15 U. PA. J. CONST. L. 265, 266 (2012) (noting that “based on Supreme Court precedent at the time of the ACA’s passage, the Article I argument bordered on frivolous whereas the due process argument had, and still has, no ‘all-fours’ doctrinal obstacles”).

223. See also *supra* notes 183–184 and accompanying text.

224. See Zietlow, *supra* note 216, at 495–97.

225. WHITTINGTON, *supra* note 12, at 1 (“Constitutional construction is the method of elaborating constitutional meaning in this political realm.”); see also BALKIN, *supra* note 213, at 297–312. Different authors articulate the distinction between interpretation and construction in different ways. See, e.g., Barnett, *supra* note 12, at 66; Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 95–96 (2010).

226. WHITTINGTON, *supra* note 12, at 1.

227. See *id.*; see also BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 196 (1991) (discussing Reconstruction and the New Deal).

228. WHITTINGTON, *supra* note 12, at 218.

229. *Id.* at 219.

230. BALKIN, *supra* note 213, at 83–84.

231. The fact that the former argument was rejected by the Supreme Court in *Gonzalez v. Raich*, 545 U.S. 1, 33 (2005), does not mean it is necessarily precluded from forming the basis of a constitutional construction. Political actors engaged in constitutional interpretation frequently “depart from judicial efforts to define constitutional meaning.” WHITTINGTON, *supra* note 12, at 2. Indeed, the very existence of constitutional constructions is a testament to the “continuing effort to resist the judicial monopolization of the Constitution and its meaning.” *Id.* at 207.

process of construction on this issue is not yet complete. It is unclear what the contours of any eventual construction will be, or even whether a construction will be reached. Nevertheless, state legislation has indisputably molded the constitutional debate on this issue in important ways thus far.<sup>232</sup>

### C. Affecting Federal Policy

Finally, opposition laws are capable of exerting a direct influence on both the federal government's enforcement priorities and its substantive policies. The statutes with the most significant real-world impact in this respect fall into two categories: those that exempt conduct from state penalties and those that prohibit state officers from assisting in the enforcement of federal law.<sup>233</sup> The former may convince the federal government to allocate enforcement resources elsewhere in order to address conduct criminalized under both state and federal regimes, while the latter may induce the federal government to alter its substantive policies in order to coax states into offering enforcement assistance.

The War on Drugs represents the most prominent setting in which state laws have significantly influenced federal enforcement priorities. The federal government lacks the resources to comprehensively enforce its marijuana ban: “[o]nly 1 percent of the roughly 800,000 marijuana cases generated every year are handled by federal authorities.”<sup>234</sup> As a result, the federal government must carefully choose where to allocate its enforcement capital. Widespread state legalization<sup>235</sup> of medical<sup>236</sup> marijuana has apparently convinced the Department of Justice (DOJ) to moderate its prosecution of individuals who use the drug in compliance with state regulations.<sup>237</sup> Attorney General Eric Holder announced in 2009 that “it will not be a priority to use federal resources to prosecute patients with serious illnesses or their caregivers *who are complying with state laws on medical marijuana*.”<sup>238</sup>

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232. California's regulatory scheme, for instance, received extensive attention in *Raich*, despite the fact that the issue presented involved the scope of Congress's Commerce Clause authority, which is doctrinally unrelated to state law. 545 U.S. at 5–6.

233. Direct nullification bills, in contrast, have had minimal effect on federal lawmakers thus far. See Emily Bazelon, *Nullification Everywhere*, SLATE (Sept. 4, 2013, 5:49 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/09/colorada\\_and\\_washington\\_marijuana\\_legalization\\_why\\_aren\\_t\\_liberals\\_as\\_excited.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/09/colorada_and_washington_marijuana_legalization_why_aren_t_liberals_as_excited.html).

234. Mikos, *supra* note 86, at 1424.

235. Jost, *supra* note 136, at 871 (noting that, as of 2010, over a quarter of all U.S. states had legalized medical marijuana).

236. As before, this subpart focuses primarily on medical rather than recreational marijuana statutes for the simple reason that they are more prevalent. See *supra* note 82.

237. The DOJ has adopted a similarly hands-off approach to state legalization of recreational marijuana. See Press Release, U.S. Dep't of Justice, Justice Department Announces Update to Marijuana Enforcement Policy (Aug. 29, 2013), available at <http://www.justice.gov/opa/pr/2013/August/13-opa-974.html>; see also Ryan J. Reilly & Ryan Grim, *Eric Holder Says DOJ Will Let Washington, Colorado Marijuana Laws Go into Effect*, HUFFINGTON POST (Aug. 29, 2013, 1:30 PM), [http://www.huffingtonpost.com/2013/08/29/eric-holder-marijuana-washington-colorado-doj\\_n\\_3837034.html](http://www.huffingtonpost.com/2013/08/29/eric-holder-marijuana-washington-colorado-doj_n_3837034.html).

238. Dinan, *supra* note 12, at 1650 (emphasis added).

A contemporaneous memorandum issued to United States Attorneys reaffirms this policy,<sup>239</sup> but is careful to note that “clear and unambiguous compliance with state law” does not “create a legal defense to a violation of the Controlled Substances Act.”<sup>240</sup> The policy contained in the memorandum is therefore “intended solely as a guide to the exercise of investigative and prosecutorial discretion.”<sup>241</sup> Thus, although state medical marijuana statutes are incapable of neutralizing federal penalties, they have achieved limited success by prompting (at least for now) a reallocation of federal enforcement resources.<sup>242</sup> The current policy may even survive the transition to a new administration insofar as it creates reliance interests and special interest groups that serve as impediments to change.

Opposition statutes are also capable of influencing the federal government’s substantive agenda. Enactments that prohibit state officers from assisting in the enforcement of federal law are especially likely to have this effect for two reasons. First, state opposition can sensitize federal officials to constitutional concerns they had not previously been inclined to address. This phenomenon may already have materialized in the War on Terror, where local opposition to Patriot Act enforcement has repeatedly forced federal officials to publicly confront civil liberties issues that they would have preferred to ignore.<sup>243</sup>

Second, the federal government may be inclined to modify its position in order to induce state enforcement assistance. The War on Terror again serves as a paradigmatic example. Federal authorities lack the manpower to ensure national security on their own.<sup>244</sup> And, under the anticommandeering rule, the federal government cannot mandate that state officers provide aid.<sup>245</sup> It therefore has a powerful incentive to moderate its substantive position in order to persuade reluctant or dissenting states to cooperate.<sup>246</sup> In short, federal dependence on state assistance may compel national lawmakers to grant concessions to state concerns in order to achieve federal policy objectives.<sup>247</sup> Although the secrecy surrounding Patriot Act implementation makes a comprehensive evaluation difficult, certain indicators suggest that an effect of this nature may already have occurred.<sup>248</sup>

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239. David W. Ogden, *Memorandum for Selected United States Attorneys on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, JUST.BLOG (Oct. 19, 2009), <http://blogs.justice.gov/main/archives/192>.

240. *Id.*

241. *Id.*

242. See Taylor, *supra* note 26, at 32 (noting that in the context of medical marijuana, “[d]e facto nullification has won a partial victory.”).

243. Althouse, *supra* note 12, at 1271–73 & n.139 (describing the reactions of federal officials to civil liberties concerns attending the Patriot Act).

244. Bulman-Pozen & Gerken, *supra* note 12, at 1280; Young, *supra* note 155, at 1280–81.

245. See *supra* note 107 and accompanying text. The federal government may offer monetary incentives to states to obtain their assistance, but even these grants may not be coercive. See *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

246. See Young, *supra* note 155, at 1290.

247. See Bulman-Pozen & Gerken, *supra* note 12, at 1266–67.

248. Althouse, *supra* note 12, at 1272–73; cf. Bulman-Pozen & Gerken, *supra* note 12, at 1280 n.85 (noting that federal “secrecy makes it difficult to know how, if at all, state resistance has thwarted or modified the Act’s implementation[,]” but that “[a]t a minimum, . . . state resolutions helped shape the national conversation”).



## IV. TRANSSUBSTANTIVE CHARACTERISTICS

As the prior Part illustrates, contemporary opposition statutes are designed to serve a multitude of legal and political purposes. The obvious unifying characteristic of these laws is resistance to federal policy. Several other properties, however, also tend to permeate the field. First, opposition statutes frequently use language that characterizes the offensive federal legislation not merely as unwise but as unconstitutional. Enactments that explicitly adopt a constitutional stance are important instruments in the process of constitutional politics. Second, sovereignty laws tend to be characterized by a remarkably variable political orientation. Members of both the traditional left and right repeatedly invoke principles of state autonomy to justify deviation from the national norm. This feature lends credence to theories of opportunistic federalism. Third, opposition statutes are universally territorial: insofar as they purport to invalidate or impede federal policy, they do so only within the physical borders of the complaining state. This Part explores each of these unifying traits in turn.

*A. Constitutional Language*

Constitutional claims form the centerpiece of a wide array of state sovereignty laws. Expressive statutes, obviously, are riddled with constitutional language, as exemplified by the widespread enactment of Tenth Amendment resolutions.<sup>249</sup> Laws that exempt federally prohibited conduct from state penalties incorporate constitutional arguments less frequently, but enumerated powers objections are beginning to emerge in the medical marijuana context.<sup>250</sup> Prohibitions on state participation in federal enforcement efforts occasionally incorporate constitutional standards by barring assistance only when it would entail unconstitutional conduct on the part of state officers.<sup>251</sup> Finally, statutes that declare federal law invalid,<sup>252</sup> as well as those that provide for the arrest of federal officers,<sup>253</sup> almost universally predicate their claims on independent interpretations of the Constitution. The only initiatives that do not employ constitutional arguments are those intended to supplement federal law enforcement.<sup>254</sup>

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249. *See supra* notes 72–74 and accompanying text.

250. WOODS, *supra* note 12, at 11.

251. *See supra* notes 103–105 and accompanying text.

252. *See supra* notes 130–137 and accompanying text.

253. *See supra* notes 144–145 and accompanying text.

254. *See supra* Part II.D. The fact that these efforts do not consciously employ constitutional rhetoric does not suggest that no constitutional arguments are available in this context. States dissatisfied with feeble federal enforcement efforts could argue, for instance, that the Take Care Clause requires the President to enforce federal laws. *See* U.S. CONST. art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed . . . .”); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784–85 (2013) (arguing that “the deliberate decision to leave a substantial area of statutory law unenforced or underenforced is a serious breach of presidential duty” under the Take Care Clause).

Grounding state opposition in the Constitution serves two distinct purposes. First, it helps impart an aura of legitimacy to a historically suspect enterprise. Nullification and other forms of state resistance are commonly associated with such besmirched causes as Southern independence and racial segregation.<sup>255</sup> Furthermore, as a purely conceptual matter, nullification can easily be characterized as an act of usurpation— from a constitutional perspective, it is perfectly clear that states do not possess the authority to unilaterally override federal law.<sup>256</sup>

Phrasing state objections in constitutional terms simultaneously solves both of these problems. First, the use of constitutional language helps to cleanse the states' rights project of its checkered history by aligning modern foes of particular federal policies with the "true" meaning of the Constitution.<sup>257</sup> This strategy permits proponents of state autonomy to portray themselves as working within the confines of a national system to defend the Constitution against federal distortion and misappropriation.<sup>258</sup> In this light, modern-day nullifiers are not traitorous malcontents, but rather vigorous dissenters striving to preserve and perpetuate fundamental American principles.

Second, constitutional rhetoric helps to rebut the critique that state opposition— in particular, state nullification—represents an act of usurpation. The Supremacy Clause 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 . . . , any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."<sup>259</sup> On its face, this language appears to render nullification statutes categorically illegitimate. In order for a federal law to trigger the Supremacy Clause, however, it must conform to constitutional rules.<sup>260</sup> A federal statute that offends the Constitution is not law at all, for purposes of the Supremacy Clause or otherwise.<sup>261</sup> Nullification statutes play off this analysis by asserting that the targeted federal

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255. See, e.g., Wilentz, *supra* note 26.

256. U.S. CONST. art. VI, cl. 2.

257. See WHITTINGTON, *supra* note 12, at 213 ("Whether defending an existing construction or advocating its replacement with a new one, those engaging in constructions sought to identify themselves with the true and required meaning of the Constitution."); Bulman-Pozen & Gerken, *supra* note 12, at 1279 ("The states position themselves as rightful interpreters of the U.S. Constitution, and they express their purposes as members of the national community, not isolated sovereigns.").

258. See Althouse, *supra* note 12, at 1233 (noting that many state sovereignty laws "acknowledge federal supremacy in the form of the Constitution, but express independence in articulating the content and extent of constitutional rights").

259. U.S. CONST. art. VI, cl. 2.

260. The Supremacy Clause's mandate that federal law be made "in pursuance of" the Constitution arguably makes explicit the principle that only law enacted in conformity with substantive constitutional rules can qualify as supreme. Compare *Printz v. United States*, 521 U.S. 898, 924–25 (1997) (suggesting that a law is not made "in pursuance of" the Constitution unless it complies with substantive constitutional rules), with Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 5 (2011) ("This 'in Pursuance' caveat is most plausibly read to confer supremacy on all statutes that survive the bicameralism-and-presentment hurdles established in Article I, Section 7.").

261. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("[A]n act of the legislature, repugnant to the constitution, is void.").

legislation is unconstitutional. If their reasoning is meritorious, the Supremacy Clause will be inapplicable. Constitutional claims thus enable nullification bills to sidestep outright defiance of higher law.

Apart from legitimizing a potentially subversive enterprise, the use of constitutional language also empowers states to play a role in the development of constitutional doctrine. As discussed in the previous Part, sovereignty laws may affect the trajectory and content of both judicial precedent and constitutional construction.<sup>262</sup> State legislatures that enact statutes designed to resist federal policy are thus engaged in a form of popular constitutionalism, or “constitutional advocacy outside of the courts.”<sup>263</sup>

The fact that these constitutional claims are employed in the service of political agendas does not automatically render them disingenuous or invalid.<sup>264</sup> The use of constitutional rhetoric by social movements places their claims on a different plane than those phrased in the vocabulary of ordinary partisan disagreement; the former may result in binding constitutional constructions, while the latter will not. Political crusades that explicitly frame their arguments in constitutional terms thus cannot be disregarded simply on the grounds that their constitutional objectives shade into their political ones.

In fact, popular constitutionalists actually “reinscribe the authority of the law/politics distinction.”<sup>265</sup> Constitutional argumentation in the political realm reflects a self-conscious decision by a social movement to engage in a qualitatively distinct mode of discourse.<sup>266</sup> State legislators who ground their arguments in constitutional law rather than mere politics necessarily embrace and reaffirm the distinction between the two. The invocation of constitutional principles is not merely a politically expedient rhetorical strategy; instead, it is a mechanism for bringing the nation’s ultimate law to bear on the deepest issues of national identity. By drawing on unifying, overarching principles to advance political agendas, opposition statutes reinforce constitutional supremacy and relevance.<sup>267</sup>

### *B. Political Diversity*

The second transsubstantive characteristic of opposition statutes is their variable political valence. State efforts to undermine federal policy originate with legislators and activists across the political spectrum.<sup>268</sup> Nullification is traditionally associated with conservative ideology, and many stereotypically right-wing causes are represented among the multitude of modern opposition measures. Efforts to impede

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262. See *supra* notes 211–232 and accompanying text.

263. Zietlow, *supra* note 216, at 484.

264. WHITTINGTON, *supra* note 12, at 107 (“The Constitution is not simply used as political cover, nor are constitutional arguments employed in a purely cynical manner as yet another tactical weapon available to disputants. Rather, . . . the constitutional text is provided meaning by the success of political movements in relating the document to current political life.”).

265. Siegel, *supra* note 12, at 1345.

266. See BALKIN, *supra* note 213, at 86.

267. See *id.*

268. See, e.g., Kirk Johnson, *States’ Rights is Rallying Cry of Lawmakers*, N.Y. TIMES, Mar. 17, 2010, at A1 (noting the politically diverse policy agendas pursued by modern proponents of state autonomy).

federal gun control or thwart national healthcare reform serve as prototypical examples. A significant number of these statutes, however—including medical marijuana laws and bills enacted in opposition to foreign interventionism<sup>269</sup>—are more closely associated with liberal ideology. Less mainstream political philosophies, such as libertarianism<sup>270</sup> and localism,<sup>271</sup> also find expression in at least a handful of antifederal enactments. Many resistance efforts are even bipartisan.<sup>272</sup> This variability has a lengthy pedigree; historical instances of state opposition similarly embody a pattern of unstable political affiliation.<sup>273</sup>

These examples should be sufficient to refute any superficial perception that state resistance efforts are driven exclusively by conservative interests. The political diversity of the contemporary sovereignty movement lends credence to theories of opportunistic federalism, which posit that arguments about the structural allocation of authority between states and the federal government “are mere proxies for substantive objections to particular laws and policies.”<sup>274</sup> These theories necessarily rely on the observation that federalism “is an empty normative shell”<sup>275</sup> that can be invoked to support an infinite variety of political agendas. The primary hypothesis of such theories is that commitments to federal values are typically based on transient convenience rather than principle.<sup>276</sup> Historical patterns and contemporary politics tend to confirm this conjecture.<sup>277</sup>

Opportunistic federalism may be undesirable for a number of reasons. First, the value of appeals to state autonomy is degraded by excessive opportunism. Advocates of states’ rights on particular issues may be ineffective if the public perceives that their “commitment” to local diversity is merely a convenient rhetorical device for promoting

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269. For examples of opposition statutes relating to foreign interventionism, see Vikram David Amar, *Converse § 1983 Suits in Which States Police Federal Agents*, 69 BROOK. L. REV. 1369, 1369–70 (2004).

270. Virtually all state efforts to erode federal regulatory authority can plausibly be classified as libertarian in at least some respects.

271. See, e.g., David Gumpert, *Here’s a Way To Eliminate the Regulators and Lawyers, and Build Community at the Same Time: Organize and Declare “Food Sovereignty,” Like Sedgwick, Maine*, COMPLETE PATIENT (Mar. 7, 2011, 5:40 PM), <http://thecompletepatient.com/article/2011/march/7/heres-way-eliminate-regulators-and-lawyers-and-build-community-same-time> (discussing a food sovereignty resolution which declares that local “citizens possess the right to produce, process, sell, purchase, and consume local foods of their choosing,” and that “[i]t shall be unlawful for any law or regulation adopted by the state or federal government to interfere with the rights recognized by this Ordinance”).

272. See Taylor, *supra* note 26.

273. E.g., Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 598 (2007) (“Among the more famous examples of . . . federalism opportunism is the role reversal between pro-slavery and abolitionist interests before and after the Civil War.”).

274. Leonard, *supra* note 12, at 126; see also Cross, *supra* note 12, at 1307 (“[F]ederalism is consistently (and I contend inherently) employed only derivatively, as a tool to achieve some other ideological end, rather than as a principled end in and of itself.”).

275. Hays, *supra* note 40, at 202.

276. See Cross, *supra* note 12, at 1307.

277. See Neal Devins, *The Judicial Safeguards of Federalism*, 99 NW. U. L. REV. 131, 134–36 (2004).

an unrelated substantive position.<sup>278</sup> Second, as noted above, the prevalence of opportunism in this context reflects the absence of a principled commitment to federalism as a stand-alone constitutional feature.<sup>279</sup> If federal limits are only applied when convenient, they may be underenforced. Principles invoked exclusively to achieve certain ends will be ignored when they are not useful to achieve those ends—even if, as a neutral matter of text or structure, their application is warranted.

Finally, pervasive opportunism may deter even those who hold a principled commitment to federalism from adhering to their beliefs. As Ilya Somin and John McGinnis argue:

In the absence of a credible commitment to federalism, it is irrational . . . even for those who would prefer a consistent respect for federalism to their particular first order substantive policies to act on such preferences. They have no assurance that their political opponents will similarly respect federalism. If they hold back on pursuing their preferred policies for the sake of federalism, they take a risk that their forbearance will result in neither a coherent federalism nor their preferred substantive policies.<sup>280</sup>

Despite its drawbacks, this type of opportunism is nevertheless capable of indirectly serving structural interests. In the absence of a principled federalism, the utility of states' rights as a convenient, temporary political tool may actually be necessary to ensure the long-term preservation of state autonomy.<sup>281</sup> State legislatures and executives arguably represent a sufficiently diverse collection of political views that, regardless of the particular national policy at stake, at least some state actors will resist it on federalism grounds.<sup>282</sup> Ongoing friction between state and federal governments—whether it stems from a principled or opportunistic appeal to federal values—assists in policing the federal balance of power.<sup>283</sup> The repeated invocation of state autonomy by a host of different agents thus represents an important mechanism for preserving federalism as a structural principle.<sup>284</sup>

### *C. Territorialism*

The third unifying characteristic of state opposition efforts is their territorialism. This particular feature accompanies sovereignty laws of every stripe. Statutes that remove state penalties for federally prohibited conduct, for instance, affect only

278. See Young, *supra* note 155, at 1310.

279. Several commentators have argued that opportunistic appeals to federalism are far more prevalent than principled appeals. See, e.g., Devins, *supra* note 277, at 134 (“[T]he willingness of lawmakers and interest groups to manipulate federalism in order to secure preferred substantive policies is the rule.”).

280. McGinnis & Somin, *supra* note 12, at 99–100.

281. Young, *supra* note 155, at 1308–09.

282. See Bulman-Pozen, *supra* note 163, at 1090 (“In a nation with fifty states, a sizeable number are always governed by the party out of power at the national level.”).

283. See Devins, *supra* note 277, at 134.

284. See Young, *supra* note 155, at 1309.

in-state behavior.<sup>285</sup> Measures that bar state officials from implementing federal law,<sup>286</sup> as well as those that supplement federal enforcement efforts,<sup>287</sup> also tend to exclusively affect the operations of the enacting state. Similarly, statutes that purport to invalidate federal law or hinder its enforcement universally declare that their effects are confined to state residents and purely intrastate conduct.<sup>288</sup> Expressive statutes represent the only category of Part II's taxonomy that arguably lacks this characteristic. Nevertheless, even resolutions of this ilk frequently include language indicating that the expressed views are those of the state and its residents alone.<sup>289</sup>

The territorial quality of these enactments obviously does not imply a similar limitation on their consequences—as noted, many opposition statutes are expressly designed to influence national policy.<sup>290</sup> Nevertheless, sovereignty laws are universally territorial in their *direct* effects. Nullification, in both its historical and modern incarnations, is an intrinsically defensive mechanism, designed to interpose the state between its citizens and an allegedly tyrannical federal government. This dynamic illustrates James Madison's famous observation that federalism creates a "double security" for individual rights by empowering and motivating competing sovereigns to thwart the development of excessive concentrations of power.<sup>291</sup> Opposition statutes represent an important tool in state efforts to ensure that regional interests are not overrun by an "irresistible gravitation of all power" to the central government.<sup>292</sup>

Territorialism represents a necessary consequence of certain practical realities. In depriving the federal government of law enforcement assistance, for example, a state can only withhold its own resources; it cannot mandate that other states do the same. Similarly, the removal of state penalties for federally prohibited conduct will, by practical necessity, be confined in scope to the jurisdiction of the legalizing state. Although individual states may call on their sisters to join in an opposition effort,<sup>293</sup> they lack the authority to command them to do so. Constitutional text also plays a role in producing the territorial quality of many sovereignty laws. Statutes that purport to insulate purely intrastate activity from federal regulation on the grounds that such conduct falls outside the purview of the Commerce Clause,<sup>294</sup> for instance, are necessarily territorial.<sup>295</sup> These enactments explicitly refer to state borders as an essential element of their constitutional theories.

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285. *See supra* Part II.B.

286. *See supra* Part II.C.

287. *See supra* Part II.D.

288. *See supra* Part II.E–F.

289. *See supra* Part II.A.

290. *See supra* Part III.B–C.

291. THE FEDERALIST NO. 51 (James Madison).

292. Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229, 1237 (1994).

293. *See, e.g.*, Letter from Susan Lynn, Tenn. State Representative, to the Other Forty-Nine State Legislatures (Oct. 20, 2009), available at <http://tenthamentendmentcenter.com/2009/10/20/they-cant-push-us-around-forever/> (reprinting a letter calling for "a joint working group between the states to enumerate the abuses of authority by the federal government").

294. The Supreme Court, of course, does not place definitive weight on state borders in conducting Commerce Clause analysis. *See Gonzales v. Raich*, 545 U.S. 1, 17 (2005).

295. *See, e.g.*, WYO. STAT. ANN. § 6-8-404(a) (2013).

Territorialism is not only inevitable in many respects, however, but can also be beneficial. For instance, it both encourages regional variation and decentralizes power. “So long as preferences for government policies are unevenly distributed among the various localities, more people can be satisfied by decentralized decision making than by a single national authority.”<sup>296</sup> This principle holds true not only in contexts where states originate first-order policies but also in those situations where they attempt to counteract the effects of certain federal statutes. Voters’ appetite for resistance to federal law, like their appetite for any policy, varies geographically. The territorial character of opposition statutes confines their expressive and functional impact to those populations willing to bear the negative consequences associated with active dissent.<sup>297</sup>

#### V. ASSESSING THE COSTS AND BENEFITS

The analysis to this point has been purely descriptive. State resistance efforts, however, also raise complex normative questions regarding the permissible scope and character of state action in a federal system. This Part tentatively concludes that opposition laws are desirable insofar as they safely promote the benefits of decentralization within the constraints imposed by a national union. The chief purpose of the following analysis, however, is primarily to establish a framework for assessing the relevant issues—not to furnish definitive conclusions. Many of the normative questions raised by state opposition laws are not amenable to clean conceptual or empirical resolution, but identifying these statutes’ principal benefits and costs represents an important first step in constructing the analytical framework necessary for further study.<sup>298</sup> The following skeletal analysis thus attempts to lay the groundwork for future debate.<sup>299</sup>

Viewed charitably, opposition statutes produce a multitude of benefits. First, they provide a check on erroneous federal constitutional interpretations. Second, as a tool of constitutional politics, they deepen political discourse and strengthen the Constitution’s democratic legitimacy. Third, they further the traditional federalism values of regional diversity and satisfaction of local preferences. Like any complex social phenomenon, however, the sovereignty movement is also characterized by a number of potential downsides. Nullification efforts have historically posed serious

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296. McConnell, *supra* note 12, at 1493.

297. For a more complete discussion of the extent to which state opposition laws further the values of federalism, see *infra* notes 324–326 and accompanying text.

298. In a sense, the arguments for and against state sovereignty laws presented in this Part are analogous to the arguments for and against the use of legislative history by judges. Although riddled with intractable empirical disputes, such arguments provide useful ways of thinking about the pertinent issues. See CALEB NELSON, STATUTORY INTERPRETATION 350–62 (2011).

299. This Part focuses on opposition statutes exclusively from the perspective of constitutional structure. It does not address their purely local costs or benefits. For example, some detractors of direct nullification claim that it is fruitless and wastes state resources. *E.g.*, Editorial, *Nullification Bills Are Waste of Public’s Time*, OKLAHOMAN, Mar. 21, 2013, <http://newsok.com/nullification-bills-are-waste-of-publics-time/article/3767824/?page=1>.

These criticisms raise questions of political expedience that can only be resolved on the basis of local preference. They thus fall beyond the purview of this Article.

threats to national unity and served as major obstacles to the implementation of federal policy. Furthermore, even moderate forms of interpretive pluralism may be conducive to anarchy or detrimental to the rule of law. This Part explores each of these potential ramifications in turn.

One of the principal upsides of state opposition is its capacity to limit the impact of spurious constitutional interpretations championed by the federal government. State officers who predicate their dissent on the Constitution necessarily assert at least a limited degree of interpretive autonomy.<sup>300</sup> As a result, opposition statutes frequently constitute a form of vertical departmentalism, representing the efforts of state actors to interpret the Constitution without regard to the interpretations favored by federal entities.<sup>301</sup> Modern assertions of state interpretive autonomy typically occur in the interstices of national supremacy, that is, in situations where state action is shielded by the anticommandeering rule or in contexts where the state is not subject to a direct court order resolving the precise question at issue.<sup>302</sup>

The major drawback of a federal monopoly on constitutional meaning is that it insulates interpretive errors from correction.<sup>303</sup> Vertical departmentalism ameliorates this failing. Although contemporary opposition leaders respect the authority of judicial decrees in litigated cases to which the state is a party,<sup>304</sup> they decline to accept judicial dictates as legislating universal rules of conduct.<sup>305</sup> This approach curbs the reach of federal constitutional interpretations and, by amplifying dissent, encourages the federal government to fully consider alternative arguments before definitively imposing its preferred vision.

In addition to blunting the impact of erroneous federal interpretations, state resistance may affirmatively promote the pursuit of truth: “[i]t is more likely that the law will be interpreted faithfully when that interpretation is the product of the interaction of competing views, fighting for either supremacy or consensus,”<sup>306</sup> than when a single decision maker enjoys autocratic discretion. Interpretive pluralism affords a voice to a wider slice of the political spectrum than does a model of judicial

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300. Cf. Young, *supra* note 155, at 1288–89 (arguing that state dissent sometimes represents a “state-based version of departmentalism”).

301. See, e.g., Paulsen, *supra* note 12, at 329–30; Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALB. L. REV. 671, 688 (1995).

302. Even modest versions of vertical departmentalism, however, arguably strain the limits of existing Supreme Court precedent. See *Cooper v. Aaron*, 358 U.S. 1, 18–19 (1958); cf. Paulsen, *supra* note 12, at 225.

303. Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U. CHI. L. REV. 691, 710 (2004) (“[T]he possibility of erroneous constitutional interpretations . . . exists without the possibility of a check or corrective if interpretive supremacy is vested in a particular body.”).

304. See *infra* notes 336–337 and accompanying text.

305. For instance, the intrastate sale of firearms almost certainly falls within the ambit of Congress’ commerce powers under existing precedent. See *Gonzales v. Raich*, 545 U.S. 1 (2005). Utah’s Firearms Freedom Act, however, implicitly asserts that the state is justified in declining to accept the implications of this precedent in the absence of a binding judicial decision on the precise point in issue in a case to which the state is a party. See *supra* notes 130–134 and accompanying text.

306. Paulsen, *supra* note 12, at 330.



exclusivity, which may be prone to favoring establishment viewpoints. In short, vertical departmentalism breaks the federal monopoly on interpretation and subjects constitutional meaning to the marketplace of ideas.<sup>307</sup>

Furthermore, a diffuse approach to constitutional interpretation is arguably more congruous with the broader constitutional scheme of decentralization than is a system of pure federal interpretive supremacy.<sup>308</sup> Various constitutional mechanisms operate to create “gridlock” in the process of policy formulation. Interpretive gridlock advances many of the same purposes—such as compelling deliberation and preventing dangerous concentrations of power—that policy gridlock does.<sup>309</sup>

These benefits, however, are accompanied by a symmetrical cost: just as interpretive pluralism may obstruct the implementation of *incorrect* federal decisions, so too may it obstruct the implementation of *correct* ones.<sup>310</sup> This particular hazard is minimized by the fact that modern nullifiers accept judicial supremacy in cases to which they are parties.<sup>311</sup> A nullifying state can thus be induced to retract its position if conclusive litigation demonstrates that its constitutional arguments are untenable. Judicial decrees are not a panacea, however—states that exempt federally prohibited conduct from state penalties or withhold enforcement assistance are protected by the anticommandeering rule from interference by courts. Nevertheless, the federal government is still free to muster its own resources to enforce federal law in those states.

Consequently, regardless of the type of state opposition at issue, federal authorities have the ultimate power to impose their policy vision (assuming that vision is constitutional). Rather than fatally undermining federal supremacy, active resistance merely ensures that sufficient accord exists to warrant imposing the federal government’s stance on outlier states.<sup>312</sup> Modern forms of opposition may fragment weak consensus predicated on specious constitutional interpretations but will not ultimately prevent the implementation of a constitutional vision supported by a truly national understanding.<sup>313</sup>

The second potential benefit produced by opposition statutes relates to their effect on “constitutional consciousness.”<sup>314</sup> Confiding exclusive interpretive authority to a single body, such as the Supreme Court, may have the practical effect of reducing

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307. See, e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

308. See Paulsen, *supra* note 26, at 2738 (noting that interpretive pluralism “admits of—indeed, virtually assures—*exactly* what separation of powers is designed to produce as a general proposition” (emphasis in original)).

309. Paulsen, *supra* note 12, at 330 (“Interpretive gridlock is no different from substantive gridlock.”).

310. See, e.g., McKay, *supra* note 29, at 991–92 (exploring Southern resistance to the Court’s desegregation decisions).

311. See *infra* notes 337–339 and accompanying text.

312. Cf. Hays, *supra* note 40, at 206 (“[S]tate resistance creates a form of gridlock that slows the suspect policy’s enforcement” and “provides a constitutional alternative to the one promulgated by the national government.”).

313. See *id.* at 206–07 (“With states protecting against national oppression, the people would have the time necessary to express their preference through the ballot or through the constitutional amendment process.”) (footnote omitted).

314. SUSAN R. BURGESS, *CONTEST FOR CONSTITUTIONAL AUTHORITY: THE ABORTION AND WAR POWERS DEBATES* 22–27 (1992).

the likelihood that other governmental actors will take their constitutional obligations seriously.<sup>315</sup> State legislators, for instance, are less likely to carefully consider the constitutional implications of statutes they enact if their own views on the subject are accorded zero weight.<sup>316</sup> In contrast, state participation in constitutional politics increases popular awareness of our founding principles and deepens individual commitments to observe them.<sup>317</sup> Vertical departmentalism decentralizes the interpretive enterprise, thereby involving a greater number of governmental officers in the task of constitutional articulation.<sup>318</sup> This process expands the scope and depth of constitutional discourse,<sup>319</sup> transforming idle onlookers into active participants in the constitutional project.

State involvement in this deliberative give-and-take may also serve to revitalize the Constitution's democratic legitimacy.<sup>320</sup> "The ability of people to criticize the Constitution-in-practice in the name of the Constitution and to work to push it toward their desired vision is what helps make an ancient document newly legitimate to each generation of Americans."<sup>321</sup> Vesting interpretive authority solely in the judiciary has the potential to alienate individual citizens from the constitutional text and the values it embodies.<sup>322</sup> In contrast, state opposition efforts enable local populations to participate in the Constitution's development, thereby motivating them to become informed and engaged on constitutional issues.<sup>323</sup> This process produces feedback effects; the greater quantity of discourse generated by state activism tends to educate the public and endow constitutional disputes with a heightened degree of public salience, thus stimulating further state involvement.<sup>324</sup>

Finally, state resistance promotes the traditional values of federalism, including increased democratic participation, interjurisdictional competition, and the

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315. Stephen Macedo, *Liberal Virtues, Constitutional Community*, 50 REV. POL. 215, 227 (1988) ("Denying judicial interpretive supremacy helps engage the interpretive responsibilities of the other branches and the public . . .").

316. See JAMES BRADLEY THAYER, *The Origin and Scope of the American Doctrine of Constitutional Law*, in LEGAL ESSAYS 1, 39 (1908) (arguing that legislators "have felt little responsibility; if we are wrong, they say, the courts will correct it").

317. See Sanford Levinson, *Could Meese Be Right This Time?*, 61 TUL. L. REV. 1071, 1077 (1987).

318. See Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359, 386 (1997).

319. Bulman-Pozen & Gerken, *supra* note 12, at 1309; Hays, *supra* note 40, at 219.

320. See Siegel, *supra* note 12, at 1418.

321. BALKIN, *supra* note 213, at 70.

322. See BURGESS, *supra* note 314, at 18 ("[J]udicial finality in constitutional interpretation breeds public indifference to moral and constitutional argument."); Neil Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 98–104 (1998) (arguing that judicial supremacy ultimately leads to marginalization of the Constitution).

323. Cf. BURGESS, *supra* note 314, at 19.

324. See Leonard, *supra* note 12, at 163. *But see* Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMM. 455, 468 (2000) ("[I]t appears to us far from certain that a constitution is either a necessary or a sufficient condition, or even a significant causal contributor, to fruitful public debate about matters of great political and moral moment.").

heightened satisfaction of local preferences.<sup>325</sup> By expanding the outlets available for individuals to express themselves on national issues, opposition efforts plainly broaden the scope of civic involvement.<sup>326</sup> They also foment competition between states with respect to both first-order policies (e.g., allocating enforcement resources) and second-order policies (expressing dissatisfaction with federal law).<sup>327</sup> Finally, state control over the use of state enforcement resources tends to satisfy local preferences more effectively than would a blanket national policy.

It is important to note that in all of these circumstances the potential for state action is symmetrical; states that support federal policy may pass resolutions expressing their views, enact laws providing assistance to federal authorities, and generally take any action parallel to that which a dissenting state might take. A jurisdiction's stance with respect to federal policy thus serves as another dimension along which it may compete to attract residents.<sup>328</sup>

The obvious rejoinder to this line of analysis lies in the observation that federalism is intended to permit state variation only within a limited compass. In a federal union, states have relatively free rein within a sphere of reserved powers, but cannot legitimately diverge with respect to issues on which the national government has constitutionally decreed that uniformity prevail.<sup>329</sup> Two points serve to rebut this particular objection. First, the scope of the federal government's delegated powers is precisely the point of contention for many dissenters.<sup>330</sup> General appeals to national supremacy thus beg the question rather than answer it. Second, as noted, sovereignty laws—because they operate merely in the interstices of federal supremacy—can be displaced by a sufficiently resolute national consensus. Contemporary resistance efforts conspicuously refrain from challenging the federal government's ultimate authority to determine the extent of state power.

Opposition statutes do, however, pose at least a rhetorical threat to national unity. Historically, state resistance repeatedly aroused divisive regional sentiments, in addition to occasionally thwarting the exercise of federal power.<sup>331</sup> At certain junctures, nullification even represented a serious existential threat to federal integrity; its most robust incarnation, in the antebellum South, arguably foreshadowed the Civil War.<sup>332</sup> In assessing the normative validity of modern opposition measures, these historical episodes provide a useful point of comparison.<sup>333</sup> To the extent contemporary sovereignty laws pose similar risks of

325. See, e.g., Leonard, *supra* note 12, at 164–65.

326. See *id.*; see also *supra* Part III.A.

327. See *supra* notes 296–297 and accompanying text.

328. See Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 468 n.34 (2002) (collecting sources discussing interstate competition).

329. William E. Thro, *That Those Limits May Not Be Forgotten: An Explanation of Dual Sovereignty*, 12 WIDENER L.J. 567, 582–83 (2003).

330. See *supra* notes 249–254 and accompanying text.

331. Accusations that nullification promotes anarchy and enfeebles the federal government have as extensive a historical pedigree as nullification itself. See Claiborne, *supra* note 23, at 932 (describing the reaction of the Federalists to the Virginia and Kentucky Resolutions).

332. See *supra* notes 46–51 and accompanying text.

333. Cf. Dinan, *supra* note 12, at 1667 (“[C]ritics understandably [have sought] to de-

disunity, their potential costs will likely outweigh their potential benefits.<sup>334</sup>

As a form of organized, state-level resistance to federal policy, modern opposition statutes plainly bear a superficial resemblance to their predecessors. Beyond this elemental similarity, however, they fail to conform to the historical paradigm in a number of ways. Several features help to minimize the risks traditionally associated with state dissent.<sup>335</sup> First, contemporary opposition measures assume a range of forms far more diverse than simply nullification per se.<sup>336</sup> Declining to provide assistance to federal enforcement efforts, for example, is qualitatively different—both substantively and rhetorically—than outright nullification. The latter poses a far greater risk of inciting serious discord.

Second, and most importantly, even states that purport to invalidate federal law categorically accept judicial supremacy in litigated cases to which they are parties. States that attempted to nullify the individual mandate provision of the ACA, for instance, ultimately acquiesced in judicial resolution of the contested issues.<sup>337</sup> The policy of deferring to judicial authority was even made explicit in Virginia's nullification statute, which provided that “[n]o resident of this Commonwealth . . . shall be required to obtain or maintain a policy of individual insurance coverage *except as required by a court . . .*”<sup>338</sup> Furthermore, proponents of nullification often advise state residents to continue to comply with federal law until a conclusive adjudication has been obtained.<sup>339</sup>

This pervasive deference to judicial supremacy suggests that contemporary assertions of state interpretive autonomy will typically be confined to areas of legal indeterminacy, where federal supremacy has not been conclusively imposed and a plausible space for heterodox state interpretations exists. Those few statutes which violate this general rule—such as laws that provide for the arrest of federal officers engaged in the performance of their official duties<sup>340</sup>—are exceedingly rare<sup>341</sup> and have never been implemented in conformity with their literal text.<sup>342</sup> Thus, the

legitimize recent state measures by associating them with the repudiated doctrine of nullification, especially as practiced by southern states in the 1830's and 1950's . . .”).

334. Cf. Wilentz, *supra* note 26 (arguing that “[o]nly an astonishing historical amnesia can lend credence to” nullification).

335. See, e.g., Dinan, *supra* note 12, at 1639–40.

336. See *supra* Part II. In this Part, “nullification per se” is used to refer to statutes that purport to directly invalidate federal law.

337. See Claiborne, *supra* note 23, at 952. Thus, even such direct opposition measures arguably “partake of something short of, and other than, nullification.” Dinan, *supra* note 12, at 1667.

338. VA. CODE ANN. § 38.2-3430.1:1 (2014) (emphasis added).

339. See Dinan, *supra* note 12, at 1657.

340. See *supra* Part II.F.

341. For example, a notable Missouri effort to criminalize the enforcement of federal gun regulations was vetoed by the governor and subsequently failed to garner the necessary votes for an override. See *Missouri Measure Nullifying Federal Gun Laws Fails in State Senate*, FOXNEWS.COM (Sept. 12, 2013), <http://www.foxnews.com/politics/2013/09/12/missouri-measure-nullifying-federal-gun-laws-fails-in-state-senate/>; see also Robert A. Levy, *The Limits of Nullification*, N.Y. TIMES, Sept. 4, 2013, at A23 (commenting on the proposed Missouri bill in the context of the modern nullification movement more broadly).

342. Wyoming, for instance, which has such a statute, has never arrested a federal officer

modern sovereignty movement, in both its rhetoric and substantive content, likely minimizes (but does not eradicate) the problems of disunion traditionally associated with nullification.<sup>343</sup>

Apart from its implications for national supremacy, vertical departmentalism may also be criticized on the more general grounds that it produces interjurisdictional legal disparities and is detrimental to the rule of law.<sup>344</sup> Conflicting interpretations of constitutional rules can create a type of “interpretive anarchy,”<sup>345</sup> thereby muddling the legal obligations of state actors and private citizens.<sup>346</sup> Direct nullification may also engender lawlessness to the extent it invites civil disobedience.<sup>347</sup> Furthermore, because it enables a broader range of participation in the interpretive enterprise, vertical departmentalism may amplify extremist viewpoints that would otherwise be muffled. This effect is exaggerated by the fact that nullification, as a tool of the dissenter, is disproportionately likely to be utilized by politicians outside the mainstream.

Two observations serve to mitigate these concerns. First, although vertical departmentalism can reduce uniformity on certain issues, it may also solidify constitutional supremacy by compelling state officers to grapple directly with the constitutional text.<sup>348</sup> Claims that departmentalism undermines the rule of law fail to recognize the “profound difference between the rule of law and submission to any particular institution’s understanding of what the law requires.”<sup>349</sup> Opposition statutes—even when they appear to contradict settled judicial precedent—universally assert fidelity to the Constitution itself.<sup>350</sup> To the extent it forces governmental actors to engage with the text, departmentalism arguably reinforces the validity and authority of constitutional norms.<sup>351</sup>

Second, the legal discrepancies produced by a scheme of interpretive pluralism will frequently be both temporary and constructive. Just as it serves to forestall the

for violating it. Bazelon, *supra* note 233.

343. See, e.g., Claiborne, *supra* note 23, at 952, 956–57.

344. BURGESS, *supra* note 314, at 20; see also Kight, *supra* note 12, at 556. Many of the criticisms explored in this section are also applicable to horizontal departmentalism.

345. Alexander & Schauer, *supra* note 12, at 1379; see also Levinson, *supra* note 317, at 1077 (“The critique of Protestantism has always included references to its potential for anarchy.”).

346. Burt Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 TUL. L. REV. 991, 994–95 (1987).

347. Jost, *supra* note 136, at 871.

348. See Devins & Fisher, *supra* note 322, at 101 (“Democratic institutions will only take the Constitution seriously if they have some sense of stake in it.”).

349. Levinson, *supra* note 317, at 1076; cf. Alexander & Schauer, *supra* note 12, at 1362 (noting that the rejection of judicial supremacy is consistent with the acceptance of constitutional supremacy).

350. The force of this argument is partially reduced by the fact that even John Calhoun claimed to be acting in conformity with the Constitution; this purported faithfulness to the Constitution obviously did not preclude Calhoun’s efforts from posing a serious threat to the rule of law. See W. KIRK WOOD, 2 NULLIFICATION, A CONSTITUTIONAL HISTORY, 1776–1833, at 115 (2009) (describing Calhoun’s position that the principle of nullification was inherent in the federal structure established by the Constitution). The disruptive features associated with Calhoun’s program, though, are mitigated in the modern context by other characteristics of contemporary state opposition—such as submission to judicial decrees.

351. See BURGESS, *supra* note 314, at 122.

implementation of dubious federal interpretations, vertical departmentalism may in practice temper extreme views and prompt competing governmental actors to strive for a degree of reflective equilibrium.<sup>352</sup> “[T]he natural consequences of shared interpretive power . . . are often compromise, accommodation, or partial resolution—not constitutional disaster.”<sup>353</sup> In this light, state participation in the interpretive process is capable of contributing positively to the formation of stable, enduring constitutional settlements.<sup>354</sup> Constitutional constructions or resolutions that emerge from popular consensus after a period of intensive debate may even achieve a binding quality absent in judicial decrees imposed by *ipse dixit*.<sup>355</sup>

#### CONCLUSION

This Article has attempted to sketch a comprehensive portrait of an important modern political movement: widespread state resistance to national policy. It has sought not only to establish a conceptual framework for parsing the movement’s functional and purposive qualities but also to identify a normative foundation for assessing its political legitimacy. Opposition measures, which are facially designed to serve a host of different functions, represent effective tools of dissent that have the potential to alter the course of constitutional adjudication and the content of federal policy. These statutes are united by their use of constitutional language, their political variability, and their territoriality. As a result, they constitute a unified and distinctive political phenomenon worthy of examination on its own terms.

Although any normative assessment of this movement is intrinsically plagued by certain intractable empirical questions, opposition measures are accompanied by at least a modicum of political value to the extent they promote the aims of federalism within the constraints imposed by a national system. Modern exercises of state interpretive discretion occur primarily in the interstices of federal supremacy, thereby providing the benefits of departmentalism without posing any serious threat of national destabilization. The contemporary sovereignty movement thus represents a valuable element in the ongoing American effort to accommodate meaningful state autonomy with the demands of federal union.

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352. See JOHN RAWLS, A THEORY OF JUSTICE 42–44 (rev. ed. 1999).

353. Paulsen, *supra* note 12, at 329; see also *id.* at 324 (“[C]hecked independence does not invariably lead to meltdown; rather, it typically leads to compromise and moderation.” (emphasis in original)).

354. See Devins & Fisher, *supra* note 322, at 105 (“Emotionally charged and highly divisive issues are best resolved through political compromises that yield middle-ground solutions, rather than through an absolutist, and often rigid, judicial pronouncement.”); cf. Hays, *supra* note 40, at 219 (“Deadlock over constitutional policy will be resolved but only after one side builds sufficient support either on the merits or through electoral victories.”).

355. See Devins & Fisher, *supra* note 322, at 90–91; see also Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 LAW & SOC’Y REV. 151, 152 (2009) (discussing the “backlash thesis,” which posits that “unpopular judicial decisions provoke political reactions that undercut their effectiveness”).