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Modern-Day Nullification: Marijuana and the Persistence of Federalism in an Age of Overlapping Regulatory Jurisdiction

Ernest A. Young

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MODERN-DAY NULLIFICATION: MARIJUANA AND THE PERSISTENCE OF FEDERALISM IN AN AGE OF OVERLAPPING REGULATORY JURISDICTION

Ernest A. Young[†]

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† Alston & Bird Professor, Duke Law School. This essay was originally presented at the Case Western Reserve School of Law symposium on “Marijuana, Federal Power, and the States.” I am grateful to Jonathan Adler and the Law Review for the invitation to participate, to Scott Anderson for research assistance, and to my co-panelists, Brannon Denning and Robert Mikos, who have labored long in this vineyard and whose work taught me most of what I know about marijuana and federalism. My errors, of course, should not be laid at their door. I am also thankful to and for my wife, Erin—not only (as always) for her love and support but also for her insights as an Assistant U.S. Attorney into federal law enforcement policy.

Finally, I hope no one will mistake my views on the federalism issues here for endorsement of marijuana legalization as a policy matter. I continue to think that that is a terrible idea. But our constitutional system provides states with room to innovate, even if some innovations are misguided.

INTRODUCTION

In 1832, South Carolina's famous nullification ordinance declared that the federal tariffs of 1828 and 1832 were null and void within the boundaries of that state.¹ The ordinance, which built on a strong theory of state sovereignty advanced by John C. Calhoun, did not exactly prosper. President Andrew Jackson—like Calhoun, born in South Carolina—rejected nullification in principle, threatened to enforce the tariff by force, then undercut the state's practical position by introducing new legislation to radically lower that same tariff.² No other state joined South Carolina's protest, and, in fact, eight Southern state legislatures passed resolutions condemning the South Carolinians' action.³ And if that denouement did not suffice to settle the question of whether a state may defy a valid federal law, well, there was also the "late unpleasantness" of 1861–65.⁴

Fast-forward, however, to November 2012, when the states of Colorado and Washington both voted to legalize recreational marijuana use—also in contravention of federal law and policy.⁵ These states joined the District of Columbia and twenty other states that have legalized the drug for medicinal purposes.⁶ California and

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1. See South Carolina Ordinance of Nullification, Nov. 24, 1832, available at http://avalon.law.yale.edu/19th_century/ordnull.asp.
 2. See DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848, at 395–410 (2007) (describing South Carolina's nullification motive and plan, and President Jackson's response); RICHARD E. ELLIS, THE UNION AT RISK: JACKSONIAN DEMOCRACY, STATES' RIGHTS, AND THE NULLIFICATION CRISIS (1987) 41–73 (detailing Jackson's and Calhoun's fight over nullification).
 3. HOWE, *supra* note 2, at 406–07.
 4. Cf. Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U. CHI. L. REV. 691, 693 n.4 (2004) (asserting that the legality of secession had been settled in the case of "*Grant v. Lee*").
 5. See Jack Healy, *Voters Ease Marijuana Laws in 2 States, but Legal Questions Remain*, N.Y. TIMES, Nov. 8, 2012, at P15.
 6. See ALASKA STAT. § 17.37.030 (2012); ARIZ. REV. STAT. § 36-2811 (2012); Cal. Health & Safety Code §11362.5(b)(1)(A) (West 2007); COLO. CONST. art. XVIII, § 14; CONN. GEN. STAT. ANN. § 21a-408a (West 2014); DEL. CODE ANN. tit. 16, § 4903A (Supp. 2014); D.C. CODE § 7-1671.02 (LexisNexis Supp. 2012); HAW. REV. STAT. § 329-122(2013); 410 ILL. COMP. STAT. ANN. 130/25 (West Supp. 2014); ME. REV. STAT. ANN. tit. 22, § 2423-A (Supp. 2014); MD. CODE ANN., HEALTH-GEN. § 13-3313 (West Supp. 2014); MASS. GEN. LAWS ANN. ch. 94C App., § 1-4 (West Supp. 2014); MICH. COMP. LAWS ANN. § 333.26424 (West Supp. 2014); MINN. STAT. ANN. § 152.32 (West Supp. 2014); MONT. CODE ANN. § 50-46-319 (2013); NEV. REV. STAT. ANN. § 453A.200 (Lexis-Nexis 2009); N.H. REV.

Colorado—pioneers in legalizing medical and recreational marijuana use, respectively—have fared better than did South Carolina in the 1830s. Other states have followed their lead, prompting a national debate about marijuana use. Even the District of Columbia—a federal enclave governed by “federal” law—has defied Congress by legalizing recreational use.⁷ And President Obama—rather than reprising Andrew Jackson’s threat to “hang the first man of them [nullifiers resisting federal authority] I can get my hands on to the first tree I can find”⁸—has instructed his Departments of Justice and Treasury to accommodate these state departures from federal norms.⁹

STAT. ANN. § 126-X:2 (LexisNexis Supp. 2013); N.J. STAT. ANN. § 24:6I-6 (West Supp. 2014); N.M. STAT. ANN. § 26-2B-2 (West 2013); OR. REV. STAT. ANN. § 475.319 (West 2003); R.I. GEN. LAWS § 21-28.6-4 (2011); VT. STAT. ANN. tit. 18, § 4474b (2013); WASH. REV. CODE § 69.51A.040 (2013); *see generally* Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL’Y 5, 5 (2013) [hereinafter Mikos, *Preemption*] (surveying developments in marijuana legalization).

7. *See* Melanie Eversley, *D.C. Marijuana Decriminalization Law Takes Effect*, USA TODAY (July 17, 2014, 11:14 AM), <http://www.usatoday.com/story/news/nation/2014/07/17/dc-marijuana-law/12770301/> (noting the conflict with federal law).
8. HOWE, *supra* note 2, at 406 (quoting 2 AUGUSTUS C. BUELL, HISTORY OF ANDREW JACKSON 244–45 (1904)).
9. *See* FIN. CRIMES ENFORCEMENT NETWORK, DEP’T OF THE TREASURY, FIN-2014-G001, GUIDANCE: BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESSES (2014); Memorandum from James M. Cole, Deputy Att’y General, U.S. Dep’t of Justice, to All United States Att’ys, Guidance Regarding Marijuana Related Financial Crimes (Feb. 14, 2014), *available at* <http://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%20%2014%2014%20%282%29.pdf>; Memorandum from James M. Cole, Deputy Att’y General, U.S. Dep’t of Justice, to All United States Att’ys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), *available at* <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>; Memorandum from James M. Cole, Deputy Att’y General, U.S. Dep’t of Justice, to All United States Att’ys, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011), *available at* <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf>; Memorandum from David W. Ogden, Deputy Att’y General, U.S. Dep’t of Justice, to Selected United States Att’ys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), *available at* <http://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf>.

Across a range of issues—including, for example, health insurance,¹⁰ experimental medicines,¹¹ gun control,¹² sports gambling,¹³ and immigration¹⁴—states are acting contrary to federal law policy. Unlike South Carolina’s infamous ordinance, most of these instances of modern-day nullification may well be legal. They generally do not purport to alter the binding force of federal law, but they rely on the likelihood that, as a practical matter, federal authorities cannot enforce national law without the cooperation of state officials.¹⁵ The history of marijuana legalization over the past decades suggests that, at least on some issues, contemporary nullification is a winning strategy.

This Article asks what modern-day nullification can tell us about the health and structure of contemporary federalism. Contemporary resistance to federal law is made possible by the structure of cooper-

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10. The Advisory Bd. Co., *Where the States Stand on Medicaid Expansion*, DAILY BRIEFING (Feb. 11, 2015), www.advisory.com/daily-briefing/resources/primers/medicaidmap (noting that nineteen states have rejected the Affordable Care Act’s invitation to expand Medicaid).
 11. See Kimberly Leonard, *Seeking the Right to Try*, U.S. NEWS & WORLD REP. (Nov. 18, 2014, 12:01 AM), <http://www.usnews.com/news/articles/2014/11/18/right-to-try-laws-allowing-patients-to-try-experimental-drugs-bypass-fda> (noting that five states have passed “right to try” laws that “allow terminally ill patients access to drugs that have not been approved by the [federal] government”).
 12. See Justine McDaniel, Robby Korth & Jessica Boehm, *In States, a Legislative Rush to Nullify Federal Gun Laws*, WASH. POST BLOG (Aug. 30, 2014, 1:49 AM), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/08/29/in-states-a-legislative-rush-to-nullify-federal-gun-laws/> (noting that eleven states have passed laws purporting to forbid enforcement of federal gun laws in the state).
 13. See James Surowiecki, *A Call to Action*, NEW YORKER (Feb. 11, 2013), <http://www.newyorker.com/magazine/2013/02/11/a-call-to-action> (noting that New Jersey has legalized sports gambling despite its continuing illegality under federal law).
 14. See, e.g., *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (upholding Arizona law enforcing restrictions on employment of undocumented aliens more strictly than under federal policy).
 15. See generally Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1419 (2009) [hereinafter Mikos, *Limits of Supremacy*] (exploring the often ignored ability of states to permit conduct otherwise prohibited by Congress). The gun control nullification laws—which have a similar structure to South Carolina’s nineteenth-century ordinance—appear to be an exception. And federal authorities may be willing to contest state defiance in areas other than marijuana enforcement. The Justice Department has sued New Jersey, for example, to contest New Jersey’s action on sports betting. See Surowiecki, *supra* note 13.

ative federalism, under which federal and state authorities share overlapping regulatory jurisdiction and state officials frequently participate in the implementation and enforcement of federal regulatory schemes.¹⁶ This interdependent relationship gives rise to what Heather Gerken and Jessica Bulman-Pozen have called the “power of the servant”: because federal authorities depend on state officials to enforce federal law, state officials have opportunities to influence the shape of federal regulation and, sometimes, to resist aspects of federal policy that they do not like.¹⁷ Modern-day nullification goes beyond the “uncooperative federalism” described by Professors Gerken and Bulman-Pozen, however; rather than subverting federal marijuana policy by nibbling around the edges, Colorado and Washington have gone on strike. And as the marijuana controversy illustrates, state officials derive the power to defy federal policy from the fact that they are not *servants*, but rather officers of a different government with an independent base of legitimacy and accountability.

It is hard to know how far contemporary state officials will go to defy federal policy. Certainly the circumstances of contemporary debate about marijuana legalization are particularly auspicious—marijuana enforcement is a low priority at best for federal officials, national public opinion favors legalization, and the national Executive is both sympathetic to legalization and fond of not enforcing federal laws with which it disagrees. Some of these circumstances may well prove ephemeral even as to marijuana, and several will not translate well to other issues on which states wish to depart from federal norms. Modern-day nullification may have important advantages, however, including not only the traditional benefits of federalist policy diversity but also the potential to defuse important and intractable problems of separation of powers at the national level. Rather than viewing modern-day nullification as yet another obstacle to federal policy to be overcome, Congress may wish to consider institutionalizing aspects of state power to depart from federal policy.

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16. See MORTON GRODZINS, *THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES* 4 (Daniel J. Elazar ed. 1966) (observing that, in modern America, “virtually all governments are involved in virtually all functions. . . . [T]here is hardly any activity that does not involve the federal, state, and some local government in important responsibilities”); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665 (2001) (“[C]ooperative federalism envisions a sharing of regulatory authority between the federal government and the states that allows states to regulate within a framework delineated by federal law.”).
17. See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1264 (2009).

I. COOPERATIVE FEDERALISM AND
MARIJUANA LEGALIZATION

Federal law classifies marijuana as a Schedule 1 drug¹⁸ under the Controlled Substances Act (CSA),¹⁹ based on a finding that it has no accepted medical use and a high potential for abuse.²⁰ The CSA thus categorically prohibits the manufacture, distribution, and possession of marijuana.²¹ And the federal prohibition has been upheld against both charges that it exceeds Congress's commerce power and claims that, for medical patients at least, it contravenes a fundamental right of access to pain relief.²² Although some of us still think the Court erred in upholding the CSA as applied to personal possession and consumption of marijuana for medicinal purposes, in the absence of any commercial transaction or movement across state lines,²³ that ship has sailed. The federal marijuana ban is thus "the supreme Law of the Land . . . any Thing in the Constitution or laws of any State to the Contrary notwithstanding."²⁴

Except that in Boulder, Colorado, it is easier to find a head shop than a coffee shop.²⁵ The reason has to do with the cooperative federalism structure of criminal law enforcement. Generally speaking, federal and state governments not only share constitutional jurisdiction over drug crimes, but they have also criminalized largely the same behavior. As a practical matter, however, federal authorities play a decidedly secondary role. The overall ratio of federal to state and local law enforcement personnel in this country is roughly one to ten,²⁶ and drug enforcement is not the priority it once was. In 2007,

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18. 21 C.F.R. § 1308.11 (2014).
 19. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as amended at 21 U.S.C. §§ 801-971 (2012)).
 20. See 21 U.S.C. § 812(b)(1) (2012).
 21. See *id.* §§ 841, 844.
 22. See *Gonzales v. Raich*, 545 U.S. 1 (2005) (Commerce Clause); *Raich v. Gonzales*, 500 F.3d 850, 861-66 (9th Cir. 2007) (substantive due process).
 23. See Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival after Gonzales v Raich*, 2005 SUP. CT. REV. 1.
 24. U.S. CONST. art. VI, cl. 2.
 25. Or at least so it was reported by a notable federalism scholar who went out looking for the latter (so she says) but found only the former at a recent conference at the University of Colorado.
 26. See BRIAN A. REAVES & MATTHEW J. HICKMAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: CENSUS OF STATE & LOCAL LAW ENFORCEMENT AGENCIES, 2000 1 (2002); BRIAN A. REAVES & LYNN M. BAUER, U.S. DEP'T OF JUSTICE, BUREAU OF

federal agents made 7,276 marijuana arrests—less than 1 percent of all American marijuana arrests that year.²⁷ Hence, as Robert Mikos has observed, “[t]he federal government has too few law enforcement agents to handle the large number of potential targets. Simply put, the *expected* sanctions for using or supplying marijuana under federal law are too low, standing alone, to deter many prospective marijuana users or suppliers.”²⁸

Federal marijuana policy thus depends heavily on state and local enforcement. In this sense, drug policy parallels any number of other federal regulatory regimes—from environmental policy to Medicaid—in which state officials play a critical role in implementing federal policy. Drug enforcement differs from these other cooperative federalism regimes in that state officials are not implementing the *federal* drug laws but rather enforcing parallel state prohibitions. But drug enforcement involves not only overlapping substantive offenses but also coordinated investigation and prosecution strategies; federal prosecutors tend to focus on major distribution “kingpins,” for example,²⁹ while state and local officials prosecute the overwhelming majority of minor drug offenses. Hence, the “War on Drugs” amounts to a cooperative federalism regime not all that different, say, from state implementation of the Clean Air Act.

One critical difference between the actions of states “legalizing” marijuana in defiance of federal policy and South Carolina’s nullification ordinance in 1832 is the purported effect on the relevant federal rights and obligations. For John C. Calhoun and the South Carolina legislature, nullification rested on a judgment that the federal tariff was *unconstitutional*.³⁰ Nullifiers thus did not so much

JUSTICE STATISTICS BULLETIN: FEDERAL LAW ENFORCEMENT OFFICERS, 2002 1 (2003); see also William J. Stuntz, *Terrorism, Federalism, and Police Misconduct*, 25 HARV. J.L. & PUB. POL’Y 665, 665 (2002) (“The federal government has never employed a sizable fraction of the nation’s law enforcement officers or prosecutors, nor housed a large portion of its prisoners.”).

27. See Mikos, *Limits of Supremacy*, *supra* note 15, at 1464.
28. *Id.* at 1463. As the husband of a federal prosecutor, however, I must note that federal enforcement policy seems to be different with respect to marijuana use on federal lands—such as national parks, forests, and seashores. At least in North Carolina, marijuana crimes continue to be pursued when they occur in these federal enclaves, even though the Feds might be unlikely to prosecute such crimes where the state has primary jurisdiction. Be careful where you light up!
29. See Mikos, *Limits of Supremacy*, *supra* note 15, at 1465 (detailing how federal enforcement targets suppliers rather than minor offenders).
30. The argument was that Congress was empowered to impose tariffs only for the purpose of raising revenue and that the tariffs in question had been levied to protect Northern industries rather than raise revenue.

deny the supremacy of valid federal laws but rather the exclusivity of federal judicial review as a mechanism for determining those laws' constitutional validity.³¹ States that have legalized marijuana, by contrast, do not rely on an argument that the federal CSA is unconstitutional (although many proponents may well think that), and they do not purport to affect the binding legal force of the federal prohibition. States like California and Colorado have "legalized" marijuana only as a matter of state law. They are simply making a bet—and it is a good one—that absent state cooperation, federal law is unlikely to be enforced in their states. This is functional—not principled—nullification, but its effect on the ground is very close to what John C. Calhoun's South Carolina hoped to achieve.³²

If state noncooperation undermines federal enforcement to this degree, then one might think federal authorities would have a strong argument that state marijuana laws are preempted. After all, surely they "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."³³ But the anticommandeering cases have established that states have no obligation to implement or enforce federal law unless they voluntarily agree to do so.³⁴ It follows that states have no obligation to criminalize conduct simply because federal law does, and, in fact, there are any number of federal offenses that are not mirrored under state law.³⁵ Just as state marijuana laws do not formally question the validity of federal marijuana

See, e.g., H.W. BRANDS, ANDREW JACKSON: HIS LIFE AND TIMES 439–41 (2005); HOWE, *supra* note 2, at 396–97.

31. Lest one think that this resistance was confined to Southern slaveholders, the Wisconsin Supreme Court took a similar position that it could judge for itself the unconstitutionality of the Fugitive Slave Act, notwithstanding the U.S. Supreme Court's judgment that the act was valid. *See* DAVID M. POTTER, THE IMPENDING CRISIS, 1848–1861, at 294–95 (1976) (noting that Wisconsin's defiance "involved nullification in a form that even John C. Calhoun had not advocated"). That did not work out either. The U.S. Supremes rejected Wisconsin's position in *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858), and "the Wisconsin court, perceiving that it was a tactical error for antislavery men to support doctrines of state sovereignty, acquiesced in the decision." POTTER, *supra*, at 295. The *Ableman* saga nonetheless makes clear that nullification could work against slavery as well as for it.
32. Notably, the contemporary Tenth Amendment Center defines "nullification" as "[a]ny act or set of acts which renders a law null, void or just unenforceable." TENTH AMENDMENT CENTER, <http://tenthamendmentcenter.com> (last visited Mar. 7, 2015).
33. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).
34. *See* *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 149 (1992).
35. *See, e.g.*, 18 U.S.C. § 794 (2012) (making it a crime to gather or deliver defense information to aid a foreign government).

regulation, I am unaware of any serious legal argument that states may not decide *not* to criminalize marijuana possession (or any other crime, for that matter) as a matter of state law.

The constitutional line between state interference with federal law and state participation in federal enforcement was drawn long ago. In *Prigg v. Pennsylvania*,³⁶ the Court held that states could not intervene on behalf of putative escaped slaves by enacting personal liberty laws that imposed procedural safeguards. But Justice Story's majority opinion also made clear that state officials could not be required to participate in the capture or return of escapees³⁷—a holding that presaged the modern anticommandeering doctrine. A devoted abolitionist, Justice Story may have hoped that efforts to return escaped slaves to their owners would fail without the ability to mandate cooperation from state and local law enforcement.

Prigg's denouement illustrates a critical weakness of modern-day nullification. It turned out that the return of fugitive slaves was centrally important to national efforts to keep the Southern states in the Union, and federal authorities were willing to devote significant federal resources to enforcing the Fugitive Slave Law without state cooperation.³⁸ Moreover, many slave owners seem to have relied on self-help (such as Mr. Prigg himself, a private agent of the owner) to recapture their fugitives, so that state noncooperation afforded little practical protection to blacks in the free states. There are, in other words, only certain circumstances when a state's decision not to participate in a federal regulatory regime will effectuate the state's own policy preferences.

I return to the prospects of modern-day nullification in Part III. First, however, I consider what the phenomenon can tell us about the dynamics of cooperative federalism.

II. STATE SOVEREIGNTY IN THE AGE OF COOPERATIVE FEDERALISM

One of the most important developments in federalism scholarship over the last decade has been a shift from old questions about the boundary between state and federal regulatory authority to new questions about the role of state governments and officials within cooperative federalism schemes. The Supreme Court's 1937 "switch in time" largely marked the end of the "dual federalism" regime that had

36. 41 U.S. (16 Pet.) 539, 612 (1842).

37. *Id.* at 615–16.

38. See POTTER, *supra* note 31, at 138–39 (concluding that the fugitive slave laws were relatively effective even though the second Fugitive Slave Act, enacted in 1850, "carefully avoided any attempt to employ state officials in its enforcement").

dominated American law for its first century and a half;³⁹ rather than separate and exclusive spheres of state power, we now generally presume that Congress and the states exercise concurrent jurisdiction over most subjects.⁴⁰ Nowadays, the national and state governments not only share the same *potential* regulatory jurisdiction—they also frequently work together to implement federal programs.⁴¹ Although federalism scholars concerned about the autonomy of the states long viewed “cooperative federalism” as a euphemism for the absorption and cooptation of states into the swirling vortex of federal power,⁴² scholars like Jessica Bulman-Pozen and Heather Gerken have argued that state participation in cooperative regimes offers new opportunities for states to assert “the power of the servant.”⁴³

The scholarly literature on federalism is only just beginning to explore the full implications of cooperative federalism for intergovernmental relations and the constitutional balance of power.⁴⁴ The intergovernmental drama playing out in Colorado and Washington over marijuana helps, I think, to illustrate some of the basic dynamics of the cooperative model. Three things are becoming clear. First, federalism is becoming more like the horizontal separation of powers among the branches of the national government, in the sense that the constitutional structure is no longer held in place by strict norms of separation but rather by a regime of interlocking checks and balances. Second, state officials implementing federal law exercise power, but they are not “servants.” In fact, the most essential aspect of state sovereignty in the contemporary era may be the state political community’s right to select and hold to account its own officers—even when they are acting within cooperative federalism schemes. And third, intergovernmental conflict over marijuana illustrates the crucial

39. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (rejecting a Commerce Clause challenge to the National Labor Relations Act); see generally Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

40. See generally Ernest A. Young, *The Puzzling Persistence of Dual Federalism*, in *FEDERALISM AND SUBSIDIARITY* 34, 66 (James E. Fleming & Jacob T. Levy eds., 2014) [hereinafter Young, *Puzzling Persistence*].

41. See *supra* note 16 and accompanying text.

42. See, e.g., JOSEPH F. ZIMMERMAN, *CONTEMPORARY AMERICAN FEDERALISM: THE GROWTH OF NATIONAL POWER* 1 (1992) (arguing that the subordinate role of state officials within federal regulatory schemes represents a “concentration of political powers in the national government . . .”).

43. Bulman-Pozen & Gerken, *supra* note 17, at 1265.

44. See, e.g., Ernest A. Young, *A Research Agenda for Uncooperative Federalists*, 48 TULSA L. REV. 427 (2013) (sketching directions for future research) [hereinafter Young, *Uncooperative Federalists*].

differences between preemption of state law and commandeering of state officials. Even where Congress's power to preempt remains broad, constitutional limits on preemption afford states crucial inter-governmental leverage.

A. *Separation vs. Checks and Balances*

Discussions of federalism in this country have, throughout our history, typically focused on jurisdictional boundaries. For the first century and a half, the “dual federalism” regime posited separate and exclusive spheres of state and local authority; after 1937, legislative jurisdiction is generally concurrent (with minor exceptions falling outside Congress's broad commerce authority⁴⁵). Those scholars who have grappled with the dynamics of federalism in a concurrent regime have typically focused on the interplay of political forces that may protect state autonomy,⁴⁶ the security afforded to states by the procedural difficulty of making federal law,⁴⁷ or the potential of doctrines of statutory construction to ease the threat that federal preemption poses to state autonomy.⁴⁸

This is all valuable work, but the marijuana situation calls attention to another structural dynamic more familiar to horizontal separation of powers analysis than to federalism: institutional checks and balances. One suspects that it is the sour taste of nineteenth-century nullification (and the secession that followed shortly afterward) that has made us reluctant to consider the possibility that states might actually *check* federal government. But regardless of the reason, modern courts and commentators have tended to interpret the Supremacy Clause as strictly forbidding this sort of thing. As my friend Heather Gerken recently observed, American law has “licens[ed] opposition” primarily through “a rights-based strategy, not an institu-

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45. See, e.g., *United States v. Lopez*, 514 U.S. 549, 551 (1995) (holding the Gun-Free School Zones Act of 1990 was beyond the scope of Congress's commerce authority).
46. See, e.g., Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); see also Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 219 (2000).
47. See, e.g., Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001).
48. See, e.g., Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 288–92 (2012) [hereinafter Young, *Ordinary Diet*]; Garrick B. Pursley, *Preemption in Congress*, 71 OHIO ST. L.J. 511 (2010).

tional one.”⁴⁹ We have lost the sense of federalism facilitating a “loyal opposition.”⁵⁰

We *do* find institutional notions of loyal opposition in separation of powers law. Although we all get frustrated with gridlock in Washington, D.C., most of us have calmer moments when we remember James Madison’s notion in *Federalist 51* that the conflicting interests and efforts of officials in the various branches of government are what keeps the system in rough balance.⁵¹ Opposition, in the Founders’ vision, is a key component of the political structure—and that was emphatically true of federalism as well as separation of powers.⁵²

What may be less readily remembered is that the American doctrine of checks and balances is a creature of overlapping and concurrent authority, not jurisdictional separation. The draft constitution was, in fact, criticized for not adhering to Montesquieu’s ideal that the legislative, executive, and judicial powers should be kept strictly separate and exercised by different institutions.⁵³ Madison rebutted this criticism by insisting that such jurisdictional boundaries were but “parchment barriers,” which could not actually preserve the independence, much less the separation, of the branches in practice.⁵⁴ In place of jurisdictional separation, he urged a theory of checks and balances predicated on jurisdictional overlap. “[T]he great security against a gradual concentration of the several powers in the same department,” he wrote, “consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”⁵⁵ He thus embraced the fact that “[t]he several departments of power are distributed and blended,” citing as precedents the overlap of powers among the branches in the British and the various state constitutions.⁵⁶ Juris-

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49. Heather K. Gerken, *The Loyal Opposition*, 123 YALE L.J. 1958, 1959 (2014).
50. *Id.*
51. See THE FEDERALIST NO. 51, at 318–20 (James Madison) (Isaac Kramnick ed., 1987).
52. See, e.g., The Federalist No. 46, at 299–302 (James Madison) (Isaac Kramnick ed., 1987) (extolling the efficacy of state opposition to national ambitions).
53. See THE FEDERALIST NO. 47, at 302–03 (James Madison) (Isaac Kramnick ed., 1987) (“One of the principal objections inculcated by the more respectable adversaries to the Constitution is its supposed violation of the political maxim that the legislative, executive, and judiciary departments ought to be separate and distinct.”).
54. THE FEDERALIST NO. 48, at 309 (James Madison) (Isaac Kramnick ed., 1987).
55. THE FEDERALIST NO. 51, *supra* note 51, at 319.
56. THE FEDERALIST NO. 47, *supra* note 53, at 303–08.

dictional and functional overlap rendered each branch dependent on the other, because none could act alone.

Horizontal separation of powers thus offers neglected lessons for the preservation of the federal balance in an age of concurrent regulatory jurisdiction. As Colorado and Washington are demonstrating, their ability to oppose federal policy—and get away with it, to a considerable extent—arises from the blending of federal and state institutions within cooperative federalism schemes. The federal government depends on state cooperation to enforce national law, and that dependence is what empowers state officials to dissent. As I discuss in Part III, this power of opposition may not extend far enough for dissenting states to establish and secure their own policies, but they can at least force a national conversation and some sort of compromise on the issues they care about.

B. Of Servants and Sovereigns

Modern-day nullification trades on the leverage that cooperative federalism schemes give state officials, but it also demonstrates that the “servant” metaphor can mislead about the actual dynamics of these relationships. I thus offer a friendly amendment to the notion of “uncooperative federalism” emphasizing that state officials’ capacity and motivation for resistance to federal policy stems largely from the fact that they are agents of a different principal.

Professors Bulman-Pozen and Gerken’s theory argues that “power also resides with states when they play the role of federal servants.”⁵⁷ This power stems from several sources. These include the “dependence” of the federal government on state officials to administer federal programs, which gives state officials both “leverage” and “discretion in choosing how to accomplish [their] tasks and which tasks to prioritize.”⁵⁸ State officials also derive power from their “integration” into federal regulatory schemes; “[w]hen an actor is embedded in a larger system,” Bulman-Pozen and Gerken argue, “a web of connective tissues binds higher- and lower-level decisionmakers. Regular interactions generate trust and give lower-level decisionmakers the knowledge and relationships they need to work the system.”⁵⁹ Finally, Bulman-Pozen and Gerken note that state officials “serve two masters” in the sense that although they are implementing federal

57. Bulman-Pozen & Gerken, *supra* note 17, at 1265.

58. *Id.* at 1266; *see also* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1544 (1994) (observing that in a cooperative system, “[t]he federal government needs the states as much as the reverse, and this mutual dependency guarantees state officials a voice in the process”).

59. Bulman-Pozen & Gerken, *supra* note 17, at 1268–69.

policy, “their constituencies are based within the state.”⁶⁰ This gives state officials both the incentive and the power to challenge federal officials, because they are not beholden to federal officials for their positions and have alternative sources of resources.⁶¹

The last of these factors partially acknowledges—but inadequately stresses—what I take to be the critical ingredient of uncooperative federalism, which is that state officials do not work for the federal government. The truth is, state officials are not servants—or at least not servants of the national government. The federal government did not hire these officials, nor can they fire them—no matter how “uncooperative” they may be. They work for, and are accountable to, the people of the state. It may be that state officials are sometimes coopted into federal regulatory programs and come to internalize the goals of the federal regulators who oversee their work; in some cases, this phenomenon might even trump state officials’ loyalties to their superiors in state government and to the citizens of their states. Whether and to what extent this occurs is an interesting empirical question worthy of further investigation. But a vast range of literature in political science rests on the assumption that government officials wish to retain their jobs, and that those officials are thus responsive to those who have the power to fire them or vote them out of office.⁶² By that measure, state officials serve one master, not two, and that master is their state.

Modern-day nullification, as illustrated by the marijuana saga, vividly illustrates the independence of state officials. It is the limiting case of uncooperative federalism—an entire refusal to participate in a federal regulatory scheme that is contrary to state policy. And it is driven by the fact that although the once-distinct spheres of state and federal regulatory authority are now understood to overlap,⁶³ federal and state officials continue to confront largely separate chains of electoral and administrative accountability. They are agents of separate principals. And while the national government has powerful leverage (especially financial inducements under the Spending Power) to induce state cooperation, the anticommandeering doctrine ensures that the choice remains with state governments and, ultimately, the state electorate.⁶⁴ If a state legislature is willing to sacrifice federal

60. *Id.* at 1270.

61. *Id.* at 1270–71.

62. Likewise, much separation of powers jurisprudence assumes that the power to control an executive official is synonymous with the power to remove him. *See, e.g.*, *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492–93 (2010).

63. *See, e.g.*, Young, *Puzzling Persistence*, *supra* note 40, at 34–35.

64. *See, e.g.*, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (striking down the Affordable Care Act’s Medicaid expansion on the

funding and other inducements in order to opt out of a federal regulatory program, state officials have little choice but to walk away.

This, in turn, suggests that certain aspects of state sovereignty and certain forms of federal intervention ought to be particularly sensitive from an uncooperative federalism perspective. A state's control over its own officials—whether it takes the form of elections, executive control, or accountability to the legislature—is crucial. And any federal intervention that threatens to dilute that control ought to be particularly suspect. For example, the Supreme Court's characterization of the Voting Rights Act as a unique threat to state sovereignty because it amounted to federal intervention into the process by which a state chooses its representatives and officials⁶⁵ makes a great deal of sense from this perspective. And the anticommandeering doctrine—which Professors Bulman-Pozen and Gerken think may *undermine* uncooperative federalism⁶⁶—is actually critically important to its efficacy because that doctrine ensures that state officials remain beholden *only* to their state principals.⁶⁷

Much work remains to be done to flesh out the theory of uncooperative federalism and verify its empirical claims.⁶⁸ Examples where states decline to participate in cooperative federalism arrangements—like California's, Colorado's, and other states' dissent from federal marijuana policy—may well provide insight into more nuanced resistance and less spectacular instances of resistance within other federal regulatory schemes.

III. NULLIFICATION'S PROSPECTS

The jury is still out on whether modern-day nullification will meet a similar fate to its nineteenth century counterpart. As the preceding

ground that it coerced state governments into administering a federal program).

65. See *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2623 (2013) (observing that “States retain broad autonomy in structuring their governments” and that “[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen” (quoting *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161 (1892))).
66. See Bulman-Pozen & Gerken, *supra* note 17, at 1297 (“A strong proponent of uncooperative federalism would embrace commandeering not because it increases national power or furthers federal-state cooperation, as most proponents of commandeering would have it, but because it facilitates challenges to federal policy.”).
67. See also Young, *Uncooperative Federalists*, *supra* note 44, at 440–42 (2013) (criticizing Bulman-Pozen and Gerken's criticism of the anticommandeering doctrine).
68. See *id.* at 434–52.

discussion suggests, the key to modern-day nullification lies in charting the boundary between valid preemption of state law and invalid commandeering of state governments. I thus begin this last section with an assessment of arguments that federal law preempts Colorado's marijuana legalization regime—including an extraordinary recent lawsuit filed in the original jurisdiction of the Supreme Court by the neighboring states of Nebraska and Oklahoma. I then consider the more general prospects for modern-day nullification as a form of resisting federal encroachments on state autonomy.

A. *Federal Preemption of State Marijuana Laws*

In December 2014, Nebraska and Oklahoma moved for permission to file a lawsuit against the state of Colorado in the original jurisdiction of the Supreme Court, arguing that federal law preempts Colorado's marijuana legalization regime.⁶⁹ The complaint argues that “a state may not establish its own policy that is directly counter to federal policy against trafficking in controlled substances or establish a state-sanctioned system for possession, production, licensing, and distribution of drugs in a manner which interferes with the federal drug laws.”⁷⁰ This statement nicely frames the two crucial aspects of the marijuana preemption debate. The first—the claim that “a state may not establish its own policy that is directly counter to federal policy”⁷¹—is rather plainly wrong. But the second—that a state may not establish “a state-sanctioned system . . . which interferes with the federal drug laws”⁷²—has considerable validity. That principle forbidding interference with federal law states the outer limit of modern-day nullification, and it suggests that while nullification may be an effective means of forcing a political dialogue on a given policy question, it cannot itself provide an effective basis for stable state governance.

Begin with the assertion that “a state may not establish its own policy that is directly counter to federal policy.”⁷³ That has been untrue ever since the early Republic. When Congress enacted the

69. Motion for Leave to File Complaint, Complaint, and Brief in Support, *States of Nebraska and Oklahoma v. State of Colorado*, No. 220144 (filed Dec. 18, 2014) [hereinafter NE & OK Complaint]; see also Lyle Denniston, *Two States Sue to Block Colorado Marijuana Markets*, SCOTUSBLOG (Dec. 19, 2014, 8:31 AM), <http://www.scotusblog.com/2014/12/two-states-sue-to-block-colorado-marijuana-markets/>.

70. NE & OK Complaint, *supra* note 69, at 2 (emphasis omitted).

71. *Id.* (emphasis omitted).

72. *Id.*

73. *Id.*

Alien and Sedition Acts in 1798,⁷⁴ Virginia and Kentucky not only pursued a contrary policy of *not* persecuting aliens and dissenters but vigorously (and officially) protested and worked to undermine Congress's policy.⁷⁵ Abolitionist states could not interfere with federal laws favoring slaveholders, but they certainly pursued a contrary policy by outlawing slavery within their own territory and forbidding their officials to cooperate with the federal Fugitive Slave law. More recently, several states recognized same-sex marriage even though it was the avowed policy of the national government to recognize marriages only between a man and a woman.⁷⁶ Even before the Supreme Court struck down the Defense of Marriage Act on equal protection grounds,⁷⁷ no one thought that state same-sex marriage laws were preempted simply because the national government had pursued a different policy.

To take the simplest illustration, imagine that Colorado chose to leave marijuana completely unregulated and have no laws on the subject at all. It is hard to imagine a state policy that is more "directly counter to federal policy" than that. And yet the Supremacy Clause certainly does not require states to enact laws that mirror federal regulation; as *New York v. United States*⁷⁸ held, the anticommandeering doctrine *forbids* Congress to demand that sort of action.⁷⁹ There are two relevant differences between this example and the actual state of affairs. The first is that Colorado once *did* prohibit marijuana use; hence, it took an action to repeal significant parts of that prohibition rather than simply declining to regulate in the first place. That cannot make the constitutional difference, however. The Supremacy Clause has never been interpreted to "lock in" state policies that the state cannot be required to enact in the first instance.⁸⁰

The second difference is that Colorado has done more than decline to regulate marijuana; rather, it has put in place a state regulatory regime that arguably supports and encourages a line of business that

74. Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired 1801); Alien Act, ch. 58, 1 Stat. 570 (1798) (expired 1800); Naturalization Act, ch. 54, 1 Stat. 566 (1798), *repealed by* Act of Apr. 14, 1802, ch. 28, § 5, 2 Stat. 153, 155.

75. *See, e.g.*, Wayne D. Moore, *Reconceiving Interpretive Autonomy: Insights from the Virginia and Kentucky Resolutions*, 11 CONST. COMMENT. 315, 316 (1994).

76. Defense of Marriage Act, Pub. L. No. 104-199, § 7, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7, 28 U.S.C. § 1738C (2012)).

77. *See* *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013).

78. 505 U.S. 144 (1992).

79. *Id.* at 159-66.

80. For one thing, that sort of policy lock-in would induce states to think twice before enacting legislation in support of federal policy.

still violates federal law.⁸¹ This leads to the second aspect of Nebraska and Oklahoma's preemption claim—that is, that Colorado's regulatory regime actually interferes with the federal policy prohibiting marijuana production, distribution, and use. This claim does, in my view, raise a plausible preemption argument.

Colorado has not simply decided not to prohibit marijuana use. Rather, it has established a regulatory regime predicated on the legality of some marijuana consumption—notwithstanding the continuing prohibition of marijuana cultivation, distribution, and consumption under federal law. Robert Mikos has identified three classes of state laws that raise plausible claims of interference with federal policy. The first class “regulates the supply of marijuana. This body includes regulations that require suppliers to obtain a license from the state, laws that dictate how suppliers operate (e.g., zoning), laws that tax the sale of marijuana, and so on.”⁸² A second class regulates marijuana consumption—particularly in those states permitting only medical uses. For example, this class “includes laws that stipulate the steps patients must take to establish eligibility for the medical marijuana defense and laws that limit the consumption behavior of marijuana users.”⁸³ Finally, “[a] third category of laws arguably promotes marijuana-related activities.”⁸⁴ These laws may protect marijuana users from discrimination or provide public benefits to marijuana users; some proposals would go even further and involve the state in the cultivation or distribution of the drug.⁸⁵

All of these laws arguably encourage behavior that remains a violation of federal law. Licensing suppliers or medicinal users to distribute or consume marijuana is, literally, licensing a violation of the Controlled Substances Act. The states have a good answer to this argument, however, which ought to preclude preemption of mere licensing laws. State laws on marijuana are currently in a state of flux, and those states that have legalized (or decriminalized) the drug have done so only partially, for certain persons or in certain quantities or circumstances. Citizens have a right under the Due Process Clause to fair notice as to when the state will prosecute them and when it will not.⁸⁶ From this perspective, a state “license” is merely an official

81. See John Hudak, *Colorado's Rollout of Legal Marijuana Is Succeeding: A Report on the State's Implementation of Legalization*, 65 CASE W. RES. L. REV. 649 (2015).

82. Mikos, *Preemption*, *supra* note 6, at 31.

83. *Id.*

84. *Id.* at 32.

85. *Id.* at 32–36.

86. See, e.g., *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (“No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what

statement from the state that a person's behavior falls within the zone that is immune from prosecution under state law. It is not at all clear that Congress *could* constitutionally enact a statute preventing the states from giving clear notice of what acts are crimes under state law—and even less clear that Congress intended to do so in the Controlled Substances Act.

Other aspects of the state regulatory scheme, however, cannot readily be characterized as efforts to give fair notice. Certainly proposals to have the state cultivate marijuana in order to safeguard its quality are preempted (and could well lead to actual federal prosecution of state officials). Laws that prohibit private individuals from discriminating against marijuana users effectively seek to remove the stigma and private consequences ordinarily attendant upon violations of federal law. To the extent that all laws depend on social norms as well as public enforcement for their effectiveness, such efforts to undermine those norms would stand as an obstacle to the purposes of federal law.

Nonetheless, the mere legalization of marijuana use—apart from efforts to regulate it just discussed—should pass a preemption challenge. The CSA does not expressly preempt such legalization in that it does not purport to require states to enact parallel prohibitions, and if it did, it would raise serious anticcommandeering problems.⁸⁷ And its antipreemption clause disavows any intent to “occupy the field” of marijuana regulation.⁸⁸ That leaves conflict preemption, which comes in two flavors: “impossibility” preemption,⁸⁹ and “purposes and objectives” or “obstacle” preemption.⁹⁰

Impossibility preemption is unlikely. As Professor Mikos points out, “[a] citizen can obey a state law allowing or even authorizing the possession, distribution, or cultivation of marijuana and the CSA’s express ban on these same activities by not engaging in them.”⁹¹ Brannon Denning’s contribution to this Symposium thinks this answer “carr[ies] verbal wizardry too far, deep into the forbidden land

the State commands or forbids.” (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939))).

87. See also Mikos, *Limits of Supremacy*, *supra* note 15, at 1451 (“Notably, the CSA does not proscribe omissions; that is, it does not impose any duty to act . . . such as a duty to report known violations.”).

88. 21 U.S.C. § 903 (2012).

89. See *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963) (noting that state law is preempted “where compliance with both federal and state regulations is a physical impossibility . . .”).

90. See *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (stating that preemption occurs when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”).

91. Mikos, *Preemption*, *supra* note 6, at 27–28.

of the sophists.”⁹² But impossibility preemption is *supposed* to be extremely narrow. The broadest expansion of the impossibility category occurred in *PLIVA, Inc. v. Mensing*,⁹³ which held that a generic drug manufacturer could not comply with both a state tort duty requiring it to change its warning label and a federal regulatory regime that required FDA approval to do so. “The question for ‘impossibility,’” Justice Thomas wrote for the majority, “is whether the private party could independently do under federal law what state law requires of it.”⁹⁴ Here, state law requires *nothing* of individuals—no one is making them grow, distribute, or consume marijuana. And the impossibility notion does not run in the opposite direction, to require preemption wherever state law allows what federal law prohibits. If it did, then the Supremacy Clause would require each state to enact espionage statutes.

What about “obstacle” preemption? Professor Denning “find[s] it self-evident that state legalization regimes permitting marijuana use for medical or recreational purposes present a substantial obstacle to the implementation of a federal law that (1) recognizes no medical use for marijuana and (2) seeks to eliminate the national market in marijuana by banning all production, possession, and transfer.”⁹⁵ And the Nebraska and Oklahoma Complaint claims that the federal CSA regime will be “undercut unless the *intrastate* activity . . . were regulated as well as the interstate and international activity.”⁹⁶ That may be so, but that fact cannot itself compel *Colorado* to regulate the intrastate activity. Federal law can—and does—regulate intrastate marijuana production, distribution, and consumption,⁹⁷ and Colorado may not affirmatively interfere with that regulatory effort. But the

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92. Brannon P. Denning, *Vertical Federalism, Horizontal Federalism, and Legal Obstacles to State Marijuana Legalization Efforts*, 65 CASE W. RES. L. REV. 567, 578 (2015) (quoting National Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2656 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting)).
93. 131 S. Ct. 2567, 2577 (2011); *see also* Young, *Ordinary Diet*, *supra* note 48, at 288–92 (discussing *PLIVA* and the impossibility standard).
94. *Id.* at 2579. “Independently” was the key point in *PLIVA*, because the plaintiffs pointed out that the defendant drug manufacturer could have applied for FDA approval to change the license as required by state law. Impossibility should only exist, plaintiffs (and the Court’s dissenters) said, if the defendant could show that federal approval would not have been forthcoming. *Id.* at 2588–89 (Sotomayor, J., dissenting).
95. Denning, *supra* note 92, at 580.
96. NE & OK Complaint, *supra* note 69, at 6.
97. The Supreme Court upheld Congress’s authority to regulate intrastate activity where necessary to support its interstate regulatory efforts even during the *Lochner* era. *See* Houston, E. & W. Tex. Ry. Co. v. United States (Shreveport Rate Cases), 234 U.S. 342 (1914).

anticommandeering doctrine necessarily means that it cannot be required to *help* without its consent.

Consider, for example, *Prigg v. Pennsylvania*,⁹⁸ in which Pennsylvania's "personal liberty law" required agents of slave owners to satisfy a state court that the person they proposed to apprehend was, in fact, a fugitive slave before exercising their rights under the federal Fugitive Slave Act to return her to her owner. Justice Story's majority opinion held the liberty law preempted in what nowadays would be a classic case of obstacle preemption: the state law threw up significant barriers to the owner's exercise of rights guaranteed under federal law. But Story was also careful to say that state officials and courts need not *assist* in the repatriation of allegedly escaped slaves. Practically speaking, this was surely an obstacle too—given the preponderance of state officials and the more ready availability of state tribunals. Allowing the states to opt out of fugitive slave enforcement would inevitably make that enforcement more difficult. But this is the difference between preemption and commandeering: "obstacles" posed by state officials' decisions not to help enforce federal law are not the sort of obstacles upon which preemption may rest.

Even apart from preemption, however, the continuing federal prohibition will make it extremely difficult for legalizing states to establish a stable regime. Limited federal enforcement remains possible in a variety of scenarios. Federal authorities may choose to target marijuana businesses or commercial-scale growers. They may use marijuana charges as a lever against persons targeted for some other reasons (including arbitrary ones). The federal illegality of marijuana businesses also has a host of collateral consequences: marijuana businesses may be unable to access the banking world on account of federal prohibitions on financial transactions involving illegal activity;⁹⁹ they may face damaging federal tax consequences;¹⁰⁰ and state ethics rules may prevent attorneys from counseling persons who engage in activities that remain illegal under federal law.¹⁰¹ Likewise, individuals using marijuana in violation of federal law may face significant employment or family law consequences, and persons on probation or parole may find that marijuana use constitutes a viola-

98. 41 U.S. (16 Pet.) 539 (1842); *see supra* note 36 and accompanying text (discussing *Prigg*).

99. *See* Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RES. L. REV. 597, 600 (2015); Erwin Chemerinsky, Jolene Forman, Allen Hopper & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 91–93 (2015).

100. *See* Chemerinsky, Forman, Hopper & Kamin, *supra* note 99, at 94.

101. *See id.* at 95–97.

tion of that status.¹⁰² Finally, not everyone is Justice Holmes's "bad man"—that is, motivated only by the fear of sanctions.¹⁰³ Even if adverse legal consequences are unlikely, some persons may have strong moral or religious aversions to lawbreaking.¹⁰⁴

States like Colorado and California thus have not succeeded—and cannot succeed, on their own—in making either recreational or medicinal use of marijuana *legal*, either as a formal or as a practical matter. They have, instead, created a highly unstable situation that is unlikely to satisfy proponents of either legalization or prohibition over the long term. Legalization cannot achieve its goals—a safe, above-board, and well-regulated market for marijuana—in the teeth of a continuing federal prohibition. But that prohibition will hardly be a legitimate, nonarbitrary legal regime in the absence of state and local enforcement partners. Something will have to give.

The remarkable thing for students of federalism is that a handful of states have been able to force both a fundamental rethinking of national marijuana policy and to secure significant exemptions from federal law—notwithstanding the clear mandate of the Supremacy Clause that federal law trumps state policy. The inability to establish a stable state regulatory regime for marijuana free of federal interference should not blind us to this fact. Destabilizing a federal policy that had endured for many decades and opening a national conversation on the issue is a major accomplishment for this handful of dissenting states. It is, after all, just the sort of thing that a loyal opposition is supposed to do.

B. Other Applications?

It is difficult to say whether the effective nullification of national marijuana laws in a significant and growing proportion of American states is likely to become a more general feature of our federalism, impacting a broader array of federal regulatory regimes. Modern-day nullification seems unlikely to work outside a fairly narrow range of legal and political circumstances. Within those bounds, however, it may offer an attractive mechanism for harnessing the dynamism of contemporary state governments in an era of federal gridlock. Moreover, it may also hold out some promise for defusing certain problems vexing the separation of powers at the federal level.

102. *See id.* at 98–100.

103. *See* O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

104. *See, e.g.*, H.L.A. HART, *THE CONCEPT OF LAW* 55–56 (1972) (suggesting that law binds from the “internal point of view”—that is, voluntary compliance without regard to the practical threat of sanctions).

Marijuana-style nullification makes sense only with respect to regulatory problems with a particular legal structure. A state's preferences must be more libertarian than the current state of law. If the state wishes to regulate *more strictly* than the federal government, then one of two things will be true. The first possibility is that federal law will not preempt the state's regulation—perhaps because federal law sets a regulatory floor but not a ceiling¹⁰⁵—in which case no resort to exotic concepts is necessary; the state is free to supplement federal regulation as it sees fit. The other is that federal law *does* preempt state regulation. In that event, the state cannot rely on federal resource constraints to permit it to regulate more broadly, because individuals or businesses affected by the state regulation will be able to raise a preemption defense in court when it is enforced against them.

Modern-day nullification thus seems likely to be a viable tactic only when a state prefers less regulation on a particular subject than does the federal government. It is also unlikely to work where federal regulation has direct beneficiaries who would be able to sue to compel enforcement of federal law by the courts. Generally speaking, federal standing doctrine is stingy about suits by the beneficiaries of regulation arguing that federal authorities are enforcing the law with insufficient rigor.¹⁰⁶ But Article III does not categorically prohibit such suits either. Where permitted access to federal court, beneficiaries of federal regulation may prove able to induce federal authorities to enforce federal law even where they might prefer to pursue other priorities.

Serious political constraints also exist. National public opinion on marijuana places the federal Controlled Substances Act in a kind of limbo. There is insufficient public demand for legalization to engender a strong political movement for repeal or amendment, but there is also insufficient support for prosecuting marijuana users to prompt federal authorities to allocate increased resources that might compensate for state noncooperation. It may be that there are other federal crimes that arouse similarly ambivalent public attitudes—sports betting is one possibility. But it is hard to think of many other obvious examples.

Under the right conditions, however, modern-day nullification may well be an attractive mechanism for promoting government innovation. The federal government, not to put too fine a point on it,

105. See, e.g., William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1558 (2007).

106. See, e.g., *Allen v. Wright*, 468 U.S. 737, 753–55 (1984) (denying standing to parents of black children in public schools who argued that the IRS was inadequately enforcing rules and that segregated private schools cannot claim tax-exempt status).

has been largely dysfunctional for the better part of the last two-and-a-half presidential administrations. The “mess in Washington” has not only torpedoed the approval ratings of presidents and the Congress; it has also contributed to a significant and persistent decline in public trust for federal governmental institutions.¹⁰⁷ As Robert Mikos has pointed out, the trust disadvantage that the federal government now suffers vis-à-vis state and local governments is one reason that modern-day nullification can be successful.¹⁰⁸ When state governments are more trusted than the Feds, state judgments about, say, the appropriateness of marijuana use more readily displace the moral suasion of federal law.

State governments are not only more trusted; they are also frequently more able to act on matters of current social concern. That is because, unlike the national government, a significant number of states have unitary governments—that is, the same party controls the governorship and both houses of the state legislature.¹⁰⁹ Nonetheless, where federal statutes like the CSA’s marijuana prohibition are already in place, gridlock at the federal level may prevent efforts to facilitate state policy innovation. Federalism scholars (including this one) have often cited the difficulty of enacting federal law as a

107. See, e.g., Cindy D. Kam & Robert A. Mikos, *Do Citizens Care about Federalism? An Experimental Test*, 4 J. EMPIRICAL LEGAL STUD. 589, 598 (2007) (“Citizens on average evaluate the performance of the federal government as significantly lower than that of the state and local governments, report less faith in the federal government to ‘do the right thing,’ have significantly lower confidence in the ability of the federal government to solve problems effectively, see the federal government as significantly less responsive than lower levels of government, and nearly 60 percent see the federal government as the most corrupt level of government.”); see also PEW RESEARCH CTR., STATE GOVERNMENTS VIEWED FAVORABLY AS FEDERAL RATING HITS NEW LOW 1 (2013) (showing the results of a 2013 survey where only 28% of the public rated the federal government favorably); Megan Mullin, *Federalism, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY* 209, 216–19 (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008) (showing that the results of public surveys indicated a decline in public trust of the federal government); Marc J. Hetherington & John D. Nugent, *Explaining Public Support for Devolution: The Role of Political Trust, in WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE?* 134, 137–38 (John R. Hibbing & Elizabeth Theiss-Morse eds., 2001) (summarizing surveys that showed that “on average, state governments were perceived in an increasingly positive light at about the same time that people were losing faith in the federal government”).

108. See Mikos, *Limits of Supremacy*, *supra* note 15, at 1471.

109. See, e.g., Dan Balz, *Red, Blue States Move in Opposite Directions in a New Era of Single-Party Control*, WASH. POST, Dec. 29, 2013, at A1 (“[T]oday, three-quarters of the states . . . are controlled by either Republicans or Democrats.”).

safeguard of state autonomy.¹¹⁰ Carlos Vazquez has pointed out, however, that “[r]ather than protect state interests, [the difficulty of enacting federal law] privileges the legal status quo—whether that status quo be state law or federal.”¹¹¹ Hence, the federal legislative gauntlet “sometimes hinders the devolution of legislative power to the states.”¹¹² Modern-day nullification may break this sort of impasse, returning us to a federalist solution in which individual states can effectively legalize or criminalize a particular activity by choosing whether to cooperate with federal enforcement.

State divergence from federal enforcement priorities may also help untangle one of the intractable separation of powers puzzles in contemporary law—that is, how to curb the national *executive’s* discretion not to enforce, and sometimes not to defend in court, particular federal statutes. Most agree that prosecutorial discretion is a valuable safeguard that allows the executive to do a more nuanced form of justice in particular cases; most would likewise acknowledge that the executive ought not to have its own nullification power by declining to enforce laws with which it disagrees. And yet, partly because drawing the proper boundary is so difficult, there are virtually no institutional checks on the Executive’s enforcement discretion. One possibility would be for states to harness potential disagreement between the President and the states by authorizing states to enforce federal law where the President refuses to do so.

Justice Scalia suggested in *Printz* that this sort of circumvention of the national executive is unconstitutional under the unitary executive principle.¹¹³ That argument, however, proves too much—it suggests that not only commandeering but *all* cooperative federalism arrangements (as well as enforcement of federal law by private attorneys general) must be unconstitutional. More recently, in *Arizona v. United States*,¹¹⁴ the Court treated the question whether Arizona could enforce federal immigration laws more aggressively than the President had chosen to do as a pure question of congressional intent. Although the Court found preemption in that case, the Court’s analysis strongly implied that if Congress chose to authorize state enforcement that went further than the Executive wished, there would be no constitutional impediment to doing so.

110. See, e.g., Clark, *supra* note 47, at 1339–40.

111. Carlos Manuel Vazquez, *The Separation of Powers as a Safeguard of Nationalism*, 83 NOTRE DAME L. REV. 1601, 1603 (2008).

112. *Id.*

113. *Printz v. United States*, 521 U.S. 898, 922–23 (1997).

114. 132 S. Ct. 2492 (2012).

CONCLUSION

Nullification is dead. South Carolina lost the constitutional debate over resistance to the State, and the South lost the Civil War. And yet, state resistance to federal authority persists. California, Colorado, and other states have demonstrated that, at least in some circumstances, states can establish a legal regime contrary to federal law simply because the national government lacks the resources and political will to enforce its rules without state cooperation.

This contemporary form of nullification can tell us some important things about federalism. It suggests, for instance, that the most important zone of state autonomy is a state's control over its own officials. Even when spheres of regulatory jurisdiction overlap, the fact that state officials do not work for federal authorities affords the states important opportunities to influence—and sometimes defy—the enforcement of federal law. California's and Colorado's example may also offer an attractive way to mitigate national gridlock and, perhaps, to ease otherwise intractable separation of powers tensions arising from the national Executive's enforcement discretion.

Long live nullification.