SOUND AND FURY, SIGNIFYING NOTHING: NULLIFICATION AND THE QUESTION OF GUBERNATORIAL EXECUTIVE POWER IN IDAHO

RYAN S. HUNTER

FULL CITATION:

Ryan S. Hunter, Sound and Fury, Signifying Nothing: Nullification and the Question of Gubernatorial Executive Power in Idaho, 49 IDAHO L. REV. 659 (2013).

This article Copyright © 2013 *Idaho Law Review*. Except as otherwise expressly provided, permission is hereby granted to photocopy this article for classroom use, provided that: (1) Copies are distributed at or below cost; (2) The author of the article and the *Idaho Law Review* are properly identified; (3) Proper notice of the copyright is affixed to each copy; and (4) Notice of the use is given to the *Idaho Law Review*.

SOUND AND FURY, SIGNIFYING NOTHING: NULLIFICATION AND THE QUESTION OF GUBERNATORIAL EXECUTIVE POWER IN IDAHO

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.¹

TABLE OF CONTENTS

I. INTRODUCTION	.660
II. A PRIMER ON NULLIFICATION & INTERPOSITION	.663
A. Historical Origins	.663
1. The Alien & Sedition Acts of 1798	.663
2. The Embargoes of 1807-1808, <i>United States</i>	
v. Peters, & Georgia's Attempt at	
Nullification	
3. The Nullification Crisis of 1832	674
4. Nullification of the Fugitive Slave Acts of	
1793 & 1850	
B. Modern Incarnations	.686
1. Nullification & Desegregation: Massive	
Resistance & the Little Rock Crisis	.686
2. The Real ID Act: Nullification or	
Uncooperative Federalism?	.691
C. Nullification Today: A Revitalization of a Foundationless	
Doctrine	.692
1. The Influence of Model Legislation: Other	
States' Responses to the PPACA	.693
2. Idaho's Legislative Response to the PPACA	.696
III. THE GUBERNATORIAL EXECUTIVE ORDER AS A	
MEANS OF NULLIFICATION	.706
A. The Gubernatorial Executive Order	.707
1. Generally	
2. Types & Form of Executive Orders	.709
3. Source of Authority for Executive Orders	
B. The Gubernatorial Executive Order in Idaho	
1. The General Grant of Constitutional	
Authority	.714
2. The Statutory Grant of Authority	.717

^{1.} The Federalist No. 51 (James Madison).

C. The Gubernatorial Executive Order as a Means of	
Nullification	718
1. Nullification is Constitutionally Invalid,	
Regardless of the Form Used	718
2. Activities Attempting Nullification May	
Retain Some Rhetorical Value	720
IV. CONCLUSION	722

I. INTRODUCTION

The Patient Protection and Affordable Care Act² (PPACA) has quickly become one of the most controversial laws in American history. It has divided the country broadly along the lines of those in favor of its revolutionary changes to the legal landscape of healthcare and those vehemently opposed to its drastic and unprecedented appropriation of a previously private choice. Indeed, one judge stated that "[t]he Act is a controversial and polarizing law about which reasonable and intelligent people can disagree in good faith." Moreover, the PPACA has provoked significant rhetorical backlash from its opponents and has spurred to action self-proclaimed defenders of individual rights and states' powers.

The tool of choice for most opponents to the PPACA has been judicial intervention.⁴ Indeed, challenges to the Act's constitutionality started literally minutes after President Barack Obama signed the bill.⁵ Regardless of whether one supports or opposes the Act, this method of challenging the validity of statutory law has been a bedrock component of our political system for over two centuries.⁶ However, not all opponents of this law have taken the constitutional path; indeed, some have

^{2.} The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (signed into law by President Barack Obama March 23, 2010, and March 30, 2010, respectively) [hereinafter PPACA].

^{3.} Florida *ex rel.* McCollum v. U.S. Dept. of Health & Human Services, 716 F. Supp. 2d 1120, 1127 (N.D. Fla. 2010) (statement of Judge Roger Vinson).

^{4.} See, e.g., id.; Virginia ex rel. Cuccinelli v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010) vacated, 656 F.3d 253 (4th Cir. 2011); Liberty Univ., Inc. v. Geithner, 753 F. Supp. 2d 611 (W.D. Va. 2010) vacated, 671 F.3d 391 (4th Cir. 2011); Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882 (E.D. Mich. 2010) aff'd, 651 F.3d 529 (6th Cir. 2011); Calvey v. Obama, 792 F. Supp. 2d 1262 (W.D. Okla. 2011); Goudy-Bachman v. U.S. Dept. of Health & Human Services, 764 F. Supp. 2d 684 (M.D. Pa. 2011); Peterson v. United States, 774 F. Supp. 2d 418 (D.N.H. 2011); Baldwin v. Sebelius, No. 10 Civ. 1033, 2010 WL 3418436 (S.D. Cal. Aug. 27, 2010) cert. denied before judgment, 131 S. Ct. 573 (2010) and aff'd, 654 F.3d 877 (9th Cir. 2011); New Jersey Physicians, Inc. v. Obama, 757 F. Supp. 2d 502 (D.N.J. 2010) aff'd sub nom. New Jersey Physicians, Inc. v. President of U.S., 653 F.3d 234 (3d Cir. 2011).

^{5.} See, e.g., Florida ex rel. Bondi v. U.S. Dept. of Health & Human Services, 780 F. Supp. 2d 1256, 1263 (N.D. Fla. 2011) ("This case, challenging the Constitutionality of the Act, was filed minutes after the President signed."); Virginia ex rel. Cuccinelli v. Sebelius, 656 F.3d 253, 267 (4th Cir. 2011) ("Virginia filed this action on March 23, 2010, the same day that the President signed the Affordable Care Act into law.").

^{6.} See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

chosen to resurrect a favorite historical argument of advocates of states' powers and limited government—nullification. The theory of nullification asserts that each individual state, as a co-equal partner with the other states collectively to the national compact that is the Constitution, have the ability to declare when the compact has been violated and refuse to abide by the violation; in other words, the states have the right to declare federal law unconstitutional. This historical theory has been reinvigorated and employed by several states as a means of opposing the PPACA since talk of healthcare reform began. In fact, from January 2011 to February 2012 fifteen states introduced bills into their legislatures with the intent of effecting nullification of the PPACA. Of these state legislative efforts, two failed, one passed, and the remainders have had no significant action taken on them. Further, on November 8, 2011, Ohio became the first and only state thus far to amend its state constitution by ballot initiative in an attempt to nullify the PPACA.

However, of all the efforts to oppose the PPACA through the questionable practice of nullification, Idaho Governor C.L. "Butch" Otter's use of an executive order to effect nullification is most peculiar.¹³ Even setting aside the fact that nullification as a legal theory lacks any constitutional foundation, nullification by executive order lacks even the asserted historical and philosophical value of legislative nullification. Indeed, at the point when a single person is deciding whether a federal law is constitutional within a state is the very point when the founda-

^{7.} See Peter Zavodnyik, The Age of Strict Construction: A History of the Growth of Federal Power. 1789-1861 77 (2007).

^{8.} Federal Health Care Nullification Act, The Tenth Amendment Center, http://tenthamendmentcenter.com/nullification/health-care-nullification-act/ (last visited Oct. 29, 2012). The fifteen states are Arizona (S.B. 1475 and H.B. 2725); Oregon (S.B. 498); Idaho (H.B. 059 (died in committee), H.B. 117 (died in committee), and H.B. 298 (vetoed)); Montana (S.B. 161 (died in committee) and H.J.R. 20 (failed on third house vote)); Wyoming (H.B. 0035); North Dakota (S.B. 2309 (enacted)); South Dakota (H.B. 1165); Nebraska (L.B. 515); Minnesota (H.F. 1351); Oklahoma (H.B. 1276); Texas (H.B. 297); New Jersey (A. 4155); New Hampshire (H.B. 126); Maine (H.P. 51, L.D. 58); and Missouri (H.B. 1534).

^{9.} Id. (Idaho and Montana).

^{10.} Id. (North Dakota; signed into law April 27, 2011).

^{11.} Id.

^{12.} State Issue 3: November 8, 2011, Ohio Secretary of State, http://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2011results/20111108Is sue3.aspx (last visited Oct. 29, 2012). See also Issue 3: Full Text, Ohio Secretary of State, http://www.sos.state.oh.us/sos/upload/ballotboard/2011/3-fulltext.pdf (last visited Oct. 29, 2012) ("No federal, state, or local law or rule shall compel, directly or indirectly, any person, employer, or health care provider to participate in a health care system No federal, state, or local law or rule shall prohibit the purchase or sale of health care or health insurance No federal, state, or local law or rule shall impose a penalty or fine for the sale or purchase of health care or health insurance.").

^{13.} Exec. Order No. 2011-03, IDAHO ADMIN. BULL. 11-9, at 16–17 (Sept. 7, 2011), available at http://adminrules.idaho.gov/bulletin/2011/09.pdf

tions of our democratic republic crumble. But is Governor Otter's executive order, in fact, nullification, or something else with the title of nullification artificially attached to it? Furthermore, if it is not nullification, what is it, and what legal effect, if any, does it have for the state of Idaho and for the nation? This comment will delve into the legal ramifications and practical impact of Governor Otter's novel¹⁴ use of the executive order, with particular attention paid to the nature of executive power in Idaho and whether the contours of this power countenance a use of the executive order in this way.

Part II begins with an in-depth primer on the history and arguments of nullification and interposition theory. This history will emphasize the theoretical similarities and differences between nullification and interposition, which are often cited interchangeably but are not, in fact, the same. As the more virulent of the two theories, nullification will be the primary focus. Nullification and interposition arose out of the writings of Thomas Jefferson and James Madison, respectively, who advocated the theories as a means for state opposition to oppressive federal laws in general, and specifically the Alien and Sedition Acts of 1798. They both argued that, as co-equal partners to the constitutional compact, the states had the power to pass judgment as to an offensive law's constitutionality. Madison advocated for joint action by most or all of the states in this respect and stopped short of suggesting that the states' statement on the constitutionality of a law had any legal effect. In addition, he argued in favor of utilizing all constitutional means to oppose legislation the states declared unconstitutional. Jefferson, on the other hand, argued that states could act individually to declare a law unconstitutional and that such a declaration rendered the law void and of no force within that state. As a result, from its inception and throughout history, nullification has incorrectly been cited as a constitutional means for resisting and obstructing federal supremacy, whether against the laws passed by the legislature or rulings issued by the Supreme Court; indeed, by its very nature nullification is an extra-constitutional political tool, not an inherent constitutional failsafe. Part I will conclude with an analysis of how the states, including Idaho, have forwarded nullification as a means of opposing the PPACA, and how Idaho's efforts compare with those of its sister states. This will include an analysis of whether any of these efforts are, in fact, nullification, or merely interposition and uncooperative federalism.

Part III will then examine the gubernatorial executive order in general terms of its historical origins, its various types, and its general form. This will serve as context for a more specific examination of the gubernatorial executive order in Idaho. Part III will also undertake a critical analysis of the gubernatorial executive order in Idaho, identifying the source of its authority and discussing whether it can act as a

^{14.} I have been unable to find any examples of similar uses of the gubernatorial executive order in Idaho or any other state. *See infra* Part II.

means of nullifying federal law such as the PPACA, ultimately concluding that it, like any other nullification tactic, cannot. Finally, Part III will conclude with the argument that Executive Order No. 2011-03 is not actual nullification, but is merely an act of uncooperative federalism done as part of a larger effort to interpose the state between its citizens and the federal government to prevent, or at least slow, implementation of the PPACA.

II. A PRIMER ON NULLIFICATION & INTERPOSITION

The history of nullification is intertwined with the history of the United States, though predominantly with its darker moments. Indeed, from its inception nullification has been the last tactic of the desperate and self-proclaimed disenfranchised, used to oppose what its advocates see as violations of the compact between the states. Thus, it has manifested itself at moments when history has proven the federal government went astray by violating fundamental constitutional rights, such as with the Alien and Sedition Acts and the Fugitive Slave Acts. Conversely, it has manifested at moments when the states have failed in their duty to protect the liberty and rights of their own citizens, such as with the Massive Resistance movement against desegregation efforts in the South. Today, advocates of nullification cite to its pedigreed origins in the writings of Thomas Jefferson and James Madison, both of whom set the groundwork for nullification and interposition theory through opposition to the Sedition Act—the first major federal infringement on the First Amendment right of free speech. However, the origin of the theory of nullification is much more complex than most of its proponents will admit. As a result, that is where any discussion involving the theory must begin.

A. Historical Origins

1. The Alien & Sedition Acts of 1798

The Alien and Sedition Acts of 1798¹⁵ set the stage for the introduction of the theories of nullification and interposition at a time when the principles of our constitutional form of government were still in their infancy. Indeed, federative government was first introduced to America only twenty-four years before when the first Continental Congress took

^{15.} Alien Act of June 25, 1798, 1 Stat. 566 (1798); Sedition Act of July 14, 1798, 1 Stat. 596 (1798).

control of foreign affairs from the colonial assemblies.¹⁶ Moreover, it had been just eleven years since the Constitutional Convention convened in Philadelphia.¹⁷ Thus, the principles of federalism and the relationship between the newly formed federal government and the states had not yet solidified, leading to a wealth of formative interpretations. The ensuing decade saw a constant struggle between the states and the federal government over the scope of the federal government's powers.¹⁸ This struggle came to a head for James Madison and then-Vice President Thomas Jefferson following the passage of the Alien and Sedition Acts of 1798 and the ensuing abuses perpetrated under them by President John Adams's administration.¹⁹

In response to these abuses, Jefferson and Madison took up their pens in opposition to the unconstitutional actions, although their respective approaches tendered very different results. 20 Jefferson's view explicitly favored action by individual states and implicitly indicated that a state's declaration that a law was unconstitutional rendered it legally void within that state. 21 These ideas served as the theoretical genesis for nullification theory, which would later be used as a justification for actual resistance to and obstruction of federal authority, though it is doubtful that Jefferson actually intended to convey such an idea. Madison's view, on the other hand, would produce significantly different results through the development of the theory of interposition. Indeed, Madison differed with Jefferson on all but the question of whether a state could declare a federal law or act unconstitutional.²² Madison favored concerted action by most or all of the states, and supported resistance to federal authority through all constitutional means, including court challenges, appeals to the federal government to repeal or overturn the federal action, and the like.²³ As a result, Jefferson argued that each individual state had legal authority to declare and void unconstitutional actions, while Madison took the more defensible approach of arguing for the collective states' political authority to declare an act unconstitutional and resist it within the confines of the Constitution.²⁴ Accordingly, Jefferson and Madison's different approaches to the same problem led to the creation of two unique theories for resisting perceived abuses

^{16.} See ZAVODNYIK, supra note 7, at 7. The author also notes that "[a]s a practical matter, federative government had been a fact of life in the American corner of the British Empire from the time the first settlers arrived in 1607." Id.

^{17.} See id. at 12.

See id. at 35–70.

^{19.} *Id.* at 70–75. Under the Sedition Act, federal authorities tried fourteen men and convicted ten of them for perceived seditious statements or activities, most of which were little more than criticism of the Acts and of the President and his administration. *Id.* at 74–75.

^{20.} Id. at 75-76.

^{21.} Id. at 75.

^{22.} See id.

^{23.} Id.

^{24.} Id. at 76.

of federal authority—Jeffersonian Nullification and Madisonian Interposition.²⁵

Jefferson laid out the basic foundation for what would become his theory of nullification by anonymously authoring a resolution for the Kentucky House of Representatives in November of 1798, in which he laid out the compact theory of government. In it, he wrote that as parties to the compact, each state could judge the legality under the compact of federal acts; otherwise, the federal government would be left in the odd position of judging for itself its own authority. Thus, when the government assumed powers not delegated to it within the original compact, a nullification of the act [was] the rightful remedy, which could be done by each state individually. In the Resolution, Jefferson repeatedly declared, *inter alia*, the Alien and Sedition Acts void and of no force, since they appeared to him to be blatantly unconstitutional. Further, he repeatedly invoked the Tenth Amendment as supporting the argument that the states reserved to themselves the power to decide the

See H. Jefferson Powell, The Principles of '98: An Essay in Historical Retrieval, 80 VA. L. REV. 689, 717-18 (1994) (citing the difference in how Madison and Jefferson saw the compact theory and how that led to an important practical difference in what the states could do, namely that Madison advocated that the states' interpretive authority was political rather than legal in nature, while Jefferson advocated for each individual state's legal authority to declare an act unconstitutional and void within the state); Arthur S. Miller & Ronald F. Howell, Interposition, Nullification and the Delicate Division of Power in a Federal System, 5 J. Pub. L. 2, 18-20 (1956) (discussing the differences between interposition and nullification, with the former being state challenge of federal power through joint action with other states in attempting to bring about the repeal of unfavorable laws and the latter being the outright declaration of a federal act as null and void within the state); DREW R. MCCOY, THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY 143-48 (1989) (arguing that assertions that Jefferson explicitly favored nullification and its logical next step, secession, as legitimate constitutional procedures were tenuous at best, and more likely ignored the historical context of the moment in which his statements implying those ideas were made).

^{26.} ZAVODNYIK, *supra* note 7, at 75–76; Thomas Jefferson, *The Kentucky Resolution of November 10, 1798, in* WE THE STATES: AN ANTHOLOGY OF HISTORIC DOCUMENTS AND COMMENTARIES THEREON, EXPOUNDING THE STATE AND FEDERAL RELATIONSHIP 143–51 (Va. Comm'n on Const. Gov't ed. 1964). For a discussion of the alternative conceptions of the nature of the Constitution, see Edward A. Fallone, *Charters, Compacts, and Tea Parties: The Decline and Resurrection of the Delegation View of the Constitution*, 45 WAKE FOREST L. REV. 1067, 1069–95 (2010).

^{27.} ZAVODNYIK, supra note 7, at 76.

^{28.} *Id.*; Thomas Jefferson, *The Kentucky Resolution of November 10, 1798, in 30* The Papers of Thomas Jefferson: 1 January 1798 to 31 January 1799, at 548 (Barbara B. Oberg ed., 2003). It is important to note that the quoted phrase, indeed even the word "nullification," only appeared in an earlier draft of the Kentucky Resolution, not the final version passed by the Kentucky Legislature. *Id.*

^{29.} ZAVODNYIK, supra note 7, at 76.

limits on enumerated rights like the First Amendment.³⁰ However, he stopped short of advocating for actual resistance to federal authority, only asking that the other states join Kentucky in declaring the Acts void and of no force.³¹ Still, he briefly contemplated the use of secession as a final remedy, but Madison was able to dissuade him from this position.³²

While Jefferson was correct in his assertion that the states had the ability to amend the Constitution under Article V, and thereby correct federal violations and excesses to the compact, his idea that states could individually decide for themselves the constitutionality of a validly enacted federal law was entirely absent from the constitutional convention, the ratification debates, and the text of the Constitution.³³ Indeed, it was not even supported by his compatriot, Madison.³⁴ In spite of this fact, the Kentucky Legislature quickly adopted the Resolution and independently declared the Alien and Sedition Acts unconstitutional, engaging in the first state declaration of nullification of a federal law.³⁵

Madison, on the other hand, was more measured in his linguistic approach to the issue in the Virginia Resolution of 1798, which he also anonymously authored. In it, he largely echoed Jefferson's conception of the compact theory, abandoning his original conception of the compact forwarded in *The Federalist*—that the compact was between the federal government and the people of the states, not the states themselves—and stated that the acts of the federal government were valid only insofar as they "are authorized by the grants enumerated in that compact." His focus was more on the states acting as a group, rather than in their individual capacity. This is because he conceived of the compact not as between each individual state as a sovereign party and the other states as a body, with the federal government as their common agent—as Jefferson did—but instead as a compact between the states collectively and the federal government. Thus, when the government exceeded its limits, "the *states*... have the right and are in duty bound, to interpose for

^{30.} See The Kentucky Resolution of November 10, 1798, in WE THE STATES, supra note 26, at 144–46 (invoking the full text of the Tenth Amendment three times in the first four sections of the Resolution).

^{31.} See generally ZAVODNYIK, supra note 7, at 76.

^{32.} See Daniel A. Farber, Judicial Review and Its Alternatives: An American Tale, 38 Wake Forest L. Rev. 415, 434–35 (2003) (stating that Madison objected and ultimately convinced Jefferson to eliminate any secessionist language); McCoy, supra note 25, at 146 (stating that Madison convinced Jefferson to "retreat from his extreme proposals" that the situation justified the threat of secession, and cautioned him against conveying the false impression that secession and nullification were legitimate constitutional procedures).

^{33.} ZAVODNYIK, supra note 7, at 76.

^{34.} Powell, *supra* note 25, at 717–18 (discussing the differences between Jefferson and Madison concerning the exact format of the federal compact).

^{35.} FORREST McDonald, States' Rights and the Union 41 (2000).

^{36.} ZAVODNYIK, supra note 7, at 76; Farber, supra note 32.

^{37.} Id.; McDonald, supra note 35, at 42.

^{38.} See McDonald, supra note 35, at 42.

^{39.} Powell, *supra* note 25, at 718–19.

arresting the progress of evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them."⁴⁰ Without defining what "interpose" meant, Madison declared the Acts unconstitutional and dangerous, but stopped short of declaring that the states had any right to defy federal laws, even if unconstitutional.⁴¹

Even at this early point in American history, the concept that a state could defy federal law unilaterally and without resorting to the mechanisms for resolution of conflicts described in the compact to which they had acceded was utterly rejected by all but a few southern advocates of states' rights. ⁴² Indeed, every state north of Maryland soundly rejected the Kentucky and Virginia Resolutions; in fact, there is no evidence that any state actually adopted the Resolutions. ⁴³ On the contrary, ten states explicitly repudiated the Resolutions and seven state legislatures passed their own resolutions firmly denouncing those of Kentucky and Virginia and the theories they advocated. ⁴⁴

Neither Jefferson nor Madison immediately backed down, however. Jefferson remained an ardent supporter of states' rights and limited federal government, though he did not directly respond to the criticisms publicly, and his authorship of the Kentucky Resolution remained a secret until late in his life. ⁴⁵ Kentucky, however, responded to the other states' criticism by reaffirming its position and pronouncing explicitly "[t]hat a Nullification by those sovereignties [the states], of all unauthorized acts done under color of that instrument [the Constitution] is the rightful remedy," though it took no further actions to actually effect

44. STATE DOCUMENTS ON FEDERAL RELATIONS: THE STATES AND THE UNITED STATES 16–26 (Herman V. Ames ed., 1970); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 29–44, 45 (2004) (Delaware called the resolutions "unjustified;" Rhode Island stated that the resolutions were "an infraction of the Constitution of the United States;" Massachusetts denounced the compact theory, finding that "the consent of the people is the only pure source of just and legitimate power;" Pennsylvania called the Kentucky Resolution "a revolutionary measure, destructive of the purest principles of our State and national compacts," and presented similar sentiments in response to the Virginia Resolution; New York called the doctrines in the Resolutions "inflammatory and pernicious . . . repugnant to the Constitution of the United States, and the principles of their union;" New Hampshire stated that "the State Legislatures are not the proper tribunals for determining the constitutionality of the laws of the general government;" and Vermont found the Resolutions "unconstitutional in their nature, and dangerous in their tendency.").

^{40.} ZAVODNYIK, supra note 7, at 76; MCDONALD, supra note 35, at 42; James Madison, $The\ Virginia\ Resolution\ of\ December\ 21,\ 1798,\ in\ WE\ The\ States,\ supra\ note\ 26,\ at\ 152$ (emphasis added).

^{41.} See ZAVODNYIK, supra note 7, at 76.

^{42.} See ZAVODNYIK, supra note 7, at 77.

^{43.} Id. at 76-77.

^{45.} ZAVODNYIK, *supra* note 7, at 78; PRINCETON UNIVERSITY PRESS, *Editorial Note* to THE PAPERS OF THOMAS JEFFERSON, VOLUME 30: 1 JANUARY 1798 to 31 JANUARY 1799 (2003), *available at* http://www.princeton.edu/~tjpapers/kyres/kyednote.html.

a nullification of the Acts. 46 Madison also took up his pen again in 1800 in the Report on the Resolutions to counter the assertion that the federal courts alone could rule on the constitutionality of federal legislation.⁴⁷ In this lengthy oration, Madison argued that not all constitutional abuses would be litigated, and that the judicial branch could just as easily condone such abuses instead of impeding them. 48 As a result, he again said, the states could judge for themselves the constitutionality of federal acts, because otherwise "the concurrence of this department with the others in usurped powers, might subvert forever, and beyond the possible reach of any rightful remedy, the very Constitution which all were intended to preserve."49 However, Madison did not intend for the resolutions to imply a power in the state legislatures to intrude on judicial power, as they were merely "expressions of opinion, unaccompanied with any other effect than what they may produce on opinion, by exciting reflection," and further never intended for them to imply any power in the individual state legislatures under the Constitution to defy or obstruct federal law.⁵⁰ Nevertheless, these three documents—the Kentucky and Virginia Resolutions and Madison's Report on the Resolutions—became known as the "Principles of '98" and were treated as canon by states' rights advocates for decades to come.⁵¹

Despite his involvement at the birth of this theory, modern supporters of nullification rarely invoke Madison's name.⁵² As indicated previously, Madison stopped short of saying, and indeed he did not intend, that states had a right to actually render a federal law null and void within the state by blocking or in any way impeding its enforcement.⁵³ Furthermore, Madison opposed individual action by the states, and instead favored collective strategies that otherwise worked within the confines of the Constitution, such as making "a direct representation to Congress" to rescind the offensive acts, requiring their respective state senators to support a constitutional amendment, or proposing a constitutional amendment through two-thirds of the states.⁵⁴ As a re-

^{46.} Kentucky Legislature Resolution of Nov. 14, 1799, in WE THE STATES, supra note 26, at 155; see also MCDONALD, supra note 35, at 43.

^{47.} James Madison, *The General Assembly of Virginia Report of Jan. 7, 1800, in* WE THE STATES, *supra* note 26, at 157–224.

^{48.} ZAVODNYIK, supra note 7, at 77; see also The General Assembly of Virginia Report of Jan. 7, 1800, in WE THE STATES, supra note 26, at 164–65.

^{49.} Id

^{50.} See The General Assembly of Virginia Report of Jan. 7, 1800, in WE THE STATES, supra note 26, at 157–224; Farber, supra note 32, at 434. See also McCoy, supra note 25, at 141–42, 144–45.

^{51.} McDonald, supra note 35, at 43; Powell, supra note 25, at 690, 696.

^{52.} See, e.g., Gennady Stolyarov II, Jefferson's Arguments for Nullification and Limited Government, TENTH AMENDMENT CENTER, http://tenthamendmentcenter.com/2009/03/06/jeffersons-arguments-for-nullification-and-limited-government/ (last visited Nov. 6, 2012).

^{53.} Powell, *supra* note 25, at 717–18.

^{54.} The General Assembly of Virginia Report of Jan. 7, 1800, in We the States, supra note 26, at 221–22.

sult, Madison never actually supported Jefferson's conception of nullification as recognizing an individual state's authority to declare federal law null and void within that state; instead, he supported a different theory altogether. ⁵⁵ Indeed, Madison's interposition at least attempted to remain within the confines of the Constitution, even while implicitly questioning the Supreme Court's role as the only arbiter of the constitutionality of federal acts, while Jefferson's nullification implicitly stated that states could individually void federal law.

Furthermore, later in life, after Jefferson's Kentucky Resolution and Madison's own Virginia Resolution and Report on the Resolutions were being used during the Nullification Crisis of 1832, Madison publicly denounced his and Jefferson's prior statements that were taken as supporting nullification by individual states, which had become synonymous with interposition, as a legal means of opposing federal law.⁵⁶ In a letter to Congressman Edward Everett, which was printed in the prominent political magazine North American Review, Madison clarified the role of the states in the framework of the Constitution.⁵⁷ He stated that by acceding to the compact, the states were thusly bound to follow it to the letter.⁵⁸ Furthermore, the compact was not just between the states and the federal government, but between the states as constituting "the people thereof one people for certain purposes," and thus the compact could not be voided or altered at the will of any one state.⁵⁹ Indeed, leaving questions of constitutional interpretation to the individual states would undermine the principle of national uniformity in applying federal law.60

Madison also reasserted and defended the Supreme Court's supremacy on constitutional and federal issues, and also its integral role in securing the "safe and successful operation" of the federal Constitu-

^{55.} See Miller & Howell, supra note 25, at 18–20 (citing Madison's use of the term "interpose" and other indicators as evidence of the divergence of his and Jefferson's theories).

^{56.} ROBERT A. RUTLAND, JAMES MADISON: THE FOUNDING FATHER 247–48 (1997); Barry Friedman & Erin F. Delaney, Becoming Supreme: The Federal Foundation of Judicial Supremacy, 111 COLUM. L. REV. 1137, 1154–55 (2011); Powell, supra note 25, at 720–21. Indeed, Madison, who knew Jefferson better than almost anyone, consistently maintained that Jefferson never intended to assert any constitutional right by an individual state to nullify federal law, but instead saw the right as a natural right in line with his understanding of Lockean principles. As a result, the "Principles of '98" as originally conceived included no actual power of individual states to defy federal law. See id. at 720–21; McCoy, supra note 25, at 141, 144–45.

^{57.} RUTLAND, *supra* note 56, at 248; Letter from James Madison to Edward Everett (Aug. 28, 1830), *reprinted in James Madison*: Writings 842, 845–47 (Jack N. Rakove ed., 1999).

^{58.~} Letter from James Madison to Edward Everett, in JAMES MADISON: WRITINGS, supra note 57, at 845-47.

^{59.} Id. at 843.

^{60.} *Id.* at 842–45.

tion, specifically noting the "utter inefficiency of a supremacy in a law of the land, without a supremacy in the exposition and execution of the law."61 Accordingly, he rejected the Calhounian attempt to give the theory of nullification a "practical scope" by providing that a state's nullifying act could be voided with a three-fourths vote of the whole states, finding that this would essentially allow "the smallest fraction over 1/4 of the U.S." to dictate the law of the United States and the meaning of the Constitution to the remaining states. 62 Indeed, he continued, "[w]hat the fate of the Constitution of the U.S. would be if a small portion of States could expunge parts of it particularly valued by a large majority, can have but one answer."63 Madison—once involved in creating the theoretical foundation for the theory of nullification—eventually denounced the entire idea that states could independently defy federal law through extra-constitutional means as but one of his "political errors." Thus, advocates of nullification as a legitimate constitutional theory appropriately avoid invoking Madison's name in support thereof, as he repeatedly rejected and refuted the fundamental bases of the theory.

2. The Embargoes of 1807-1808, *United States v. Peters*, & Georgia's Attempt at Nullification

In an ironic twist of fortunes, Jefferson, too, found himself on the opposite side of the nullification debate even before Madison. During his second term as President, Jefferson's administration—in response to the British practice of impressments and British attacks on U.S. merchant and naval vessels off the east coast—called on Congress to enact a law in 1807 that prohibited ships headed for foreign ports from leaving U.S. ports; Congress obliged in December of that year. 65 However, a loophole in the law was immediately identified; vessels engaged in "coasting" trade could simply divert to Europe or the West Indies after clearing U.S. ports, rendering the embargo impotent. 66 Congress enacted a second embargo in January 1808 that attempted to close this loophole by imposing harsher penalties for violations, followed by a third in March 1808 with still more drastic penalties.⁶⁷ The embargoes were met with almost immediate resistance from some and an outright refusal to abide by them by others, with shippers leaving ports without papers and the militias refusing to suppress illegal trade.⁶⁸

63. Id. at 849.

^{61.} Id. at 847.

^{62.} Id.

^{64.} RUTLAND, supra note 56, at 248.

^{65.} ZAVODNYIK, supra note 7, at 98.

^{66.} McDonald, supra note 35, at 62.

^{67.} See id. (stating that fines of \$10,000 and forfeiture of all goods were levied for violations of the embargo).

^{68.} Id. at 63.

Jefferson became obsessed with enforcing the acts, and as a result employed the army and navy-not to protect the American shippers, but to enforce the embargoes.⁶⁹ Throughout the summer of 1808, Jefferson signed more and more oppressive legislation, some of which expanded the powers of federal collectors to include seizure of property anywhere and at any time. 70 Thus, Jefferson had become the specter he fought against less than a decade prior, imposing such oppressive federal power on the states that his own theory of nullification, which he espoused in the Kentucky Resolution, was modified and used against him; instead of state legislatures enacting nullification and interposition resolutions, state judges and juries actively prevented enforcement of the oppressive laws. 71 One supporter of these actions said that if they perceived acts as unconstitutional, the state legislatures, "whose members are sworn to support the Constitution, may refuse assistance, aid or cooperation."72 Ironically, the *Richmond Enquirer* took the opposite position it had staked just a decade earlier, stating that if the doctrines of nullification went into effect, "the chain that binds together these States will soon be dissolved. If it be at any time within the power of a State to evade the force of the General Government . . . the Union of States will be like a rope of sand."⁷³ The activities of the states were not without effect, especially as the threat of secession was made implicitly by both Massachusetts and Connecticut, causing northern supporters of the embargo to call for its repeal; Jefferson complied, signing a repeal of the acts on March 1, 1809.74

The specter of nullification rose again several more times throughout the early years of the Union, including under the administration of James Madison, who faced outright defiance by state governors. Most prominently, Governor Thomas McKean of Pennsylvania refused to comply with a federal prize court's determination of ownership of a Revolutionary War prize. The prize court had ruled in favor of a Captain Gideon Olmstead, but the state denied the court's authority, and the Pennsylvania Legislature passed a law appropriating the funds from the sale of the vessel for the use of the state. Captain Olmstead eventually sued in federal district court, and Judge Richard Peters ruled in his fa-

^{69.} *Id.*

^{70.} Id

^{71.} Id. at 63–64. In reality, the actions were closer to interposition, as state officials were actively refusing to aid in enforcement of the law, but not actually obstructing its enforcement. See supra notes 22-25 and accompanying text.

^{72.} $\emph{Id.}$ at 64 (statement of Connecticut Representative Samuel W. Dana).

^{73.} Id.

^{74.} Id. at 65-66.

^{75.} Id. at 64.

^{76.} *Id.* at 64–65.

vor. 77 Governor McKean sent a message to the state legislature denying the court's jurisdiction, and the legislature accordingly instructed Governor McKean to resist the court's order. 78 Captain Olmstead sought a writ of mandamus from the Supreme Court requiring Judge Peters to enforce his previous ruling, which Captain Olmstead received in 1809.⁷⁹ In United States v. Peters, 80 Chief Justice John Marshall delivered a brief but pointed opinion, stating that if the state legislatures had the power to "annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the [C]onstitution itself becomes a solemn mockery."81 Indeed, the Court noted that the people of Pennsylvania and every state had an interest in resisting "principles so destructive of the Union" because of the discord and chaos they would cause, and as a result ruled in favor of Captain Olmstead.82 Governor McKean continued to refuse to comply, and instead, he doubled down by dispatching the state militia to surround the home of the former state treasurer, who had control of the disputed prize funds, to prevent enforcement of the Court's decree. 83 In response, the federal marshal charged with serving the process summoned a posse of two thousand men, setting the stage for a bloody showdown.⁸⁴ Newly installed President James Madison refused a request from Governor McKean to stand with him in defiance to the Supreme Court's ruling, thereby solidifying Madison's stance that the states had no right or power to defy federal court rulings, and especially not those of the Supreme Court.85 Without this key support, Pennsylvania was forced to retreat in its position, thereby avoiding actual armed conflict between the state and the federal government.86

However, the starkest example of outright defiance of a federal order, beyond that ever contemplated by either Jefferson or Madison, came several decades later in 1830 when Georgia refused in succession several orders of the Supreme Court. 87 Georgia had passed several laws in violation of treaties made under the authority of the United States with the Cherokee Indians. President Andrew Jackson—elected on a

^{77.} Id.

^{78.} Id.

^{79.} Id

^{80.} United States v. Peters, 9 U.S. 115 (1809).

^{81.} *Id.* at 136.

^{82.} Id. at 136, 141.

^{83.} McDonald, supra note 35, at 65.

^{84.} *Id.*

^{85.} *Id.*; James Madison, *The General Assembly of Virginia Report of Jan. 7, 1800*, in WE THE STATES, supra note 26.

^{86.} McDonald, *supra* note 35, at 65. Madison would again face defiance from the chief executive of a state when the governor of Massachusetts, on advice from the state supreme court that he alone had authority to call out the militia, refused to muster state militiamen to serve the United States in the war of 1812, finding that no foreign invasion or domestic insurrection existed to give the president authority to federalize the state militia. *See id.* at 66–67.

^{87.} Id. at 99-103.

platform of states' rights—declared that he had "no power" over the laws of the state of Georgia, and refused to intervene. So On one occasion, Georgia officials arrested, tried, and sentenced a Cherokee man named Corn Tassel to hang for the murder of another Indian in the Cherokee territory. Tassel appealed, claiming the state law allowing the trial was unconstitutional, and the Supreme Court agreed, ordering that Tassel be released. However, the governor and legislature of Georgia refused, and the legislature enjoined any state officers from enforcing the mandate of the Court. Subsequently, Tassel was executed in outright defiance of the Court order, resulting in what one Supreme Court historian called "practical Nullification."

Tassel's execution was not the end of Georgia's struggle against the supremacy of federal law and the Supreme Court's role as the final constitutional arbiter. One of the disputed Georgia laws required whites living on Cherokee land to obtain a license and swear an oath of allegiance to the state or be banished therefrom. 93 Two New England missionaries living on the Cherokee territory refused to get licenses and were banished from the state, but refused to go.94 They were subsequently arrested, tried, and sentenced to four years' hard labor; they appealed to the Supreme Court, which granted certiorari in 1831.95 The Court ordered Georgia's governor and attorney general to appear and argue the case for the state, but they refused, having no intentions of abiding by an adverse decision. 96 Nevertheless, the Court heard arguments on behalf of the missionaries in early 1832.97 Only a month later, Chief Justice John Marshall announced the decision of the Court in the case of Worchester v. Georgia.98 In it, the Court declared all of the Georgia statutes governing the Cherokee nation unconstitutional, stating that "[t]he acts of Georgia [are] repugnant to the [C]onstitution, laws, and treaties of the United States," and cleared the missionaries of all charges, ordering that they be released. 99 Georgia did not comply; instead, its governor and attorney general declared that they were ready

^{88.} *Id.* at 100.

^{89.} Id. at 101.

^{90.} *Id.*

^{91.} Id.

^{92.} Id. at 101-02 (statement of Supreme Court observer Charles Warren).

^{93.} Id. at 102.

^{94.} Id.

^{95.} *Id.*

^{96.} Edwin A. Miles, *After John Marshall's Decision:* Worcester v. Georgia and the Nullification Crisis, 39 J. S. Legal Hist. 519, 527 (1973).

^{97.} $\it Id.$; see also Matthew L. Sundquist, Worcester v. Georgia: A Breakdown in the Separation of Powers, 35 Am. INDIAN L. REV. 239, 240–43 (2011).

^{98.} Worchester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

^{99.} Id. at 561; see also Miles, supra note 96.

to forcibly prevent implementation of the order if necessary.¹⁰⁰ In addition, President Jackson again refused to assist in enforcing the Court's order, being famously attributed with saying "[w]ell: John Marshall has made his order, now let him enforce it!" While there is no direct evidence indicating that he did in fact ever say this, ¹⁰² he did state that "[t]he decision of the [S]upreme [C]ourt has fell still born, and they find that they cannot coerce Georgia to yield to its mandate." Thus, Georgia engaged in "practical nullification" again by defying a direct decree of the Court.

The nullification crisis in Georgia resolved itself ironically: Georgia's governor released the two missionaries about a year later to avoid having Georgia lumped in with South Carolina and its outright defiance of federal law. ¹⁰⁵ Indeed, Georgia's defiance of a Supreme Court decree was seen by many at the time as much less of a threat to the Union than South Carolina's threat of armed defiance against federal tariff laws in 1832

3. The Nullification Crisis of 1832

The Nullification Crisis of 1832¹⁰⁶ began long before 1832, catalyzing with the passage of the Tariff of 1828 and the political rise of John C. Calhoun as the banner-bearer of nullification. Calhoun was originally a prominent nationalist as a member of the House of Representatives for South Carolina and as Secretary of War under President James Monroe. ¹⁰⁷ In those roles he advocated for various federal actions such as protective tariffs, a national bank, and public works projects to expand and strengthen infrastructure. ¹⁰⁸ Indeed, early in his career, he sought to enhance national unity, which he equated with national strength, through those federal activities. ¹⁰⁹ Similarly, South Carolina was staunchly nationalistic up until the mid-1820s. ¹¹⁰

^{100.} McDonald, *supra* note 35, at 103. There is no indication, however, that Georgia actually took any steps to begin mobilizing in case they would need to make good on their threat. $See\ id.$

^{101.} Miles, supra note 96, at 519.

^{102.} *Id.* at 528. Jackson was attributed, however, with saying that if he was "called on to support the decree of the Court he will call on those who have brought about the decision to enforce it." *Id.* at 528–29.

^{103.} Letter from Andrew Jackson to John Coffee (Apr. 7, 1832), in 4 CORRESPONDENCE OF ANDREW JACKSON 429, 430 (John Spencer Bassett ed., 1929).

^{104.} See supra note 92 and accompanying text.

^{105.} Miles, supra note 96, at 519-20.

^{106.} For a full treatment of the history leading up to this pre-Civil War show of force by a state, see WILLIAM W. FREEHLING, PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA, 1816-1836, at 89–299 (1966).

 $^{107.\}quad 1$ Charles M. Wiltse & John C. Calhoun, Nationalist, 1782-1828, at 47, 142 (1944).

 $^{108.\}$ $\it Id.$ at 103–54. See also McDonald, supra note 35, at 103; Zavodnyik, supra note 7, at 166.

^{109.} WILTSE & CALHOUN, supra note 107, at 103-54.

^{110.} McDonald, supra note 35, at 103.

However, enactment of an oppressive tariff in 1824, which coincided with a severe national economic downturn that especially affected the South, began a reversal of sentiments for both South Carolina and its spokesman, Calhoun.¹¹¹ As economic conditions worsened, South Carolina increasingly called for action against the Tariff; and action they got, though not in the form they had requested.¹¹² Instead of a repeal of the Tariff of 1824, Congress passed the Tariff of 1828, referred to as the Tariff of Abominations by southern slave states, which provoked both Calhoun and South Carolina, formerly ardent nationalists, to lead a renewed cry for nullification.¹¹³

In spite of his national ambitions (believing Jackson's vow to be a one-term president, Calhoun felt he would be the favorite candidate in the 1832 election), Calhoun was more concerned with preserving his power base of support in South Carolina. As a result, he anonymously authored the *South Carolina Exposition and Protest*, which became the standard and authoritative defense of the doctrine of nullification. It is, he echoed the sentiments expressed in the Kentucky and Virginia Resolutions, but made the argument in support of nullification much more aggressively, citing to the framing, the Constitution, and the debates over ratification.

He began with the premise that irresponsible power was incompatible with liberty. The Constitution was meant to be a restraint of power, but the system of checks and balances it created had broken down under population growth and democratization, resulting in a system of majority rule, which Calhoun said the Framers had rejected. As a permanent minority to the North, the only way for the South to protect itself was through the compact that had created the Union. Calhoun rested this argument on the Tenth Amendment and Madison's Report on the Resolutions, stating that those powers not enumerated were reserved to the proper exercise of the sovereign people of the sovereign states, severally, who had compacted in that capacity—and not as a na-

112. *Id*

^{111.} *Id.*

^{113.} STATE DOCUMENTS ON FEDERAL RELATIONS, supra note 44, at 152.

^{114.} McDonald, supra note 35, at 104.

^{115.} Id.; see also ZAVODNYIK, supra note 7, at 166.

^{116.} McDonald, supra note 35, at 105.

^{117.} Id. at 104–105.

^{118.} *Id.* at 105; Lacy K. Ford, *Inventing the Concurrent Majority: Madison, Calhoun, and the Problem of Majoritarianism in American Political Thought,* J. S. HIST., Feb. 1994, at 19, 44. Ironically, Calhoun invoked the writings of James Madison in his 1800 Report on the Resolutions in support of his Doctrine of the Concurrent Majority, which directly attacked Madison's earlier theory that the diversity and size of large republics would protect against the tyranny of the majority. *Id.* at 44–45.

^{119.} McDonald, supra note 35, at 105.

tional whole—to create the United States. ¹²⁰ As a result, he took the rather odd position that while it was questionable whether state legislatures could interpose, it was undeniably the right of state conventions, which ratified the Constitution, to declare federal laws unconstitutional and to decide how they would be rendered inoperable within their state. ¹²¹

South Carolina widely circulated Calhoun's *Exposition*, and the specter of nullification rose again. ¹²² Several more southern states followed suit, passing resolutions that echoed Calhoun's arguments in the *Exposition* to lesser degrees, but all with the same basic assertion that the federal government had exceeded its enumerated powers; however, most of these states simply urged the federal government to repeal the oppressive tariffs. ¹²³ Other states rebuked the anti-tariff resolutions. ¹²⁴

While the *Exposition* caused widespread debate on the topic of nullification, it failed to effect a repeal of the 1828 tariff.¹²⁵ Undeterred, Calhoun and other southerners sought to effect a repeal of the tariff through a coalition of western and southern states.¹²⁶ For this reason, Senator Robert Hayne of South Carolina took to the Senate floor in 1830 in support of the western states' demand for free lands in the public domain in hopes of gaining the western states' support against protectionism. ¹²⁷ This proved disastrous for the proponents of the theory of nullification, as Daniel Webster also took to the Senate floor and shifted the debate from public lands to a grand discussion of nullification and the nature of the Union in what would become one of the most celebrated Senate addresses in American history.¹²⁸

After Hayne aptly articulated Calhoun's theory of nullification as laid down in the *Exposition*, Webster delivered a spellbinding three-hour retort that carried over to the next day, in which he rejected the compact theory of the Constitution, stating instead that the Constitution was a creation of the whole people. He argued that if every state had the power to determine the constitutionality of federal laws, then the United States would be nothing more than a confederation. Webster further argued that the Virginia and Kentucky Resolutions merely confirmed the states' right to complain about federal excesses, not nullification as it was being forwarded then, thereby invoking for his cause

121. ZAVODNYIK, supra note 7, at 167.

127. Id. at 105-06.

^{120.} Id

^{122.} Id. at 166-169; McDonald, supra note 35, at 104-105.

^{123.} See State Documents on Federal Relations, supra note 44, at 152–57 (discussing the resolutions of Georgia, Mississippi, and Virginia).

^{124.} See id. at 158–63 (discussing the resolutions of Kentucky, Louisiana, and Pennsylvania).

^{125.} McDonald, supra note 35, at 105.

^{126.} Id.

^{128.} ZAVODNYIK, supra note 7, at 169.

^{129.} McDonald, supra note 35, at 106.

^{130.} ZAVODNYIK, supra note 7, at 170.

Madison's argument from the Report on the Resolutions.¹³¹ Indeed, even the New England states had not attempted actual nullification in resisting the embargoes of 1808 and the call for militiamen during the War of 1812.¹³² Webster closed with a startlingly prescient foreshadowing of the secessionist consequences that the theory of nullification would have on the country in little more than a quarter century.¹³³ He concluded the speech with a powerful rebuke of the secessionist tendencies and disunion implied by the theory of nullification, rejecting its supporters' slogan of "Liberty first and Union afterwards," replacing it with his own now-famous cry of "Liberty and Union, now and forever, one and inseparable!" 134

With this one speech, the states' rights movement—at least that faction of it that embraced the concept of nullification—was transformed from a key to liberty into a divisive force threatening to tear the Union apart. 135 Calhoun's resolve only hardened as he threw off entirely his nationalistic sensibilities and aspirations and became committed to South Carolina and its cause. 136 He subsequently published the Fort Hill Address in the Pendleton, South Carolina Messenger, which elaborated the arguments he made in the Exposition.¹³⁷ In it, Calhoun forwarded his concept of the concurrent majority. His view was that the actions of society's absolute majority, when enacting laws that would negatively affect or oppress distinct minority classes or interests (the concurrent majorities), required the approval of the concurrent majorities to be effective. The effect would be giving these concurrent majorities a veto of the actions of the absolute majority. 138 This was because sovereignty was not divisible, Calhoun said, and thus sovereignty could only be given to the creation of the compact—the federal government—if it was surrendered entirely, which the original parties to the compact had not done. 139 Instead, the states were as independent governments, retained with the

^{131.} *Id. See also* James Madison, *The General Assembly of Virginia Report of Jan. 7, 1800, in* WE THE STATES, *supra* note 26, at 220 (stating that the resolutions were not a usurpation of the judicial power to render decisions on constitutional disputes, but instead were "expressions of opinion, *unaccompanied with any other effect*, that they may produce on opinion, by exciting reflection") (emphasis added); McCoy, *supra* note 25, at 141–42.

^{132.} Id.

^{133. 6} Reg. Deb. 80 (1830).

^{134.} Id.

^{135.} ZAVODNYIK, supra note 7, at 170.

^{136.} See McDonald, supra note 35, at 107.

^{137.} Id. See generally The Fort Hill Address of John C. Calhoun, in WE THE STATES, supra note 26, at 277–96.

^{138.} See McDonald, supra note 35, at 107; The Fort Hill Address of John C. Calhoun, in We The States, supra note 26, at 284–85. For a more extensive treatment of Calhoun's concept of the concurrent majority, see generally Ford, supra note 118.

^{139.} The Fort Hill Address of John C. Calhoun, in We The States, supra note 26, at 284-285.

ultimate sovereignty and the ability to judge the actions of the federal government in accordance with the compact. ¹⁴⁰ Calhoun saw this as the only way to solve the majoritarian ills that he felt plagued the nation. ¹⁴¹

The Fort Hill Address was widely circulated and elicited favorable editorial comments, but failed to move either South Carolina, or any other state, to act against the federal government; nevertheless, South Carolina remained agitated by the high tariffs. 142 Congress again took up the issue of tariffs in 1832, seemingly ready to reduce the levels on most items as the national debt was decreasing, eliminating the need for such high tariff levels. 143 But instead of significantly decreasing the tariffs, Congress rolled the levels back in such a way as to benefit northern manufacturing and industrial interests, without substantively easing the tariff's effect on southern states. 144 South Carolina was furious, and promptly followed Calhoun's formula, authorizing the election of a state constitutional convention on nullification, which adopted an Ordinance of Nullification to "nullify" the Tariff of 1832 by declaring it and the Tariff of 1828 unconstitutional, null, and void. 145 South Carolina went beyond Calhoun's formula, however, adding that it would "not submit to the application of force, on the part of the Federal Government, to reduce [the] State to obedience," and that the bonds of the Union would be dissolved if such was attempted. 146 Reaction to the ordinance was almost universally negative, with even southern states advising South Carolina to rescind the measure. 147 Calhoun himself opposed the last provision, hoping instead that the federal government would resort to the Supreme Court to enforce the tariff, as the state could simply ignore its orders, just as Georgia had done just a year earlier. 148

This defiant stance forced President Jackson, formerly thought to be a staunch defender of states' rights, to back the supremacy of the federal government over constitutional matters. ¹⁴⁹ In his Nullification Proclamation of December 10, 1832, Jackson took a hard line against South Carolina's actions, stating that the only two remedies for unconstitutional legislation were judicial review or amending the Constitution and that nullification was "contradicted expressly by the letter of the Constitution." ¹⁵⁰ Jackson also noted that South Carolina had not "appealed in

^{140.} Id. at 285–87.

^{141.} See Ford, supra note 118, at 44-46.

^{142.} MCDONALD, supra note 35, at 108.

^{143.} ZAVODNYIK, supra note 7, at 171.

^{144.} Id.

^{145.} *Id.* at 172; McDonald, *supra* note 35, at 108; State Documents on Federal Relations, *supra* note 44, at 169–173.

^{146.} McDonald, *supra* note 35, at 108; State Documents on Federal Relations, *supra* note 44, at 172.

^{147.} ZAVODNYIK, supra note 7, at 172.

^{148.} Id.

^{149.} Id.

^{150.} *Id.* For a commentary on the irony of this reversal of position from the one taken in the Georgia Nullification crisis, see Friedman & Delaney, *supra* note 56, at 1155–57.

her own name to those tribunals which the Constitution has provided," citing the Supremacy Clause and the Court's "arising under" jurisdiction as support for the singular legitimacy of the Supreme Court as the final arbiter of the constitutionality of laws. ¹⁵¹ While Jackson had no desire to use force against South Carolina, he nonetheless felt that "disunion by armed force [was] treason," and requested that Congress pass what would become known as the "force bill," which would authorize the use of force to collect tariffs. ¹⁵² In response, South Carolina's newly elected governor—formerly senator—Robert Hayne advised the people of the state to arm themselves for resistance, and the stage was set for a bloody conflict. ¹⁵³ Fortunately, the standoff was broken by Henry Clay, who introduced a compromise tariff that reduced rates over twenty years to near pre-1824 levels. ¹⁵⁴ The tariff was quickly passed in both chambers of Congress, and the South Carolina convention repealed the nullification ordinance. ¹⁵⁵

The standoff was over, and armed conflict was avoided, at least for the time. ¹⁵⁶ However, the ramifications of the crisis were inescapable, as the doctrine of nullification, as expounded by Calhoun, had become a continuous source of discord, threatening the very foundations of the Union. ¹⁵⁷ Indeed, the doctrine of nullification sowed the seeds of secession, a bitter fruit that would become ripe little more than a quarter century later. ¹⁵⁸

4. Nullification of the Fugitive Slave Acts of 1793 & 1850

In yet another ironic twist of fate, the southern states that had once trumpeted in support of nullification found themselves on the other side of the argument, as northern states utilized the theory to defy the Fugitive Slave Act of 1793. The Act gave slaveholders the right to recapture escaped slaves in northern states, and provided for an extradition process devoid of the basic protections the Bill of Rights required. 160

^{151.} Friedman & Delaney, supra note 56, at 1156.

^{152.} ZAVODNYIK, supra note 7, at 173-74.

^{153.} McDonald, supra note 35, at 109.

^{154.} *Id.* This action was likely a trick, as the extended period of reductions would allow pro-tariff forces to amend the laws and keep tariffs high. For a full discussion, see ZAVODNYIK, *supra* note 7, at 175.

^{155.} ZAVODNYIK, *supra* note 7, at 175. South Carolina stayed defiant to the end, however, formally nullifying the force bill before disbanding the constitutional convention. McDonald, *supra* note 35, at 110.

^{156.} See ZAVODNYIK, supra note 7, at 175; McDonald, supra note 35, at 110.

^{157.} See ZAVODNYIK, supra note 7, at 175; see generally McDonald, supra note 35, at 119–120.

^{158.} See Freehling, supra note 106.

^{159.} Fugitive Slave Act of Feb. 12, 1793, 1 Stat. 302 (1793).

^{160.} ZAVODNYIK, supra note 7, at 247–48.

This legislation set the stage for a state court's first attempt to nullify a federal law while simultaneously ignoring a directive of the Supreme Court in the case of *Ableman v. Booth*.

The Supreme Court's involvement began, however, in the case of *Prigg v. Pennsylvania*. ¹⁶¹ Pennsylvania had passed a law in 1826 directly opposing enforcement of the Fugitive Slave Act of 1793, making it a felony to remove any "negro or mulatto" from the state by way of force or violence for the purpose of putting them into or returning them to slavery. ¹⁶² Edward Prigg and three associates were arrested, indicted, and convicted of a felony under this statute in 1837 for removing an escaped slave from Pennsylvania to Maryland to return her to slavery. ¹⁶³ Prigg immediately appealed to the Pennsylvania Supreme Court, which affirmed the decision in 1840. ¹⁶⁴ Prigg then appealed to the U.S. Supreme Court, arguing that the Pennsylvania law was unconstitutional because it directly contradicted an act of Congress. ¹⁶⁵

The Court agreed, finding that Congress had exclusive power over the subject of escaped slaves, and thus Pennsylvania had no power to supplement or contradict the federal legislation. The most important portion of the Court's decision, however, was not necessarily its main holding. Instead, it was the Court's statement in dicta that state magistrates were not *required* to enforce the Fugitive Slave Act, which purported to require the assistance of magistrates in returning fugitive slaves, but "may, if they choose, exercise the authority, unless prohibited by state legislation." This caused northern states to enact a wave of "personal liberty laws." These laws latched onto this permissive Supreme Court language and accordingly prohibited state magistrates or any other state officials from actively assisting in the enforcement of the Fugitive Slave Act. 169 Thus, the Supreme Court's own language was being used against the federal government to resist enforcement of the

^{161.} Prigg v. Pennsylvania, 41 U.S. 539 (1842).

^{162.} See id. at 608 ("If any person or persons shall, from and after the passing of the act, by force and violence, take and carry away, or cause to be taken and carried away, and shall, by fraud or false pretence, seduce, or cause to be seduced, or shall attempt to take, carry away or seduce, any negro or mulatto, from any part of that commonwealth, with a design and intention of selling and disposing of, or causing to be sold, or of keeping and detaining, or of causing to be kept and detained, such negro or mulatto, as a slave or servant for life, or for any term whatsoever; every such person or persons, his or their aiders or abettors, shall, on conviction thereof, be deemed guilty of felony") (emphasis added).

^{163.} *Id.* at 556; Don E. Fehrenbacher, The Slaveholding Republic: An Account of the United States Government's Relations to Slavery 219 (Ward N. McAfee ed., 2001).

^{164.} Prigg; 41 U.S. at 555–57.

^{165.} Id. at 558.

^{166.} Id. at 618, 622.

^{167.} Id. at 622.

^{168.} McDonald, supra note 35, at 158; Fehrenbacher, supra note 163, at 222.

^{169.} Thomas D. Morris, Free Men All: The Personal Liberty Laws of the North, 1780-1861, at 103-04, 109-07 (1974); see also Fehrenbacher, supra note 163, at 222

Fugitive Slave Act of 1793 in a manner similar to the uncooperative federalism that would become the trend a century and a half later. ¹⁷⁰

This turn of events incensed southern slave states, who clamored for the next eight years for federal assistance in the return of escaped slaves and a solution to the enactment of the "personal liberty laws." ¹⁷¹ The slave owners would get a solution; however, it would be in a form and at a time that would set the stage for yet another nullification showdown between the states and the federal government. Passed as part of the Compromise of 1850, 173 though hardly a compromise on the issue of slavery, the Fugitive Slave Act of 1850¹⁷⁴ responded to southern calls for aid in capturing escaped slaves by effectively eliminating for slaves the traditional judicial protections of habeas corpus, the right to testify on their own behalf, the right to a jury trial, and the right to appeal of the final decisions. 175 Instead, suspected slaves were brought before a federal commissioner, who had little incentive to do anything but return suspected slaves to the South, for which he was paid ten dollars: he was paid only five dollars if he allowed the suspected slave to remain in the North. 176 In addition, severe penalties were assessed for interference with the execution of the law. 177

The South demanded stringent and heavy-handed enforcement of the reinforced law, supporting the very same federal power against which it had fought not a quarter century earlier. The law was an expansive exercise of federal power, "command[ing]" all citizens "to aid and assist in the prompt and efficient execution" of the law, 19 and was almost certainly unconstitutional as written and enacted. As one historian noted, "[i]n effect the act required every able-bodied man in the North to make himself available for service in a federal law enforcement agency for the purpose of sending others into bondage. Several Northern states sought to frustrate the Act's enforcement by enacting statutes that explicitly gave suspected slaves the rights the Act had deprived them of. In addition, abolitionists advised citizens to not cooperate with federal officials attempting to apprehend fugitive slaves,

^{170.} See infra, note 231 and accompanying text.

^{171.} McDonald, supra note 35, at 158.

^{172.} See id. at 158-60.

^{173.} See, e.g., id. at 156; ZAVODNYIK, supra note 7, at 241.

^{174.} Fugitive Slave Act of 1850, 9 Stat. 462 (1850) (repealed 1864).

^{175.} See id. at 462–464.

^{176.} Id. at 464.

^{177.} Id

^{178.} McDonald, supra note 35, at 158.

^{179.} ZAVODNYIK, supra note 7, at 248.

^{180.} Id

^{181.} See FEHRENBACHER, supra note 163, at 238 (noting that six state legislatures enacted statutes of this kind between 1854 and 1858).

while state officials arrested slave catchers and charged them with kidnapping and assault. But it was Wisconsin's outright opposition to judicial enforcement of the federal law that would lead to one of the most significant Supreme Court rulings of the nineteenth century in the case of *Ableman v. Booth.* 185

The Ableman case began its journey to the Supreme Court much as the Prigg case had: with the assault and capture of a suspected fugitive slave. 186 Joshua Glover, a suspected fugitive slave, was assaulted and captured in Milwaukee, Wisconsin in March of 1854.¹⁸⁷ In spite of officials' efforts to keep it secret, word of Glover's violent arrest spread quickly across the anti-slavery state and within days a large crowd, led by local abolitionist leader and newspaper editor Sherman M. Booth, stormed the jail where Glover was held and released him from custody. 188 Several of the instigators and leaders of the mob, including Booth, were later arrested for violating the Fugitive Slave Act of 1850. 189 Booth applied for and was granted a writ of habeas corpus from Wisconsin Supreme Court Justice Abram D. Smith in May of 1854. 190 In granting the writ, Justice Smith declared the Fugitive Slave Act of 1850 unconstitutional, 191 adopting the arguments presented by Booth's attorney, which echoed the compact theory arguments of John C. Calhoun, specifically that the states—and not the federal government or the whole people are sovereign, and that if the Supreme Court were the sole arbiter of constitutional disputes, the federal government would consume state sovereignty in contravention of the compact, leading to "consolidation [and] despotism." In addition, Justice Smith also declared that Congress had no power to legislate on the subject of escaped slaves, attempting to overrule the Supreme Court's decision in Prigg, which stated that Congress did have such authority. 193 Thus, Justice Smith em-

^{182.} ZAVODNYIK, supra note 7, at 249.

^{183.} See McDonald, supra note 35, at 174 ("For sheer stubbornness of resistance, no state topped Wisconsin.").

^{184.} See, e.g., Alfred H. Kelly et al., The American Constitution: Its Origins and Development 238, 278–79 (7th ed., 1991); Fehrenbacher, supra note 163, at 239–40, 291.

^{185.} Ableman v. Booth, 62 U.S. 506 (1858).

^{186.} Id. at 507.

^{187.} See In re Booth, 3 Wis. 157 (1854).

^{188.} See Jeffrey Schmitt, Rethinking Ableman v. Booth and States' Rights in Wisconsin, 9 Virg. L. Rev. 1315, 1323–25 (2007).

^{189.} FEHRENBACHER, supra note 163, at 236.

^{190.} In re Booth, 3 Wis 1, 8 (1854). This is one area of law, unsettled at the time, that the *Ableman* case resolved—that a state court may not issue habeas corpus on a federal prisoner. See *Ableman*, 62 U.S. at 515. ("[N]o State can authorize one of its judges or courts to exercise judicial power, by habeas corpus or otherwise, within the jurisdiction of another and independent Government.").

^{191.} In re Booth, 3 Wis. at 1-2.

^{192.} Id. at 23-24, 25.

^{193.} *Id.* at 33–34, 36–37. At least one historian has agreed with Justice Smith, noting that Article IV, section 2 of the Constitution imposed a duty of comity in fugitive slave laws of each state on the several states, but did not empower the federal government to legis-

braced Calhoun's nullification with open arms, granting the writ of habeas corpus and ordering Booth released from federal custody. His decision was upheld by the whole of the Wisconsin Supreme Court, which also declared the Fugitive Slave Act unconstitutional, albeit on narrower grounds. The decision led to immediate accusations by several southern states that the North was engaging in the very same nullification actions it had previously decried when engaged in by the South less than a quarter century earlier. He will be supported by the south less than a quarter century earlier.

Booth's trial was still pending before the United States District Court in Madison, however, and the District Court would not be so sympathetic to constitutional arguments against its own and the Supreme Court's authority. Accordingly, Booth was indicted by a federal grand jury on those pending charges, arrested again, and subsequently found guilty. Booth again filed for a writ of habeas corpus to the Wisconsin Supreme Court, and, unsurprisingly, he again obtained it, the court again finding his imprisonment illegal as a consequence of finding the Fugitive Slave Law unconstitutional. He court also explicitly found and exercised jurisdiction over the United States District Court, intervening in its proceedings and ordering the release of a prisoner convicted under its authority. Hese findings, asserted the court, would not result in confusion and a multiplicity of the interpretations of the Constitution, but instead would effectuate the system of checks and balances imagined by the Framers.

The United States Attorney General petitioned the Supreme Court for review in 1856, and the Court issued a writ of error to the Wisconsin Supreme Court. ²⁰¹ The court never responded to the writ, and refused to send the case record to the U.S. Supreme Court. ²⁰² The case was none-theless docketed and argued without counsel for Wisconsin being present. ²⁰³

late on the matter, nor did Article 1, section 8 of the Constitution list any power to legislate on the subject. See ZAVODNYIK, supra note 7, at 247.

^{194.} *In re Booth*, 3 Wis. at 49.

^{195.} *Id.* at 64–66. Justice Smith reiterated his previous position in a concurring decision, stating that to accord the Supreme Court the ability to render final judgment on the Constitution would "prostrat[e] the creators at the feet of the creature." *Id.* at 101 (Smith, J., concurring).

^{196.} See ZAVODNYIK, supra note 7, at 248.

 $^{197. \}quad Ableman \ v. \ Booth, \ 62 \ U.S. \ 506, \ 509-10 \ (1858).$

^{198.} In re Booth, 3 Wis. 157, 198, 199–200, 212 (1854).

^{199.} Id. at 199-200.

^{200.} Id.

^{201.} Ableman, 62 U.S. at 511-512.

^{202.} Id. at 512-13.

^{203.} Id. at 513.

The Supreme Court handed down its decision, written by Chief Justice Roger B. Taney, in late 1858. In it, the Court unanimously reversed the decision of the Wisconsin Supreme Court, unequivocally reasserting the Court's appellate jurisdiction over "all cases in law and equity arising under the Constitution and laws of the United States, and that in such cases, as well as the others there enumerated," and firmly rejected the notion that state courts had any power to rule with finality on the constitutionality of federal laws. ²⁰⁴

The Court spent the majority of the opinion countering the states' rights and nullification assertions made by the Wisconsin Supreme Court. It began by recounting the Wisconsin Supreme Court's actions and the arguments it marshaled in support of those actions, noting the novelty of the assertion that state courts could be supreme over the courts of the United States in cases arising under the Constitution and laws of the United States.205 The Court then took the Wisconsin Supreme Court's argument to its necessary logical end, finding that, as a practical matter, its assertion of judicial power in this case would result in the United States not being able to enforce its own laws in its own courts without the permission of the hosting state—a patently absurd result.206 Furthermore, the power claimed would necessarily allow the state court to exercise judicial authority over any laws of the United States, and indeed, every state court in the Union would have this same power when a prisoner of the United States was within its borders. As a result, acts that would result in imprisonment in one state would be deemed innocent in another, resulting in chaos and uneven and inequitable application of federal law.²⁰⁷

This result alone was sufficient to show the destructive consequences that state court nullification would have, as the discord in national laws would result in "revolutions by force of arms" without a single neutral arbiter to resolve conflicts; indeed, the Union could not "have lasted a single year . . . if offences against its laws could not be punished without the consent of the state in which the culprit was found." As a result, "Wisconsin had no more power to authorize the[] proceedings . . . than it would have had if the prisoner had been confined in Michigan, or in any other State of the Union, for an offence against laws of the State in which he was imprisoned." Chief Justice Taney also rejected the idea of unitary sovereignty, instead forwarding his own conception of dual sovereignty, stating that sovereignty was divided between the two levels of government, and the people had vested the Supreme Court

^{204.} *Id.* at 518, 520–26.

^{205.} Id. at 515.

^{206.} Id.

^{207.} Id.

^{208.} Id. at 521, 515.

^{209.} Id. at 516.

with the power to protect each level's sovereignty from encroachment by the other through the Constitution. ²¹⁰ Indeed, he stated that

Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye.²¹¹

Chief Justice Taney concluded by rejecting the Wisconsin Supreme Court's Calhoun-derived compact theory of the Constitution, firmly asserting instead that the Constitution was formed by "the *people* of the several states," and not as a compact between the states. ²¹² Indeed, the surrender of state power to the federal government was "the voluntary act of the people of the several States, deliberately done, for their own protection and safety against injustice from one another." Furthermore, the clause ²¹⁴ requiring all executive, legislative, and judicial state officers to be bound by oath or affirmation to uphold the Constitution indicated a desire to prevent individual states from evading and resisting the authority of the federal government through extra-constitutional means. ²¹⁵ Thus, it was clear that the Constitution conferred no power more clearly "than the power of this court to decide, ultimately and finally, all cases arising under such Constitution and laws." ²¹⁶

The Supreme Court's aggressive reaffirmation of its own judicial supremacy did literally nothing to stop Wisconsin's defiance. Indeed, the Wisconsin Supreme Court refused to take notice of the Court's mandate, and the state legislature passed judicial nullification resolutions declaring the Court's decision "void and of no force." Wisconsin's governor further vowed to use the power of the state to enforce the Wisconsin Supreme Court's ruling, in essence meaning he was willing to use physical force if necessary. Luckily, the state legislature rejected his request to

^{210.} Id. at 520.

^{211.} *Id.* at 515–16 (emphasis added).

^{212.} Id. at 524.

^{213.} Id.

^{214.} U.S. CONST. art. VI, cl. 3.

^{215.} Ableman, 62 U.S. at 524-25.

^{216.} Id. at 525.

^{217.} FEHRENBACHER, supra note 163, at 238.

use force.²¹⁸ The Court continued to issue orders and Wisconsin continued to ignore them until the firing on Fort Sumter made the decision and the whole issue a moot point.²¹⁹

Nonetheless, Wisconsin's nullification efforts had made their mark. Wisconsin had defied the supreme law of the United States both in the form of a federal law and a Supreme Court order attempting to enforce that law, showing that the allure of nullification as an alternative to submission to offensive—and even admittedly unconstitutional—federal laws was not confined to the southern states; indeed, it was the tool of the politically disenchanted, those unwilling to play by the rules to which they had voluntarily assented. While Wisconsin's actions did not go as far as South Carolina's saber rattling preparations for armed conflict, it nevertheless went further than Georgia's 1830 defiance and tested the boundaries of antebellum federalism, challenging the supremacy of the federal government to legislate on slavery, an issue that would result in the fracturing on the nation. Thus, Wisconsin's actions added to the growing sectional pressure, playing prelude to civil war. As a result, following the North's victory in spring of 1865, the theory of nullification was inextricably intertwined with secessionism and fraternal bloodshed, severely and rightfully delegitimizing its practicality and credibility for nearly a century.

B. Modern Incarnations

The theory of nullification lay dormant, but not dead, for most of the next century. Following the Civil War and Reconstruction, talk of disunion was regarded as taboo, and the supremacy of the federal government was secured as the nation struggled through industrial growing pains, a pandemic flu, two world wars, the Great Depression, and several other national and global trials. This was the case, at least, until the issue of race again awakened nullification in the national mind and brought it to the forefront of the national discussion.

1. Nullification & Desegregation: Massive Resistance & the Little Rock Crisis

Following the Supreme Court's landmark decisions in *Brown v. Board of Education*,²²⁰ which rejected the doctrine of "separate but equal" and declared the segregation of public schools to be a violation of equal protection, school boards across the country were ordered to de-

^{218.} Schmitt, supra note 188, at 1345-46.

^{219.} *Id.* Booth continued to be caught in the middle of the nullification struggle, as he was repeatedly arrested, released, and recaptured throughout this time, finally receiving a pardon by President James Buchanan in 1861. *Id.* at 1345–47.

^{220.} Brown v. Bd. of Educ., 347 U.S. 483 (1954); Brown v. Bd. of Educ., 349 U.S. 294 (1955).

segregate "with all deliberate speed." 221 In response, southern governors gathered in Virginia in 1954 and unanimously vowed to defy the Court's decision.²²² Two years later, the Virginia legislature adopted an "Interposition and Nullification Resolution" that declared the Brown ruling unconstitutional and null and void within the state, and it called on other southern states to do the same. 223 Over the next two years, several southern states heeded this call, adopting "Interposition and Nullification Resolutions" modeled after Virginia's. 224 These resolutions relied on the compact theory of the Constitution as forwarded by John C. Calhoun, arguing that only those powers listed in the compact had been granted to the federal government; education was not one of them, and was thus reserved to the states through the Tenth Amendment. 225 They claimed that the Constitution did not authorize the Court's ruling in Brown and viewed it essentially as an illegal constitutional amendment. 226 As a result, the resolutions declared the ruling suspended until

221.

Brown, 349 U.S. at 301.

^{222.} See Judith A. Hagley, Massive Resistance—The Rhetoric and the Reality, 27 N. M. L. REV. 167, 191 (1997).

^{223.} Id. The resolution, which was typical of those used in other southern states at the time and borrowed heavily from the Virginia Resolution of 1798, declared that "the powers of the Federal Government result solely from the compact to which the States are parties," and that "whenever the Federal Government attempts the deliberate, palpable, and dangerous exercise of powers not granted to it, the States who are parties to the compact have the right, and are in duty bound, to interpose." Interposition and Nullification-Virginia, 1 RACE REL. L. REP. 445, 445-47 (1956) (joint resolution).

^{224.} See Interposition and Nullification—Alabama, 1 RACE REL. L. REP. 437 (1956) (joint resolution declaring Brown decision "null and void"); Interposition and Nullification-Arkansas, 1 RACE REL. L. REP. 1116 (1956) (constitutional amendment approved by voters declaring Brown ineffective within the state); Interposition and Nullification—Florida, 2 RACE REL. L. REP. 707 (1957) (joint resolution stating the same); Interposition and Nullification—Georgia, 1 RACE REL. L. REP. 438 (1956) (joint resolution stating the same); Interposition—Louisiana, 1 RACE REL. L. REP. 753 (1956) (joint resolution stating the same); Interposition and Nullification—Mississippi, 1 RACE REL. L. REP. 440 (1956) (joint resolution stating the same); Interposition and Nullification—South Carolina, 1 RACE REL. L. REP. 443 (1956) (joint resolution stating the same). The Tennessee House of Representatives adopted an interposition resolution, but it was not ratified by the Senate. See Interposition and Nullification—Tennessee, 2 RACE REL. L. REP. 228 (1957). The legislatures of Texas and North Carolina did not adopt an interposition resolution.

^{225.} Hagley, supra note 222, at 192. Compare the southern states' argument to Calargument in the Exposition Protest. See John C. Caland houn, Exposition and Protest (1828), reprinted in Union and Liberty: The Political PHILOSOPHY OF JOHN C. CALHOUN 311, 313-14 (Ross M. Lence ed., 1992) (arguing that the power to pass protective tariffs that promoted the interests of one group over another was neither among the enumerated powers of the federal government nor justified by a reasonable reading of the Necessary and Proper Clause).

^{226.} Id. at 193.

a constitutional amendment was passed by the required three-fourths of states to give it effect in the interposing states.²²⁷

These "Interposition and Nullification Resolutions" lacked any legal effect and acted merely as policy statements of the state legislatures. ²²⁸ Indeed, even those within the states enacting these resolutions doubted their validity. ²²⁹ Nevertheless, these resolutions inspired Massive Resistance, and were given effect through the rapid and continuous enactment of evasive and defiant laws, all of which delayed implementation of *Brown* as the laws were individually litigated and declared unconstitutional. ²³⁰ As a result, although they were titled "Interposition and Nullification Resolutions," they were, in fact, blatant attempts at nullification because they declared federal law unconstitutional and sought to defy that law through patently unconstitutional means.

In 1958, the Supreme Court denounced the validity of such resistance and again rejected the validity and effect of nullification, reasserting its supremacy in the interpretation of constitutional matters in the case of *Cooper v. Aaron*.²³¹ Little Rock, Arkansas, became the unlikely location for the state-federal showdown over resistance to implementation of *Brown* that would lead to the decision.²³² While Little Rock school officials planned to comply with the Supreme Court's ruling, a power vacuum resulted from the lack of state and city officials willing to vocally support implementation or promise to ensure that it would proceed.²³³ As a result, segregationists mounted an aggressive public campaign against implementation of desegregation plans, demanding that Governor Orval Faubus intervene to prevent violence.²³⁴ Governor Faubus complied, calling out the Arkansas National Guard to prevent desegregation of the public schools.²³⁵ The desegregation of the school was

^{227.} Bush v. Orleans Parish Sch. Bd., 188 F. Supp. 916, 922–23 (E.D. La. 1960), aff'd, 365 U.S. 569 (1961).

^{228.} See, e.g., Hagley, supra note 222, at 194; James Madison, The General Assembly of Virginia Report of Jan. 7, 1800, in WE THE STATES, supra note 26, at 220 (Madison stating that he did not intend for the resolutions to imply a power in the state legislatures to intrude on judicial power, as they were merely "expressions of opinion, unaccompanied with any other effect than what they may produce on opinion, by exciting reflection"); Farber, supra note 32, at 434; Powell, supra note 25, at 718–19.

^{229.} For example, Virginia's attorney general, Lindsey Almond, called the resolutions legally meaningless, and stated that *Brown* could not be nullified by state resolution. See Opinion of Attorney General of Virginia, February 14, 1956, 1 RACE REL. L. REP. 462–64 (1956).

^{230.} See Hagley, supra note 222, at 194–95 (noting that state legislatures passed approximately 450 laws intended to impede federal enforcement of *Brown* in the three years following the case).

^{231.} Cooper v. Aaron, 358 U.S. 1 (1958) (per curiam).

^{232.} See Hagley, supra note 222, at 202.

^{233.} See id. at 202; Cooper, 358 U.S. at 9.

^{234.} Hagley, supra note 222, at 203.

^{235.} $\it Id.$ at 203–04. Ironically, Governor Faubus had opposed the segregationist legislation passed by the state legislature as a means of nullification, stating that "everyone knows . . . state laws can't supersede federal laws," and declaring that he would not try to

finally effectuated by the admission of nine black students after a federal district court injunction removed the state national guard. Local and state police initially enforced the desegregation, but were forced to remove the students after the mob outside the school became increasingly belligerent. Finally, President Eisenhower called out the 101st Airborne Division of the army and federalized the Arkansas National Guard, who then escorted the black students into the school and cleared the mobs from the area. ²³⁸

Segregationist tensions continued to grow, however, and soon even Governor Faubus had changed his position and declared the Court's ruling in *Brown* void and of no effect. While the Little Rock school system continued with its desegregation plan, Governor Faubus called a special legislative session to pass laws in opposition to *Brown*. Arkansas had passed an amendment to its state constitution in 1956 that "flatly command[ed] the Arkansas General Assembly to oppose in every Constitutional manner the Un-constitutional desegregation decisions . . . of the United States Supreme Court." Pursuant to this constitutional amendment, the legislature passed a law that "reliev[ed] children from compulsory attendance at racially mixed schools," and also passed a law allowing the governor to close any school by proclamation. Assembly to oppose in every Constitutional amendment, the legislature passed a law that "reliev[ed] children from compulsory attendance at racially mixed schools," and also passed a law allowing the governor to close any school by proclamation.

The Little Rock School Board petitioned the U.S. Supreme Court for permission to return to segregation while a plan was made to deal with the community hostility over desegregation. The district court approved the request, which the Eighth Circuit Court of Appeals reversed. The district court approved the request, which the Eighth Circuit Court of Appeals reversed.

In its opinion affirming the Eighth Circuit's judgment, the Supreme Court took the opportunity to again reject the ability of states, whether through their legislature, judiciary, or executive officers, to defy a ruling of the Supreme Court. Beginning with "some basic constitutional propositions which are settled doctrine," the Court noted that Article VI made the Constitution the "supreme law of the land." Further, Chief Justice John Marshall's declaration in *Marbury v. Madison* that "it is emphati-

nullify federal law through legislation. Indeed, he had stated the day before calling out the national guard that he had no plans to get involved in Little Rock in any way. *Id.*

^{236.} Cooper, 358 U.S. at 10-11.

^{237.} Id. at 11; Hagley, supra note 222, at 206.

^{238.} Hagley, supra note 222, at 206.

^{239.} *Id.* at 207.

^{240.} Id.

^{241.} Cooper, 358 U.S. at 8.

^{242.} Id. at 8-9.

^{243.} Hagley, supra note 222, at 208.

^{244.} Cooper, 358 U.S. at 4.

^{245.} Id. at 5.

^{246.} *Id.* at 18.

cally the province and duty of the judicial department to say what the law is"²⁴⁷ elucidated the "permanent and indispensable feature of our constitutional system" that the federal judiciary is supreme in the exposition of the law of the Constitution.²⁴⁸ By defying the Court's ruling in *Brown*, which interpreted the Fourteenth Amendment and thus constituted the supreme law of the land under the Constitution, state officials violated their Article VI oath to "support this Constitution."²⁴⁹ Indeed, "no state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it."²⁵⁰ If they could nullify the judgments of the federal courts "the constitution itself becomes a solemn mockery."²⁵¹ The Court specifically noted the danger of gubernatorial assertions of the ability to nullify federal law, as this would make the "fiat of a state Governor, not the Constitution of the United States . . . the supreme law of the land."²⁵²

Justice Frankfurter wrote a separate concurrence in which he reiterated the dire consequences of nullification theory and made a compelling appeal to the pragmatic sensibilities of the states. He stated that the few "tragic occasions" when states have "forcibly resisted or systematically evaded" federal law has signaled "the breakdown of constitutional processes on which ultimately rest the liberty of all."253 However, the most tragic aspect of this "disruptive tactic" was that it used the power of the State to thwart law instead of sustaining it.²⁵⁴ This conduct contrary to the purpose of the state was particularly inexcusable given that submission to federal law as required by the Supremacy Clause of Article VI did not equate to approval or surrender of the right to dissent; on the contrary, criticism is both allowed and encouraged.²⁵⁵ What is prohibited, however, is active defiance and obstruction, as "[o]ur kind of society cannot endure if the controlling authority of the Law as derived from the Constitution is not to be the tribunal specially charged with the duty of ascertaining and declaring what is the supreme Law of the Land."256 Thus, the Court reasserted its supremacy in constitutional interpretation, simultaneously rejecting in short form the state interposition and nullification efforts as antithetical to the federal system that had sustained the nation to that point. 257

^{247.} Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

^{248.} Cooper, 358 U.S. at 18.

^{249.} *Id.*

^{250.} Id.

 $^{251. \ \}textit{Id.}$ at 18–19 (quoting United States v. Peters, 9 U.S. (5 Cranch) 115, 136 (1809)).

 $^{252. \}quad \textit{Id.} \ \text{at} \ 19 \ (\text{quoting Sterling v. Constantin, } 287 \ \text{U.S.} \ 378, \ 397 - 98 \ (1932)).$

^{253.} Id. at 22 (Frankfurter, J., concurring).

^{254.} Id. at 26 (Frankfurter, J., concurring).

^{255.} Id. at 24 (Frankfurter, J., concurring).

^{256.} Id. (Frankfurter, J., concurring).

 $^{257.\;}$ For an excellent expansion of the Court's succinct argument, see Bush v. Orleans Parish Sch. Bd., 188 F. Supp. 916, 922–28 (E.D. La. 1960), $\it aff'd$, 365 U.S. 569 (1961). There, the district court countered the historical underpinnings of nullification and interpositions.

2. The Real ID Act: Nullification or Uncooperative Federalism?

Since Massive Resistance and the Little Rock Crisis, there have been few instances of nullification, and several examples of uncooperative federalism bordering on interposition by the states. ²⁵⁸ For example, the REAL ID Act of 2005, ²⁵⁹ which provided new and stringent requirements for official identification cards, including driver licenses, ²⁶⁰ met with significant opposition in implementation from states. Indeed, at least sixteen states have either passed or introduced legislation expressly opposing the provisions of the REAL ID Act and refusing to assist with implementation or funding. ²⁶¹ Indeed, nine other states have passed resolutions declaring the public policy of the state in opposition

tion theory, noting that Madison spent much of his life denouncing his and Jefferson's words from the Kentucky and Virginia Resolutions. The court cited to the reference in the Preamble to the Constitution to "[w]e the *People* of the United States" as being fatal to compact theory's assertion that the compact was between the made by the states. The court also noted that, from the beginning of the country, the Supreme Court was to be the final arbiter of constitutional issues, citing The Federalist, Nos. 78, 80, 81, and 82 in support. The court ended by noting that "interposition is not a constitutional doctrine," and that "[h]owever solemn and spirited, interposition [and nullification] resolutions have no legal efficacy." *Id.*

258. See generally, Jessica Bulman-Pozen & Heather K. Gerken, Uncooperative Federalism, 118 Yale L. J. 1256 (2009) (discussing the movement from dual federalism to cooperative federalism early in the twentieth century, and forwarding a new theory of uncooperative federalism, wherein the states use the integrated relationship with the federal government developed through cooperative federalism to affect national policy and oppose unfavorable laws, and arguing the value and benefit of this system of federalism). See also Louise Weinberg, Fear and Federalism, 23 Ohio N.U. L. Rev. 1295, 1308–09 (1997) (discussing the system of dual federalism as developed by the likes of Chief Justice John Marshall and Justice Joseph Story, wherein all national authority is held by the national government, and a state holds all legislative power within the state, subject to the supremacy of conflicting national law).

259. Pub. L. No. 109-13, 119 Stat. 231 (2005). The provisions of the REAL ID ACT were attached as a rider to the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, H.R. 1268, 109th Cong. (2005).

260. 6 C.F.R. §§ 37.1-.71 (2012).

261. ALASKA STAT. § 44.99.040 (2012) (prohibiting funding to implement the REAL ID Act); ARIZ. REV. STAT. ANN. § 28-336 (2012) (refusing to implement the REAL ID Act); GA. CODE ANN. § 40-5-4.1 (2010) (authorizing delay of compliance with the REAL ID Act); IDAHO CODE ANN. § 40-322 (2012) (stating that the Act is a violation of the "principles of federalism contained in the Tenth Amendment to the constitution of the United States," and directing the relevant Idaho agencies not to implement the REAL ID Act); H.B. 715, 2008 Reg. Sess. (La. 2008) (prohibiting state compliance with the REAL ID Act); ME. REV. STAT. ANN. § 1411 (2009); H.F. 988, 86th Leg. Sess. (Minn. 2009); Mo. REV. STAT. §§ 302.171, .183 (2010); MONT. CODE ANN. § 61-5-128 (2009) (refusing to participate in implementation of the REAL ID Act); H.B. 685, 160th Gen. Ct. (N.H. 2007); OKLA. STAT. TIT. 47, § 6-110.3 (2012); OR. REV. STAT. §§ 801.060-.066 (2009) (prohibiting compliance with the REAL ID Act unless the federal government meets certain requirements); S.C. CODE ANN. § 56-1-85 (2011) (prohibiting state participation in implementing the REAL ID Act); VA. CODE ANN. § 2.2-614.2 (2011); WASH. REV. CODE §§ 41.43.390, 46.20.191, 46.20.1911 (2012); UTAH CODE ANN. § 53-5-104.5 (2012).

to the Real ID Act and asking Congress to repeal it.²⁶² However, none of these resolutions or legislative actions has declared the REAL ID Act unconstitutional, much less null and void within their respective state.

As a result, these actions are neither nullification nor true interposition, lacking any declaration of the Act as unconstitutional. Instead, they are little more than explicit examples of uncooperative federalism. Indeed, they were legitimate protestations of the states to a law that required their cooperation to enact and enforce, and thus provide support not for nullification, but for resistance within the confines of the Constitution. Horeover, these actions have had a significant effect, as this refusal to assist in implementation of the REAL ID Act has resulted in an indefinite stay on implementation of the state licensing requirements, and underscoring the value of actions that amount to uncooperative federalism without crossing the line into nullification. Thus, while supporters of modern day nullification frequently cite to the stalled implementation of the REAL ID Act as an example of nullification in effect, they do so in error and to their own detriment, as these actions were not an exercise in nullification at all.

C. Nullification Today: A Revitalization of a Foundationless Doctrine

In a time when the government has grown far beyond what the Framers could have ever imagined possible, the discredited theory of nullification has yet again risen from the grave as a purported tool for combating further federal growth. ²⁶⁶ Thanks in part to the efforts of revisionist historians such as Thomas Woods, Jr., ²⁶⁷ who have played on the frustrations of the Tea Party movement, nullification again gained a foothold in the minds of frustrated and disenchanted Americans, especially American conservatives opposing the PPACA. ²⁶⁸ As a result, sev-

_

^{262.} See S. Con. Res. 16, 86th Gen. Assemb., Reg. Sess. (Ark. 2007); H.J. Res. 1047, 66th Gen. Assemb., 1st Reg. Sess. (Colo. 2007); S. Con. Res. 31, 24th Leg. (Haw. 2007); H.J. Res. 27, 95th Gen. Assemb., Reg. Sess. (Ill. 2007); Leg. Res. 28, 100th Leg., 1st Sess. (Neb. 2007); Assemb. J. Res. 6, 74th Reg. Sess. (Nev. 2007); S. Con. Res. 4040, 60th Leg. Assemb., Reg. Sess. (N.D. 2007); S. Con. Res. 285, 106th Gen. Assemb. (Tenn. 2009).

^{263.} See Barak Y. Orbach et al., Arming States' Rights: Federalism, Private Lawmakers, and the Battering Ram Strategy, 52 ARIZ. L. REV. 1161, 1169–70 (2010).

^{264.} Compare supra note 261 and accompanying text, with supra notes 222–230 and accompanying text.

^{265.} See 74 Fed. Reg. 68477, 68478 (Dec. 28, 2009) (staying implementation of 6 C.F.R. § 37.51(b) "from January 1, 2010 until further notice").

^{266.} See, e.g., Powell, supra note 25, at 697 (stating that the theory of nullification was an "essentially discredited ideology").

^{267.} See generally, Thomas Woods, Jr., Nullification: How to Resist Federal Tyranny in the 21st Century (2010) (defending the historical origins of nullification theory as a constitutional doctrine developed by Thomas Jefferson and advancing the theory as a means of resisting the expansion of federal power today).

^{268.} See, e.g., Nullification, The Greenville Tea Party, http://www.greenvilleteaparty.com/nullification.html (last visited Oct. 30, 2012); Donald Mellon, State Nullification, Tea Party 911 (Oct. 19, 2011), http://www.teaparty

eral states have engaged in a number of "nullification" actions, including passing nullification legislation and constitutional amendments.²⁶⁹ These efforts serve as a comparative backdrop for analyzing the nullification actions of the Idaho Legislature and, more importantly, the actions of Idaho Governor C.L. "Butch" Otter in the spring of 2011.

1. The Influence of Model Legislation: Other States' Responses to the $$\operatorname{PPACA}$$

Most states' nullification efforts in response to the passage and subsequent upholding of the PPACA by the United States Supreme Court have consisted largely of legislation, with the exception of Ohio, who made nullification of the PPACA a part of its state constitution.²⁷⁰ Of the fifteen states, including Idaho, that have introduced nullification legislation, only North Dakota has passed a "nullification" bill and signed it into law. However, the version that North Dakota's governor ultimately signed differed drastically from the version that was initially introduced, the former being a watered-down policy statement with no legal effect.²⁷¹ All other legislative efforts at nullification in other states have either stagnated since introduction or died in committee,²⁷² making Idaho's efforts rather unique.

This is especially true considering that Idaho was one of only a handful of states to actually independently craft their "nullification" legislation. Indeed, a disturbing aspect of the anti-PPACA nullification efforts in most other states is that a significant portion of the text of most of these bills is not an original product of the state legislatures, but is taken largely from an advocacy website run by the Tenth Amendment Center (TAC).²⁷³ The use of private "model" legislation as a means of

^{911.}com/issues/nullification.htm; Nullification Info, ROANOKE TEA PARTY, http://www.roanoketeaparty.com/pages/nullification-info/ (last visited Oct. 30, 2012); Nullification of Obamacare, STATE OF GEORGIA TEA PARTY, LLC, http://stateofgeorgiateaparty.com/?page_id=1426 (last visited Oct. 30, 2012); Chris Dixon, Understanding Nullification, MAINE TEA PARTY (Sept. 4, 2011), http://themaineteaparty.com/forum/topics/understanding-nullification; John Anderson, Pushing Back Tyranny—"Nullification", TEA PARTY BOISE, http://www.teapartyboise.com/pushing_back_tyranny.pdf (last visited Feb. 5, 2012).

^{269.} See supra notes 8-11 and accompanying text.

^{270.} See supra note 12.

^{271.} Compare S.B. 2309, 62d Leg., Reg. Sess. (N.D. 2011) (original version declaring PPACA null and void within the state, and making enforcement of the PPACA by a federal officer or agent a felony, and enforcement by a state official a misdemeanor), with S.B. 2309, 62d Leg., Reg. Sess. (N.D. 2011) (final version signed into law without any declaration that the PPACA is null and void in the state or any provisions for penalties, and instead only a policy statement that the Act "likely" violates the constitution and that the legislature "may" pass laws to prevent enforcement of the Act within the state).

^{272.} See supra notes 8-11 and accompanying text.

^{273.} See Federal Health Care Nullification Act, supra note 8.

propagating "nullification legislation" lends false legitimacy to the nullification effort. It makes it look as if the state legislatures have come to believe in the historical and theoretical foundations of nullification through research and investigation, when in fact they are borrowing their arguments from an advocacy website offering a quick means of opposing politically unsavory legislation without any attempt at original synthesis of the underlying logic of nullification theory. Furthermore, it makes it appear as though there is an organic movement of mirrorimage legislation being communicated between the elected officials of several states when, in fact, these nullification bills are not being thought of and designed by elected lawmakers, but instead are being plucked from websites run by private entities. 275

Indeed, most of these state legislative bills are either near-word-for-word adoptions of the TAC model, or are cut-and-paste jobs that merely reorder or reword a few inconsequential provisions. For example, of the fifteen state nullification bills, ten were either nearly word-for-word adaptations of the TAC's model legislation or took a majority of their substantive language therefrom. ²⁷⁶ Of the remaining five nullifica-

^{274.} For an excellent discussion of the phenomena of private lawmaking and the use of private legislation as a "battering ram" against unfavorable federal law, such as the PPACA, see Orbach et al., *supra* note 263, at 1161–71, 1196–1200.

^{275.} Id. at 1167–68 (noting the "ironic conflict" that arises when private legislation is used by lawmakers standing on a platform of state sovereignty, which is that the states no longer act as laboratories for unique and novel legislation—one of the key benefits of federalism).

Compare Federal Health Care Nullification Act, supra note 8, with S.B. 1475/H.B. 2725, 50th Leg., 2d Reg. Sess. (Ariz. 2012) (declaring PPACA null and void within the state, and making its enforcement a class four felony); Assemb. 861, 215th Gen. Assemb., Reg. Sess. (N.J. 2012) (original bill number A4155) (declaring the PPACA null and void and making enforcement of the Act a third degree crime punishable by up to \$5,000, up to five years in prison, or both); S.B. 498, 76th Leg. Assemb., Reg. Sess. (Or. 2011) (declaring the PPACA null and void within the state, and making its enforcement a felony punishable by a fine of up to \$5,000, up to five years' imprisonment, or both); S.B. 0161, 62d Leg., Reg. Sess. (Mt. 2011) (declaring the PPACA null and void within the state, and making its enforcement a felony punishable by a fine of up to \$5,000, up to five years' imprisonment, or both); S.B. 2309, 62d Leg., Reg. Sess. (N.D. 2011) (original version declaring PPACA null and void within the state, and making enforcement of the PPACA by a federal officer or agent a felony, and enforcement by a state official a misdemeanor); H.B. 1165, 2011 Leg. Assemb., 86th Sess. (S.D. 2011) (declaring the PPACA null and void within the state, and making its enforcement a class five felony for federal officials and a class six felony for state officials); L.B. 515, 102d Leg., 1st Sess. (Neb. 2011) (declaring the PPACA null and void within the state, and making its enforcement a class IV felony for federal officials and a class I misdemeanor for state officials); H.B. 1276, 53d Leg., 1st Sess. (Okla. 2012) (declaring the PPACA null and void within the state and making it the duty of the legislature to pass all laws necessary to prevent its enforcement in the state); H.B. 297, 82d Leg., Reg. Sess. (Tex. 2010) (declaring the PPACA null and void within the state, and making its enforcement a felony punishable by a fine of up to \$5,000, up to five years in prison, or both for federal officials and a misdemeanor punishable by up to \$1,000 fine, two years in jail, or both for state officials); and H.P. 0051, 125th Leg., 1st Reg. Sess. (Me. 2011) (declaring the PPACA null and void within the state, and making its enforcement a class C crime for federal officials and a class D crime for state officials).

tion bills, three used selected parts of the TAC model legislation,²⁷⁷ and only two—including Idaho—used very little, if any, of the TAC model legislation language.²⁷⁸ This does not necessarily mean that Idaho is one of the only states that actually believes in the theory of nullification, nor does it mean that Idaho is one of the only states to have done its own independent research into the subject and come to an independent conclusion as to nullification's validity; to be sure, neither inference would have made Idaho's actions any less unconstitutional. Instead, it means that Idaho has at least taken the time to craft its own legislation, increasing the likelihood that it will be free from the more insidious features of nullification, such as resort to armed resistance for enforcement of nullification bill provisions—the inevitable and logical end point for nullification efforts.

Indeed, the most alarming aspect of the TAC model legislation is that states are adopting most or a significant part of its language calling for criminal penalties against federal (and sometimes state) officials who attempt to enforce the provisions of the PPACA. The is this type of measure that takes a state's action from an exercise in interposition or uncooperative federalism to outright and open defiance to federal supremacy in the same vein as engaged in by South Carolina in 1832 and Arkansas in 1957. Indeed, it is this type of action that evokes the most nefarious aspect of nullification—its reliance on the use of force as a final means of resisting enforcement of a federal law.

Again, both the Idaho Legislature and Governor Otter have thus far avoided invoking such dangerous and confrontational language in all of their efforts to oppose and nullify the PPACA. While their efforts may ultimately prove to be without any legal efficacy, their attempts to avoid resorting to the use of force in any of their efforts to oppose the PPACA puts those efforts on a more historically supportable theoretical plane

^{277.} Compare Federal Health Care Nullification Act, supra note 8, with H.B. 0035, 61st Leg., Reg. Sess. (Wy. 2011) (declaring the PPACA null and void within the state, and making its enforcement a felony punishable by a fine of up to \$5,000, up to two years' imprisonment, or both); H.F. 1351, 87th Leg., Reg. Sess. (Minn. 2011) (declaring it the public policy of the state that the PPACA is unconstitutional and that the state has a duty to interpose between its citizens and the government, prohibiting enforcement of the Act by any state officials); and H.B. 1534, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012) (declaring the limited nature of the federal government's power, finding that the PPACA exceeds those powers and is therefore null and void within the state, and making its enforcement by a federal officer within the state a class A misdemeanor).

^{278.} Compare Federal Health Care Nullification Act, supra note 8, with H.B. 0126, 2011 Leg. Sess. (N.H. 2011) (declaring that any law attempting to affect the freedom of choice in health care is null and void within the state, but providing no specific penalties for enforcement) and H.B. 298, 61st Leg., 1st Reg. Sess. (Idaho 2011).

^{279.} See Federal Health Care Nullification Act, supra note 8.

^{280.} See supra Part II(A)(3) and Part II(B)(1).

than many of their counterparts in other states utilizing the TAC model legislation. Still, Idaho's response to the PPACA has been plagued by the idea that nullification of federal law is a legitimate and proper means of opposing a politically unpopular, but still valid, law. Thus, the next analytical step is an examination of those means against the history of nullification to determine first if the actions are even actual nullification or something else, and what the legal effect of those actions are in either case.

2. Idaho's Legislative Response to the PPACA

Idaho's response to passage of the PPACA took place before the Act was even signed into law. Indeed, the Idaho Legislature passed and Governor Otter signed the Idaho Health Freedom Act ("IHFA") on March 17, 2010, 282 thereby becoming the first governor in the nation to sign a law directly opposing the individual mandate of the PPACA.²⁸³ The purpose of the IHFA was to "codif[y] as state policy that every person in the state of Idaho is and shall continue to be free from government compulsion in the selection of health insurance options, and that such liberty is protected by the Constitutions of the United States and the State of Idaho."284 This first bill was intended to remove from any state official or employee the authority to enforce "any penalty which violates the policy."285 In addition to the statement of policy, the IHFA also required that the attorney general seek injunctive relief should any government seek to violate the policy, which in practical effect mandated that the State sue the federal government once the PPACA was signed into law.286

286. See Idaho Code Ann. \S 67-1401(15) (2011).

^{281.} Indeed, it is undisputed that neither Thomas Jefferson nor James Madison ever advocated for the use of force in support of nullification efforts. Instead, they saw their acts in the Kentucky and Virginia Resolutions as expressions of opinion between state legislatures, and both acknowledge, even at that time, that they would eventually bow the laws of the Union. Although Jefferson flirted with the idea of using secession or other force as a last resort, Madison convinced Jefferson to remove language to that effect. See James Madison, The General Assembly of Virginia Report of Jan. 7, 1800, in WE THE STATES, supra note 26, at 220; Farber, supra note 32, at 434.

 $^{282. \;\;}$ H.B. 391, 60th Leg., 2d Reg. Sess. (Idaho 2010) (codified at IDAHO CODE ANN. $\$ 39-9001 et seq. (2011)).

^{283.} Brian Murphy, Otter is first governor to sign a law saying state will defy requirement to buy insurance, IDAHOSTATESMAN.COM, March 18, 2010, available at http://www.teamiha.org/Documents/IHANews/0318%20Medical%20insurance%20refusal.pdf. Virginia enacted similar legislation (VA. CODE ANN. § 38.2-3430.1:1 (2011)) on Feb. 11, 2010, but it was not signed by Governor Bob McDonnell until March 24, 2010. See Olympia Meola & Tyler Whitley, McDonnell Touts New Va. Law in Health-Care Challenge, RICHMOND TIMES-DISPATCH, March 25, 2010 available at http://www2.timesdispatch.com/news/2010/mar/25/cucc251 20100324-231601-ar-7598/.

^{284.} Rep. Jim Clark, Statement of Purpose, H.B. 391, 60th Leg., 2d Reg. Sess. (Idaho 2010), available at http://www.legislature.idaho.gov/legislation/2010/H0391SOP Bookmark.htm.

^{285.} Id.

Aside from this mandate to sue if and when the PPACA became law, the Idaho Attorney General's Office regarded the IHFA "primarily as a policy statement of the legislature," and stated that the law contained "constitutional safeguards" such as making injunction the remedy for violations of the provision prohibiting enforcement by state officials and employees.²⁸⁷ However, the attorney general's office also noted the potential for either field or conflict preemption²⁸⁸ depending on the final federal legislation that was passed.²⁸⁹ The language of Title I of the PPACA, which contains the majority of the new federal standards relating to health insurance coverage, indicates express preemption, stating "nothing in this title shall be construed to preempt any State law that does not prevent the application of provisions of this title."290 In practice, this means that any state law not meeting the minimum federal standards will be preempted following the effective date of each specific standard, which would result in the Department of Health and Human Services taking over regulatory authority for the provision of that federal law. Thus, a state will retain regulatory authority unless it has laws that do not meet minimum federal standards.²⁹¹ As a result, aside from the mandate to sue directed at the attorney general's Office, the IHFA is merely a policy statement without further legal effect, and is further

287. Letter from Brian Kane, Assistant Chief Deputy, Idaho Att'y Gen. Office, to Rep. Phylis King, Idaho H.R. (Feb. 1, 2010), at 1 (on file with author); *see also* IDAHO CODE ANN. § 39-9004 (2011).

^{288.} See, e.g., Gordon v. Virtumundo, Inc., 575 F.3d 1040, 1060 (9th Cir. 2009) ("The concept of preemption derives from the Supremacy Clause of the United States Constitution, which provides that the laws of the United States 'shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' U.S. CONST. art. VI, cl. 2. Consistent with that command, we have long recognized that state laws that conflict with federal law are 'without effect.' Courts typically identify three circumstances in which federal preemption of state law exists: (1) express preemption, where Congress explicitly defines the extent to which its enactments preempt state law; (2) field preemption, where state law attempts to regulate conduct in a field that Congress intended the federal law exclusively to occupy; and (3) conflict preemption, where it is impossible to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.").

^{289.} Letter from Brian Kane (Feb. 1, 2010), *supra* note 287, at 2; *see also* IDAHO CODE ANN. § 39-9003(1) (2011) ("The state of Idaho hereby exercises its sovereign power to declare the public policy of the state of Idaho regarding the right of all persons residing in the state of Idaho in choosing the mode of securing health care services.").

^{290.} PPACA, supra note 2, \$ 1321(d), codified at 42 U.S.C. \$ 18041(d) (2011) (emphasis added). See also, e.g., id., \$ 2715(e), codified at 42 U.S.C. \$ 300gg-15(e) (2011) (preempting state laws that require summary of benefits and coverage that provides less information than required by the Act).

^{291.} Nat'l Ass'n of Ins. Comm'rs, *Preemption and State Flexibility in PPACA*, NAIC.ORG (2010), http://www.naic.org/documents/index_health_reform_general_preemption and state flex ppaca.pdf.

preempted insofar as it conflicts with the minimum requirements of the PPACA.

Following passage of the IHFA, and in accordance with its mandate that the state sue if and when the PPACA was passed, Idaho joined the multi-state lawsuit filed March 23, 2010, in the United States District Court for the Northern District of Florida. ²⁹² This action indicates that the attorney general determined that the IHFA did not prevent application of provisions of the PPACA. Thus, the PPACA did not preempt the IHFA because the attorney general interpreted the IHFA as merely a state policy statement prohibiting its officials and employees from enforcing the law—a stance consistent with uncooperative federalism. ²⁹³

Less than a year later, the Idaho Legislature began formulating a more forceful response to the PPACA. Motivated by a speech given by Thomas Woods, Jr., on his book "Nullification: How to Resist Federal Tyranny in the 21st Century" in Boise on November 10, 2010, state legislators began toying with the idea of using the discredited theory of nullification as a means of resisting enforcement of the PPACA. ²⁹⁴ Invoking language and arguments directly from Jefferson's Kentucky Resolution of 1798, state legislators vowed in early 2011 to be one of the first states to introduce a "nullification bill" against the PPACA. ²⁹⁵

Opponents of such a measure immediately began questioning the legality and constitutionality of nullification before the bill was even introduced. Idaho House Representative William Killen (D) requested an opinion of the attorney general's office regarding the legality of nullification. ²⁹⁶ In a four page letter, Assistant Chief Deputy Brian Kane stated that if the bill advocated for state action within the confines of the constitutional system, such as through federal judicial challenges and state declarations of policy, it would be permissible and even encouraged by the system of checks and balances. ²⁹⁷ However, nullification through outright defiance to federal law violated both the state and fed-

296. Brian Murphy, *Idaho Attorney General's Office Says Nullification Violates State, Federal Constitutions*, IDAHOSTATESMAN.COM (Jan. 25, 2011), http://voices.idahostatesman.com/2011/01/25/idahopolitics/idaho_attorneys_general_office_says nullification violates state.

^{292.} See Second Amended Complaint at 17, Florida ex rel. Bondi v. U.S. Dept. of Health & Human Services, 780 F. Supp. 2d 1256 (N.D. Fla. 2011) (No. 3:10-cv-91).

^{293.} See Letter from Karin D. Jones, Deputy, Idaho Att'y Gen. Office, to Senator Kate Kelley, Idaho Senate (Feb. 16, 2010), at 2 (on file with author) (stating that the attorney general retained discretion on whether to bring an enforcement action under the IHFA, which would include consideration of possible federal preemption). See also Bulman-Pozen & Gerken, supra note 258.

^{294.} Brian Murphy, *Idaho GOP May Try to 'Nullify' Health Care Law*, IDAHOSTATESMAN.COM (Jan. 20, 2011), http://www.teamiha.org/Documents/IHANews/0120%20Nullify%20Health%20Care%20Law.pdf.

^{295.} Id.

^{297.} Id. This essentially would be akin to Madison's concept of interposition. See supra Part II(A)(1).

eral constitutions.²⁹⁸ He specifically noted the historical difficulties that Idaho would have with the foundational principle of nullification theory: the constitutional compact.²⁹⁹ The states that originally advocated for nullification based their assertion that the Constitution was a compact between the states with the federal government as their common agent on their pre-constitutional positions first as independent colonies and then as sovereign entities entering into the Articles of Confederation and eventually entering into the Union by ratifying the Constitution.³⁰⁰

Idaho, however, took a very different path to becoming a member of the constitutional compact. Indeed, virtually all land within Idaho began as land claimed by the United States against the British, culminating in several treaties creating the Oregon Territory. The Oregon Territory Congress created the Idaho Territory on March 4, 1863, 202 and eventually the state of Idaho on July 3, 1890. While Idaho gained all the rights and privileges of every other state in the Union upon joining, the did not gain a historical claim to prior sovereignty, nor did it gain the rights that purportedly justify nullification theory.

Furthermore, as Kane pointed out, even the framers of the Idaho Constitution were convinced that "the Constitution of the United States is the supreme law of the land," and saw Idaho as "an inseparable part of the American Union." Accordingly, every state legislator is required to affirm that they will "support the Constitution of the United States and the constitution of the State of Idaho." As a result, action that attempts nullification through outright defiance of federal law explicitly violates the oath of office taken by every state official in Idaho to uphold the Constitution and is antithetical to constitutional government. More-

^{298.} Letter from Brian Kane, Assistant Chief Deputy, Idaho Att'y Gen. Office, to Rep. William Killen, Idaho H.R. (Jan. 21, 2011), at 1 (on file with author).

^{299.} Id. See also supra Part II(A)(1).

^{300.} Letter from Brian Kane (Jan. 21, 2011), supra note 298, at 1.

^{301.} *Id.*; Convention Respecting Fisheries, Boundary, and the Restoration of Slaves, U.S.-U.K., Oct. 20, 1818, 8 Stat. 243, 12 Bevans 57; Treaty Establishing the Boundary in the Territory on the Northwest Coast of America Lying Westward of the Rocky Mountains (Oregon Treaty), U.S.-U.K., June 15, 1846, 15 U.S.T. 1846 (1864).

^{302.} Act of March 3, 1863, Pub. L. No. 37-96, 12 Stat. 808 (1863).

 $^{303.\}quad$ Act of July 3, 1890, Pub. L. No. 105-296, 26 Stat. 215, ch. 656; (1890) (amended 1999).

^{304.} Id. § 1.

 $^{305.\;}$ IDAHO CONST. art. I, \S 3; see also Letter from Brian Kane (Feb. 1, 2010), supra note 287.

^{306.} IDAHO CONST. art. III, § 25 (Oath of Office for legislators); see also IDAHO CODE ANN. § 59-401 (2012) ("All elected and appointed officials must take the oath of office before taking office: I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States, and the Constitution of the State of Idaho, and that I will faithfully discharge the duties of (insert office) according to the best of my ability.""); U.S. CONST. art. VI, cl. 3.

over, such actions both violate the Supremacy Clause of the Constitution, and ignore the explicit pronouncements found in the Idaho Constitution that adopt the Constitution of the United States on behalf of the people of Idaho³⁰⁷ and declare the laws of the United States as "the supreme law of the land."³⁰⁸

Kane's letter did little to sway the opinion of supporters of the "nullification bill." Entitled "State Sovereignty," Idaho's first legislative attempt at nullification made it to the floor of the Idaho House of Representatives after passing the House State Affairs Committee on January 27, 2011, by a straight party-line vote. In the bill reached the House floor on February 7, 2011, in essentially the same form, except for a slight modification that removed the word "null." This was in reaction to Kane's opinion that the bill would violate the U.S. and Idaho constitutions and officials' oath of office if it attempted outright nullification. However, the bill still said that the PPACA was "void" in the state, reaching the same effect without the use of the term "null."

The attorney general's office issued a second opinion at the request of Idaho House Representative Eric Anderson (R), which specifically addressed the constitutionality and legal effect of the revised "State Sovereignty" bill. In it, Assistant Chief Deputy Kane noted that the bill still declared the PPACA unconstitutional, but because the "Idaho Legislature has no power to issue a binding determination of the statute's constitutionality" the declaration "would have no legal force or effect." Further, it directed that no state "departments, political subdivisions, courts, public officers or employees" would assist in the enforcement or implementation of any aspect of the PPACA, that neither the State nor a political subdivision could contract to enforce or assist enforcement of the PPACA or accept or expend money related to the implementation of the PPACA, and that any "order of judgment, writ or levy of execution"

^{307.} IDAHO CONST. art. XXI, § 20.

^{308.} IDAHO CONST. art. I, § 3. See also Letter from Brian Kane (Jan. 21, 2011), supra note 298. This argument closely mirrors that made by Chief Justice Roger Taney in Ableman v. Booth, 62 U.S. 506 (1859). See supra notes 214–16 and accompanying text.

^{309.} See Murphy, supra note 296 (quoting Sen. Monty Pearce as saying, after reading Kane's opinion, that "[n]o matter what they say, the states are the last voice. We have the final say on the constitutionality").

^{310.} H.B. 117, 61st Leg., 1st Reg. Sess. (Idaho 2011).

^{311.} Betsy Z. Russell, *Nullification Bill Introduced*, with Concerns, THE SPOKESMAN-REVIEW (Jan. 27, 2011), http://www.spokesman.com/stories/2011/jan/27/nullification-bill-introduced-with-concerns/.

^{312.} Betsy Z. Russell, *Idaho House Votes to Defy Health Care Reform*, The Spokesman-Review (Feb. 16, 2011), http://www.spokesman.com/stories/2011/feb/16/idaho-house-votes-defy-health-care-reform/.

^{313.} Id.; see also Letter from Brian Kane (Jan. 21, 2011), supra note 298.

^{314.} Letter from Brian Kane, Assistant Chief Deputy, Idaho Att'y Gen. Office, to Rep. Eric Anderson, Idaho H.R. (Feb. 8, 2011) (on file with author).

^{315.} *Id.* at 2; see also H.B. 117, 61st Leg., 1st Reg. Sess. \$1(6) (Idaho 2011) ("[T]he state . . . considers void and of no effect the PPACA.").

IDAHO

against the State or its residents for amounts assessed for failure to comply with the PPACA would be unenforceable. 316

This was not the most problematic aspect of the "State Sovereignty" bill, however, according to Kane. The Idaho Legislature does indeed have the power to control state and political subdivisions' exercise of otherwise valid discretion, and thus could order those entities not to assist in the implementation or enforcement of the federal law.³¹⁷ The most potentially problematic provision of the bill was that it denied enforcement of judgments for fines assessed for non-compliance with the PPACA, which raised issues under both the Full Faith and Credit Clause and the Contracts Clause. 318 Kane also noted that the bill could inadvertently opt the state out of the Medicaid program³¹⁹ and could also affect agreements for grants already entered into by the state and its subdivisions under provisions of the PPACA. 320 Thus, although the bill did "declare" the PPACA unconstitutional, and although there were potentially detrimental legal ramifications if the bill passed, it was by no means full force nullification, but instead was more akin to Madison's conception of interposition. 321 Indeed, the bill intentionally avoided using the term nullification, opting instead for "interpose," signaling that the bill's supporters and sponsors in the House may have doubted the legitimacy of nullification. 323

While the vast majority of Republicans supported the bill, several representatives from both sides of the aisle raised concerns over the legality of the bill. Almost all of the Democrats decried the potential loss of Medicaid funds and benefits available in the PPACA, while a handful of Republicans argued in favor of the legally sound path of court challenges that was already being pursued, fearing that the bill would undermine those efforts.³²⁴ Nevertheless, the bill passed in the Idaho

^{316.} See Letter from Brian Kane (Feb. 8, 2011), supra note 314, at 1–2; H.B. 117, 61st Leg., 1st Reg. Sess. §3 (Idaho 2011).

^{317.} See Letter from Brian Kane (Feb. 8, 2011), supra note 314, at 2; see also Ysursa v. Pocatello Ed. Ass'n, 555 U.S. 353, 362–64 (2009). This type of activity would essentially constitute uncooperative federalism. See generally Bulman-Pozen & Gerken, supra note 258.

^{318.} See Letter from Brian Kane (Feb. 8, 2011), supra note 314, at 2; H.B. 117, 61st Leg., 1st Reg. Sess. §3 (Idaho 2011).

^{319.} See Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 502 (1990).

^{320.} See Letter from Brian Kane (Feb. 8, 2011), supra note 314, at 3.

^{321.} See supra Part II(A)(1).

^{322.} See H.B. 117, 61st Leg., 1st Reg. Sess. §1(6) (Idaho 2011).

^{323.} See Betsy Z. Russell, Idaho Senators Kill Nullification Bill, The Spokesman-Review (Feb. 25, 2011), http://www.spokesman.com/stories/2011/feb/25/idaho-senators-kill-nullification-bill/ (quoting Rep. Vito Barbieri as saying that the bill was, in fact, not a "nullification" bill).

^{324.} See Russell, Idaho House Votes to Defy Health Care Reform, supra note 312. For example, Republican Rep. George Eskridge stated that the state should address the

House of Representatives on February 16, 2011, on a 49-20 vote that was largely along party lines.³²⁵ But this victory was short lived as the bill died in the Idaho Senate State Affairs Committee just nine days later, receiving only two votes from the nine-member committee to send it to the full Senate with a recommendation to pass.³²⁶ Most of the observers in the hearing were angered by the result, feeling that the Senate Committee was bowing to federal tyranny,³²⁷ but this was not the end of Idaho's efforts at nullification and interposition.

A month later on March 21, 2011, the sponsors of the "State Sovereignty" bill introduced into the Idaho House of Representatives a second bill, H.B. 298, nicknamed the "grandson of nullification," to oppose the implementation of the PPACA. 328 H.B. 298 passed the House on March 30, 2011, by a vote of 50-17 and subsequently passed the Senate on April 5, 2011, by a vote of 24-11. The purpose of H.B. 298 was to "expand the Idaho Health Freedom Act" and to "stop the operability of the [PPACA]'s discretionary provisions while providing a verification process to protect taxpayers against unnecessary implementation of the PPACA during the fiscal year 2012."330 H.B. 298 again declared the public policy of Idaho that "no person within the state of Idaho shall be compelled to participate in a government health insurance program not authorized by the state of Idaho."331 Interestingly, the bill did not address the constitutionality of the PPACA like its predecessor had, taking it squarely out of the realm of effective nullification. The practical effect of the bill further confirmed that it was not actually a nullification bill, but merely an exercise in uncooperative federalism. It would have prevented for one year implementation, assistance, or enforcement by any state entity of discretionary portions of the PPACA, as defined by the bill, and nothing more. 332 These discretionary provisions included those "not specifically required, mandated or directed of the states by the federal government" and those that would "not take effect or require state

overreaching of the federal government "by doing it the right way, the way that the Constitution sets up, that has already proven its strength for 200 years." *Id.*

^{325.} Id

 $^{326. \}quad \textit{See} \ \text{Russell}, \textit{Nullification Bill Introduced, with Concerns, supra} \ \text{note} \ 311.$

^{327.} See id.

^{328.} H.B. 298, 61st Leg., 1st Reg. Sess. (Idaho 2011); see also Bill Status: H0298, IDAHO LEGISLATURE, http://www.legislature.idaho.gov/legislation/2011/H0298.htm (last visited Oct. 30, 2012) [hereinafter "Bill Status: H0298"]; Betsy, Grandson of Nullification' Bill Wins Final Passage in Senate, THE SPOKESMAN-REVIEW (April 5, 2011, 2:34 p.m.), http://www.spokesman.com/blogs/boise/2011/apr/05/grandson-nullification-bill-wins-final-passage-senate/.

^{329.} Bill Status: H0298, supra note 328.

^{330.} Sen. Monty Pearce, Idaho H.R., 61st Leg., 1st Reg. Sess., H.B. 298 Statement of Purpose (2011), available at http://www.legislature.idaho.gov/legislation/2011/H0298SOP.pdf.

^{331.} H.B. 298, 61st Leg., 1st Reg. Sess. § 1 (Idaho 2011).

^{332.} \emph{Id} ; Letter from Brian Kane, Assistant Chief Deputy, Idaho Att'y Gen. Office, to Rep. Monty Pearce, Idaho H.R. (Mar. 10, 2010), at 1 (on file with author).

action prior to July 1, 2012."³³³ However, section 2 of the bill explicitly excluded Medicaid funding from the definition of "discretionary provisions," avoiding a major problem with the bill's predecessor, the "State Sovereignty" bill.³³⁴ While presenting potential difficulties in determining exactly which provisions of the PPACA met this definition, the prohibition on implementation of such provisions would have avoided any federal preemption issues, especially when read in concert with the sunset provision in section 6 of the bill.³³⁵

Furthermore, section 4 of the bill would have imposed the potentially burdensome duty on state and local entities to provide a written report outlining their compliance with the other provisions of the bill before accepting or expending money for or implementing any provision of the PPACA, and also would have required any state or local entities that received funding for enacting discretionary provisions of the PPACA to "return said funding to the appropriate federal agency." 336 However, these reporting requirements and the prohibition on enactment of the discretionary provisions are well within the power of the legislative branch to direct the discretion and actions of subordinate state and local entities.³³⁷ Finally, the bill explicitly stated that it did not "prohibit the governor, upon finding by any federal appeals court as to the unconstitutionality of the PPACA, from issuing an executive order to further restrict or prohibit implementation of the provisions of the PPACA in Idaho."338 While potentially raising non-delegation issues, the Idaho Attorney General's Office stated that it would "construe[] [the section] literally as leaving in place otherwise existing gubernatorial authority to take action in response to congressional action or judicial rulings."339 Thus, while H.B. 298 is still an action intended to defy federal law, it is nonetheless much tamer than its predecessor, H.B. 117. Indeed, H.B. 298 lacked all of the prototypical elements of a nullifying ac-

335. See id. at § 6 (stating that sections 2 and 3 of the bill are void and of no force and effect on and after July 1, 2012); Letter from Brian Kane (Mar. 10, 2010), supra note 332, at 1.

^{333.} H.B. 298, 61st Leg., 1st Reg. Sess. § 2 (Idaho 2011).

^{334.} See id

^{336.} See H.B. 298, 61st Leg., 1st Reg. Sess. § 3 (Idaho 2011); Letter from Brian Kane (Mar. 10, 2010), supra note 332, at 2.

^{337.} See Ysursa v. Pocatello Ed. Ass'n, 555 U.S. 353, 362–64 (2009).

^{338.} H.B. 298, 61st Leg., 1st Reg. Sess. § 3 (Idaho 2011).

^{339.} Letter from Brian Kane, Assistant Chief Deputy, Idaho Att'y Gen. Office, to Rep. William Killen, Idaho H.R. (Mar. 29, 2011) (on file with author). But see Sun Valley Co. v. City of Sun Valley, 109 Idaho 424, 427–28, 708 P.2d 147, 150–151 (1985) (declaring that the non-delegation doctrine was dead in Idaho, that the delegation of broad legislative power was permissible with or without guiding standards, and that the legislation or agency must simply provide for meaningful safeguards against arbitrary decision making to be constitutional).

tion, such as declaring the law unconstitutional and void within the state. Moreover, while the statement of state policy had no legal effect, it was nonetheless a legal exercise of the state legislative power to announce the policy position of the state, just as most of the other elements of H.B. 298 were legal directives to the agencies of the state. As a result, H.B. 298 was not nullification, but instead at most an exercise in uncooperative federalism.

It is therefore ironic that Governor Otter opted to veto the bill on April 20, 2011.341 Stating that "every alternative that could lead to the reversal of Obamacare was worth trying," including nullification, 342 Otter nonetheless felt that H.B. 298 "went further than what the authors intended to do."343 H.B. 298, he said, would have had the unintended effect of prohibiting Idaho from creating its own health insurance exchange, which the state has been working on through the Select Committee on Health Care—a committee Otter created in 2007.³⁴⁴ Indeed, as a discretionary provision of the PPACA, 345 the state-run health exchange would have been prohibited under H.B. 298.346 Furthermore, Otter correctly worried that this prohibition would have the unintended effect of allowing the federal government to "develop and operate an exchange for us if Idaho elects to forego the creation of our own exchange."347 This, according to Otter and other supporters of the state-run health exchange, could result in Idaho insurers being pushed out of business from having to compete in a national health exchange market.³⁴⁸ Indeed, Otter felt that such a result would be just as unacceptable as not opposing the PPACA at all.³⁴⁹ However, opponents to the health exchange, such as Idaho House of Representatives Majority Leader Mike Moyle (R), have argued that the health exchange will still be governed by federal regulations created under the PPACA, and so the result will be the

^{340.} See Letter from Brian Kane (Mar. 29, 2011), supra note 339; Letter from Brian Kane (Mar. 10, 2010), supra note 332.

^{341.} Letter accompanying veto of House Bill 298 from C.L. "Butch" Otter, Gov. of Idaho, to Ben Ysursa, Sec. of State, at 1 (April 20, 2011) [hereinafter "Veto Letter"], available at http://gov.idaho.gov/pdf/House%20Bill%20298%20Veto%20Letter%202011.pdf.

^{342.} Id.

^{343.} Marissa Bodnar, *Otter Signs Order Banning Health Care Reform*, LOCALNEWS8.COM (April 20, 2011), http://www.localnews8.com/news/27614296/detail.html. *See* H.B. 298, 61st Leg., 1st Reg. Sess. § 2 (Idaho 2011) (directing that "[n]o department, agency, or political subdivision of the state of Idaho *shall accept or expend moneys related to the implementation of discretionary provision of the PPACA*," which would include the establishment of state-run health exchanges (emphasis added)).

^{344.} Veto Letter, supra note 341, at 2.

^{345.} See PPACA, supra note 2, § 1321(c), codified at 42 U.S.C. § 18041(c).

^{346.} See H.B. 298, 61st Leg., 1st Reg. Sess. (Idaho 2011).

^{347.} Veto Letter, supra note 341, at 2; see also PPACA, supra note 2, \S 1321(c), codified at 42 U.S.C. \S 18041(c) (2011) (stating that a failure by a state to create a heath care exchange would result in federal establishment of an exchange in the state).

^{348.} Veto Letter, *supra* note 341, at 2–3; Audrey Dutton, *Idaho Readies for Health Exchange*, IDAHO STATESMAN.COM (Jan. 12, 2012), http://www.idahostatesman.com/2012/01/12/1949518/idaho-readies-for-health-exchange.html.

^{349.} Veto Letter, supra note 341, at 3.

same.³⁵⁰ Nevertheless, Otter vetoed H.B. 298 in an effort to preserve Idaho's ability to establish its own health exchange, even if under the auspices of the PPACA.³⁵¹ However, his veto was not a rejection of nullification, but a means of clearing the way for a more novel and drastic exercise of gubernatorial power.

The ink on Governor Otter's veto of H.B. 298 had hardly dried by the time he pivoted from rejecting a bill that he claimed "went too far," to issuing an executive order that went far beyond the scope of the legislatively approved H.B. 298. 352 Indeed, Otter issued Executive Order No. 2011-03 the very same day. 353 In it, he avoided stating that the PPACA is unconstitutional or null and void within the state, and instead simply declared that "regardless of the constitutionality of the PPACA" it was in the state's best interest to retain control over health care decisions and initiatives.³⁵⁴ He then utilized similar language to that found in H.B. 117 prohibiting any "executive branch department, agency and institution of the State" from implementing, enforcing, or participating in any element, provision, or program of the PPACA. 355 However, to ensure that development of a state health exchange—one of the discretionary provisions of the PPACA—could continue, Governor Otter also provided a waiver provision in his executive order, whereby he alone reviews and consents to waivers from the prohibition on accepting funding and otherwise enacting any provisions of the PPACA.356 An example of this waiver process has already occurred, as Governor Otter has allowed the Idaho Department of Health and Welfare to request and accept a total of \$21.3 million in federal funds to investigate and establish a health exchange. 357 While contrary to his mandate in section 1 of the executive

^{350.} Dutton, *supra* note 348. This argument was weakened, however, by a subsequent statement by the Obama administration indicating that it would not define a single uniform set of "essential health benefits" that state insurers in state-run health exchanges must provide. Thus, Otter's worries seemed well-founded, and his pursuit of a state-health exchange reasonable, given the promised flexibility the exchanges would be afforded. *See* Robert Pear, *Health Care Law Will Let States Tailor Benefits*, THE NEW YORK TIMES, Dec. 17, 2011, at A1, *available at* http://www.nytimes.com/2011/12/17/health/policy/health-care-law-to-allow-states-to-pick-benefits.html. For a full discussion of the requirements and potential costs of state run health exchanges under the PPACA, see Elizabeth Weeks Leonard, *Rhetorical Federalism: The Value of State-Based Dissent to Federal Health Reform*, 39 HOFSTRA L. REV. 111, 140–48 (2011).

^{351.} Exec. Order No. 2011-03, supra note 13, at 16-17.

^{352.} See Veto Letter, supra note 341, at 3 (noting that Exec. Order No. 2011-03 was attached to the veto letter); Bodnar, supra note 343.

^{353.} Exec. Order No. 2011-03, supra note 13, at 16–17.

^{354.} Id. at 16.

^{355.} Compare id. with H.B. 117, 61st Leg., 1st Reg. Sess. § 3 (Idaho 2011).

^{356.} Exec. Order No. 2011-03, supra note 13, at 17.

^{357.} See State Exchange Profiles: Idaho, THE HENRY J. KAISER FAMILY FOUNDATION HEALTH REFORM SOURCE, http://healthreform.kff.org/State-Exchange-Profiles/Idaho.aspx

order that executive entities could not accept funding distributed under the PPACA, this action is nevertheless consistent with his stated reason for vetoing H.B. 298.

This illustrates one of the fundamental deficiencies with nullification, in that it would allow states to implement only those parts of laws they decided were constitutional, which would likely look strikingly similar to those provisions of federal laws that they liked, creating an unpredictable patchwork of federal legislation, lacking any uniformity and consistency. Further, it would elevate the state legislatures or executives to the level of *de facto* national lawmakers and judiciaries, upending the entire federalist system of governance. It is against this problematic backdrop that Governor Otter's executive order must be analyzed.

III. THE GUBERNATORIAL EXECUTIVE ORDER AS A MEANS OF NULLIFICATION

The gubernatorial executive order has developed much like the office of governor itself—transforming slowly but surely from a largely ceremonial and ineffective tool into a powerful and significant element of the state political landscape. Indeed, as the office of governor has only recently gained real power, that is, within the last century or so, to direct the general operations of a state and its many and various agencies, the executive order has become a key tool in executing this power.³⁶⁰ As a result, the executive order has been studied only infrequently over the last century, and analysis of its scope and contours necessarily changes depending on the state in which it is studied. Indeed, the source of au-

(last updated Dec. 15, 2011); *Idaho: Health Insurance Exchanges*, STATEHEALTHFACTS.ORG, http://www.statehealthfacts.org/profileind.jsp?cat=17&sub=205&rgn=14 (last visited Jan. 14, 2013).

358. See James H. Read & Neal Allen, Living, Dead, and Undead: Nullification Past and Present, 1 Am. Pol. Thought 263 (2012) (discussing modern trends and impacts of the nullification doctrine).

359. See, e.g., Ableman v. Booth, 62 U.S. 506, 515 (1858) ("And, moreover, if the power is possessed by the Supreme Court of the State of Wisconsin, it must belong equally to every other State in the Union, when the prisoner is within its territorial limits; and it is very certain that the State courts would not always agree in opinion; and it would often happen, that an act which was admitted to be an offence, and justly punished, in one State, would be regarded as innocent, and indeed as praiseworthy, in another."); THE FEDERALIST NO. 44 (James Madison) (stating that without the Supremacy Clause, the federal government would be reduced to its ineffective position under the Articles of Confederation, and that since the constitutions of the various states differ between themselves, national law would be valid in some states and not in others, making a system of government where the authority of the whole was subordinate to its parts, "a monster, in which the head was under the direction of the members"); THE FEDERALIST NO. 80 (Alexander Hamilton) (stating that having several courts of final jurisdiction over the same causes would create "a hydra in government, from which nothing but contradiction and confusion can proceed").

360. See generally Thad Beyle, The Governor as Innovator in the Federal System, 18 THE ST. OF AM. FEDERALISM 131 (1988) (discussing the changing nature of the executive at the state level).

IDAHO

707

thority for issuing executive orders is different from state to state, heavily dependent on the state's own method of interpreting its constitution and laws. Nevertheless, any analysis of a state governmental power must begin by illuminating the universal and general elements of that power, thereby providing a baseline against which the individual state power can be analyzed.

A. The Gubernatorial Executive Order

1. Generally

The lack of judicial exploration and explanation of the powers of the executive branch in Idaho is breathtaking. This is especially true with reference to the powers of the governor. Indeed, there has been so little coverage of executive power in Idaho that one is left to analyze by analogy from states with similar constitutional provisions governing executive power. As a result, this discussion of gubernatorial executive power in Idaho must begin with an overview of gubernatorial executive power in general.

The governor is imbued with the supreme executive power by the people of the state through the state constitution.³⁶¹ Thus, the governor is the state's chief executive officer, charged with wielding all the executive power of the state. However, unlike the President of the United States, whose executive powers are almost entirely enumerated by the U.S. Constitution,³⁶² gubernatorial executive power is limited only by those limits specified within the state constitution and established by the legislature. Indeed, one court has noted that gubernatorial executive orders are valid when issued within constitutional bounds, and if they do not usurp legislative authority by "acting contrary to the express or

.

^{361.} See, e.g., Ala. Const. art. V, § 113 ("The supreme executive power of this state shall be vested in a chief magistrate, who shall be styled 'The Governor of the State of Alabama."); Cal. Const. art. V, § 1 ("The supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed."); Colo. Const. art. IV, 2 ("The supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed."); IDAHO CONST. art. IV, § 5 ("The supreme executive power of the state is vested in the governor, who shall see that the laws are faithfully executed."); MICH. CONST. art. V, § 1 ("The executive power is vested in the governor."); W. VA. CONST. art. VII, § 5 ("The chief executive power shall be vested in the governor, who shall take care that the laws be faithfully executed.").

^{362.} See U.S. Const. art. II. This, unfortunately, has not been the case in practice for quite some time now. See generally, e.g., David Gray Adler, George Bush and the Abuse of History: The Constitution and Presidential Power in Foreign Affairs, 12 UCLA J. INTL. L. & Foreign Aff. 75 (2007); Michael P. Van Alstine, Executive Aggrandizement in Foreign Affairs Lawmaking, 54 UCLA L. Rev. 390 (2006); ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973); Erwin Chemerinsky, The Assault on the Constitution: Executive Power and the War on Terrorism, 40 U.C. DAVIS L. Rev. 1 (2006).

implied will of the Legislature."³⁶³ Thus, although the governor has no prerogative power, ³⁶⁴ the constitutional grant of the supreme executive power implies that the governor has the power necessary to execute the law in a fair and efficient manner, so long as that power is exercised within constitutional and statutory boundaries.³⁶⁵

This was not always the case, however, as gubernatorial power was originally rather limited at the founding of the country-a reaction against the often-tyrannical colonial governors. 366 Indeed, the governor began as a weak entity compared to state legislatures.³⁶⁷ Gradually, the office of governor gained independence, power, and prestige through becoming a popularly elected position, 368 the lengthening of terms in office, and the reintroduction of a limited veto power.³⁶⁹ Initially, these increases in power were mitigated by the concomitant rise in the number of independent and semi-independent state agencies over which the governor had no real control, as the legislature usually oversaw these agencies.³⁷⁰ This arrangement was not a problem when state functions were limited.³⁷¹ However, as state services, employees, and expenditures began to grow, so did the chaos associated with having multifarious independent and semi-independent entities working without coordination, which precipitated the need for a centralized state authority to control and direct these various state agencies.³⁷² Since the state legislature could not adequately meet this centralization need, as it met only periodically, the state governor became empowered to fill this void.³⁷³ One of the main tools developed and employed to accomplish this task of ad-

^{363.} *In re* Highlands Master Plan, 25 A.3d 1172, 1179 (N.J. Super. Court App. Div. 2011). *See also* Commc'ns Workers of Am. v. Christie, 994 A.2d 545, 561 (N.J. Super. Court App. Div. 2010) ("Executive orders, when issued within their appropriate constitutional scope, are an accepted tool of gubernatorial action.").

^{364.} See Richard E. Favoriti, Executive Orders—Has Illinois a Strong Governor Concept?, 7 Loy. U. Chi. L.J. 295, 295–97 (1976) (elucidating the differences between the common law prerogative power of the English Monarch and the statutory/constitutional power of the governor as the source of the power to issue executive orders and proclamations).

^{365.} Id. at 297.

^{366.} See Note, Gubernatorial Executive Orders as Devices for Administrative Direction and Control, 50 IOWA L. REV. 78, 78 (1964) ("From conflicts between colonial governors and the elected colonial representatives there developed [a] . . . desire upon the part of the newly independent colonists to emasculate the office of governor and thus insure against abuses from that source."); Favoriti, supra note 364, at 296.

^{367.} Id.

 $^{368.\}quad \textit{Id.}$ at 78–79. The office of governor was originally selected by the state legislatures. Id.

^{369.} Id.

^{370.} Id. at 79.

^{371.} Id. at 80.

^{372.} Id

^{373.} Id. at 80–81. See also Favoriti, supra note 364, at 296–97.

ministrative control and direction was the gubernatorial executive order. 374

IDAHO

2. Types & Form of Executive Orders

There are three main types of executive orders, which each admit of variance from state to state, but which also are all generally similar in form and effect.³⁷⁵ First, there are ceremonial and political proclamations, those that declare a special day, recognize the contributions of a particular citizen or group, or engage in some other similar action.³⁷⁶ This category may have legal effect, such as declaring a state holiday or ordering a special election, or may be purely ceremonial.³⁷⁷ Second, there are the so-called "gubernatorial ordinances," relatively new but rare phenomena whereby the governor issues an executive order that "affect[s] the public at large, generally [has] the force of law, and serve[s] to implement or supplement the constitution or laws of the state."378 The third category, which is most important for the purposes of this comment, involves orders for administrative control and direction.³⁷⁹ These orders, supported by the governor's general removal power, have the potential to allow the governor to exercise a great amount of control over the administrative agencies of the state.

In form, gubernatorial executive orders are similar to other types of law and tend to be fairly uniform in structure.³⁸⁰ Most gubernatorial executive orders contain four basic parts.³⁸¹ First is the "whereas" portion of the order in which the governor states the various reasons that justify or necessitate the order.³⁸² Akin to the statement of purpose section found in most legislation, this first section helps to justify the order and

^{374.} Gubernatorial Executive Orders as Devices for Administrative Direction and Control, supra note 366, at 82.

^{375.} Id.

^{376.} Id

^{377.} *Id.* at 82–83. In Idaho, the power to convene the legislature is constitutional in nature, *see* IDAHO CONST. art. III, § 8; art. IV, § 9, while the power to declare a state holiday is statutory in nature, *see* IDAHO CODE ANN. § 73-108 (2011).

^{378.} Gubernatorial Executive Orders as Devices for Administrative Direction and Control, supra note 366, at 83. For an example of this second category in Idaho, see, e.g., IDAHO CODE ANN. § 46-1008 (2011) (granting the governor the power to issue an executive order declaring a state of emergency in specified circumstances, which has the force and effect of law, and allowing the governor to, inter alia, commandeer private property if necessary to cope with the declared emergency).

^{379.} Gubernatorial Executive Orders as Devices for Administrative Direction and Control, supra note 366, at 84.

 $^{380.^{^{\}circ}}$ Michael S. Herman, Gubernatorial Executive Orders, 30~Rutgers L. J. 987, 992~(1999).

^{381.} *Id.*

^{382.} Id.

explain what it is intended to accomplish.³⁸³ In other words, this first section lays out the governor's argument in support of his exercise of this executive power, citing factual predicates and policy motivations for issuing the order.³⁸⁴ The first section may also afford the governor an opportunity to make broad declarations about issues not the subject of the executive order or not even within his scope of authority.³⁸⁵ Indeed, when used in this way the "whereas" section closely resembles a legislative or executive proclamation done to make public the opinion or policy stance of the executive branch.³⁸⁶

The second basic portion of an executive order is the declaration of authority in which the governor makes explicit the bases of legal authority upon which he is issuing the executive order.³⁸⁷ In most cases, this section is short—usually one or two lines—and specifies the legal source of authority for the executive order, such as whether the exercise is based on general constitutional or statutory authority, or both.³⁸⁸ If applicable, the governor will cite to the specific constitutional or statutory provision granting the requisite authority.³⁸⁹

The third, and most important, portion of an executive order is its substantive sections, in which the governor lays out the directives of the order or proclamation, specifying, *inter alia*, to whom the order is directed, what they must do, how they must do it, and how long they have to do it.³⁹⁰ In essence, this is the most legally operative section of an executive order. As a result, this section can either consist of a single paragraph or span many pages depending on the complexity and scope of the executive order being issued.³⁹¹

Finally, an executive order invariably concludes with a portion devoted to the formalities of issuing the order, including the governor's signature, the date of issuance, the seal of the state in which the order is issued, and the signature of the secretary of state who affixed the seal and filed the order.³⁹²

384. *Id. See, e.g.*, Exec. Order No. 2009-17, IDAHO ADMIN. BULL. 10-2, at 11 (2010); Exec. Order No. 2010-01, IDAHO ADMIN. BULL. 10-4, at 11 (2010); Exec. Order No. 2010-02, IDAHO ADMIN. BULL. 10-6, at 12 (2010).

^{383.} See id

^{385.} Herman, supra note 380, at 992.

^{386.} Id.

^{387.} *Id.* at 992–93.

^{388.} See, e.g., Exec. Order No. 2011-03, supra note 13, at 16 ("Now, Therefore, I, C.L. "Butch" Otter, Governor of the State of Idaho, by the authority vested in me under the Constitution and laws of the state of Idaho"); Exec. Order No. 2010-04, IDAHO ADMIN. BULL. 10-6, at 16 (2010) ("Now, Therefore, I, C.L. "Butch" Otter, Governor of the State of Idaho, by virtue of the authority vested in me under the Constitution and laws of the state of Idaho").

^{389.} Herman, supra note 380, at 992-93.

^{390.} Id. at 993.

^{391.} *Id. Compare* Exec. Order No. 2011-05, IDAHO ADMIN. BULL. 11-9, at 20 (2011) *with* Exec. Order No. 2010-08, IDAHO ADMIN. BULL. 10-6, at 25–31 (2010).

^{392.} Gubernatorial Executive Orders as Devices for Administrative Direction and Control, supra note 366, at 93. See, e.g., Exec. Order No. 2011-03, supra note 13, at 17.

3. Source of Authority for Executive Orders

The brevity of the second portion of an executive order belies its importance, as it is upon this brief portion that the legal validity of an executive order may rely. Indeed, an executive order's constitutionality within the state is dependent on its cited basis or bases of authority.³⁹³ As indicated above, the governor's power to issue executive orders generally rests on one or more of four legal bases: (1) general constitutional power based on a broad grant of power; (2) specific constitutional authority based on an explicit and specific grant of power; (3) general statutory authority based on a broad grant of power, not from the people, as is the case with a broad constitutional authority, but from the legislature as the people's representative; and (4) specific statutory authority.³⁹⁴ Thus, executive orders often cite to specific constitutional or statutory grants of authority if such exist.³⁹⁵

However, even if not granted by specific constitutional or statutory authority, or implied from a general statutory grant of power, authority to issue gubernatorial executive orders may be inherent in the broad constitutional grant of the state executive power and the requirement that the governor faithfully execute and enforce the laws-provisions found in almost every state constitution. 396 Courts have historically been split as to whether these provisions are merely declaratory or actually grant power.³⁹⁷ Some argue in favor of a "weak governor," finding no grant of authority in these common state constitutional provisions. 398 The argument tends to be one of construction, in that the enumeration of specific powers following the vesting of the supreme executive power and charging to faithfully execute the laws limits and restricts those general grants. 399 Moreover, while such jurisdictions admit that the Doctrine of Implication—which states that an express constitutional duty or grant of power implies the powers necessary to execute that duty or exercise those powers—applies for express constitutional powers, 400 they

^{393.} See Favoriti, supra note 364, at 297.

^{394.} Gubernatorial Executive Orders as Devices for Administrative Direction and Control, supra note 366, at 85. See also Favoriti, supra note 364, at 297.

^{395.} Gubernatorial Executive Orders as Devices for Administrative Direction and Control, supra note 366, at 85.

^{396.} See supra note 361.

^{397.} Gubernatorial Executive Orders as Devices for Administrative Direction and Control, supra note 366, at 86.

^{398.} *Id.* at 86–87.

^{399.} Id. at 87-88.

^{400.} See Favoriti, supra note 364, at 298 ("[A]s a general rule whenever a constitution expressly grants a power or enjoins a duty, it also gives by implication that particular power necessary for the exercise of the one or the performance of the other.").

find no such express powers in the general vesting clause, and thus there are no other powers implied from the broad vesting clause. 401

Other jurisdictions favor a "strong governor," finding that if the powers of the governor were limited only to those expressly granted then the vesting provisions would be largely surplusage, something that is assumed never to be the case in statutory and constitutional construction. 402 Further, since these provisions cannot be surplusage or mere "verbal adornment of the office," they must instead serve some purpose, which, it is argued, is that they imply that the governor may exercise such power as will secure the efficient execution of the laws of the state within the boundaries of the state constitution and statutes. 403 Thus, enumerated "powers" in the state constitution are not, in fact, powers at all, but instead are merely guidelines or mandates on how the broad executive power granted through the vesting clause is to be exercised.

Determining whether a state has a "strong governor" or a "weak governor" seems, then, to turn on how the state constitution itself is conceived. As a general proposition, state constitutions operate only as a limitation on the otherwise plenary power of state legislatures. Depending on the state's constitution and how the judiciary and the legislature interpret it, this general proposition may be restrictive, applying only to the legislature. On the other hand, it may be non-restrictive, applying to all branches of state government, and more specifically to the governor, thereby supporting the "strong governor" argument of implied powers from a general grant.

^{401.} See, e.g., Field v. People ex rel. McClernand, 3 Ill. (1 Scam.) 79, 83 (Ill. 1839). But see Favoriti, supra note 364, at 299–300 (discussing the Illinois Supreme Court's dicta in Buettell v. Walker, 319 N.E.2d 502 (Ill. 1974), indicating that the duty to faithfully execute the laws found in Article V, section 8, of the Illinois Constitution granted an express power to execute the laws from which an implied power to use executive orders to do so could be found).

^{402.} Gubernatorial Executive Orders as Devices for Administrative Direction and Control, supra note 366, at 89 (quoting Tucker v. State, 35 N.E.2d 270, 286 (Ind. 1941) ("But if the executive powers granted to the Governor are confined to express grants, the provision that the executive power shall vest in the Governor is surplusage, and this cannot be. An examination of the provisions referred to as granting express executive power to the Governor discloses that they are not, in fact, grants of power, but rather directions or mandates as to the manner in which executive power is to be exercised, or limitations upon power or delegation of power which is not in essence executive.")).

^{403.} Id. at 90 (quoting State ex rel. Stubbs v. Dawson, 119 P. 360, 363 (Kan. 1911)).

^{404.} Favoriti, supra note 364, at 297.

^{405.} See Robert F. Williams, State Constitutional Law Processes, 24 Wm. & MARY L. Rev. 169, 178 (1983) ("State constitutions are usually contrasted with their federal counterpart by characterizing the former as limits on governmental power rather than grants of power. When the Union was formed, the states retained almost plenary governmental power exercised primarily by their legislatures. This power was limited only to the extent that the states granted powers to the federal government, agreed to restrictions on state power in the Federal Constitution, or imposed limitations on themselves in their own constitutions.").

 $^{406.\}$ See, e.g., Field v. People $ex\ rel.$ McClernand, 3 Ill. (2 Scammon) 79, 83 (Ill. 1839).

^{407.} See, e.g., Tucker v. State, 35 N.E.2d 270, 286 (Ind. 1941).

IDAHO

If the latter is true, then the executive order truly becomes a powerful gubernatorial tool, as executive orders, like legislation and judicial rulings, are legally binding when enacted within the boundaries of the governor's authority. They are not, however, encumbered by the procedural or substantive safeguards that are required of other types of law, and instead may be created by the mere stroke of a pen. 409

Nevertheless, the executive order is also eminently fragile and transitory. Indeed, just as it can be created with the stroke of a pen, so can it be repealed in the very same manner and with the very same ease. An executive order can be repealed by the same governor that created it, a succeeding governor, or the state legislature; however, a court can generally only repeal an executive order by finding it unconstitutional or lacking authority.

As a result, the gubernatorial executive order is both a powerful and fragile tool that may be exercised with broad discretion by a single individual. Whether this state of affairs is favorable or harmful is irrelevant to the current discussion, however. Instead, the question presented herein is much simpler. Having shown that nullification provides no legal basis for Idaho Governor C. L. "Butch" Otter's (or the legislature's) actions, and having laid out the general nature of gubernatorial executive power and the potential scope of the executive order, the question becomes whether there exists legal authority to issue Executive Order No. 2011-03, and if so, where that power is sourced. In other words, the question becomes whether Idaho has a "strong governor" or a "weak governor."

B. The Gubernatorial Executive Order in Idaho

Idaho's governor is vested with the "supreme executive power" and is charged to "see that the laws are faithfully executed" by Article IV, Section 5, of the Idaho Constitution. However, as is the case with virtu-

^{408.} See Herman, supra note 380, at 989-90.

^{409.} *Id.* at 990 ("So long as the Governor is acting within [his] authority, [he] may issue or repeal an executive order without the procedural or other safeguards that other types of law require. An executive order need not follow a defined process like a piece of legislation, comply with administrative procedures like a rule or regulation, or follow stare decisis as the courts must. Thus, the nature of executive orders gives a great deal of power to a single individual.").

^{410.} *Id.* For example, executive orders in Idaho are valid for no more than four years after the listed effective date or date of issuance if no effective date is listed, at which point they must be renewed or are no longer effective. Moreover, a governor may modify or repeal any executive orders through the issuance of a subsequent executive order. IDAHO CODE ANN. § 67-802 (2006).

^{411.} Herman, supra note 380, at 990.

^{412.} Id. at 989–90.

ally all state constitutions, the Idaho Constitution does not expressly grant the governor the authority to issue executive orders. 413 As a result, there remain three potential sources for the authority to issue gubernatorial executive orders in Idaho: a general grant of constitutional authority, a general grant of statutory authority, or a specific grant of statutory authority. 414

1. The General Grant of Constitutional Authority

Determining whether Idaho has a "strong governor" or a "weak governor" depends on whether the Idaho State Constitution grants broad authority to issue executive orders through the executive vesting clause of Article IV, Section 5. This requires an analysis of the constitutional language and history of that provision. Due to the lack of judicial precedent on point, as is often the case in Idaho, the following textual analysis will apply some fundamental principles of interpretation. 415 First, the state constitution should be interpreted so that no provision is rendered without meaning or becomes a mere surplusage; indeed, each constitutional provision is assumed to "serve some purpose or to accomplish some goal."416 To treat the vesting section in Article IV of the Idaho Constitution as providing no power in itself, but instead working merely as a declaratory statement without other legal effect, would cause the provision to be surplusage without an actual purpose. Indeed, applying the "weak governor" argument would mean that the governor's only substantive powers are those enumerated. Such a construction would obviate the need for a "vesting clause," which would act to merely declare generally what is immediately made specific in the surrounding constitutional provisions. Thus, this first canon of construction favors an alternative reading, one that gives effect to the provision to serve some purpose or accomplish some goal.

Second, constitutional provisions, like statutory provisions, should be liberally construed to accomplish the intent of the issuing body, and thus the court may look behind the bare text to determine and give effect to that intent.⁴¹⁷ Thus, the history of the state constitutional provision is relevant to determining the intent and effect of the provision.⁴¹⁸ However, the legislative intent behind Article IV, Section 5, is unclear. Although the very process of Idaho statehood began by the gubernatorial proclamations of territorial governors E. A. Stevenson and George L.

_

^{413.} See generally IDAHO CONST. art. IV (listing the executive's powers and duties, which do not include the ability to issue executive orders).

^{414.} See supra note 394 and accompanying text.

^{415.} See Keenan v. Price, 68 Idaho 423, 437–38, 195 P.2d 662, 670 (1948) (stating that the canons of statutory construction apply with equal force to constitutional construction). See also Williams, supra note 405, at 195–96.

^{416.} $\it Keenan, 68$ Idaho at 437–38, 195 P.2d at 670; Williams, $\it supra$ note 405, at 195–96.

^{417.} Keenan, 68 Idaho at 437-38, 195 P.2d at 670.

^{418.} *Id.*; Williams, *supra* note 405, at 198.

Shoup in 1889, 419 there was virtually no discussion during the state constitutional convention about the nature or scope of the executive power granted to the governor; indeed, Section 5 of Article IV was presented and passed without amendment or debate. 420 Nevertheless, the Constitution of Idaho, as with most states, reflects the political culture of the state, which is steeped in individualism, distrust of government, and a belief that the scope of governmental power should be strictly limited and subject to checks by the people. 421 This explains why portions of the executive power were vested separately in various executive officers and boards, and further why the constitution would provide for legislative restrictions on gubernatorial power; 422 however, it fails to explain fully whether the vesting section in Article IV, Section 5, grants the governor broad power to secure the efficient and faithful execution of the laws through any means that do not violate the constitution. Indeed, while such a political culture would seem to support the converse, it does not preclude the possibility of a broad grant of power, especially in light of the ability of the legislature to restrict gubernatorial power; such a power would not be necessary if the governor had only those powers enumerated within the constitution, as restriction of those powers would be both unnecessary and an unconstitutional violation of separation of powers.423

Third, constitutional provisions should be interpreted in terms of the meaning the words would convey to an "intelligent, careful voter." Again, the lack of debate over Article IV, Section 5, during the constitutional convention or ratification suggests that the people of the state were not concerned with it as drafted. However, this, of course, assumes that the convention accurately spoke for the people of the state. In any event, this still does not illuminate whether the vesting section provides a broad grant of power or is merely declaratory.

 $^{419.\}quad 1$ Proceedings and Debates of the Constitutional Convention of Idaho, 1889, at vi, vii–x (I. W. Hart ed., 1912).

^{420.} See id. at 417 (articles 4 and 5 passed committee without debate or amendment); 2 id. at 1414–15 (articles 1 through 5 passed the whole convention without amendment or debate). See also Donald Crowley & Florence Heffron, The Idaho State Constitution: A Reference Guide 9–10 (1994) (noting that in spite of the length of Article IV, little debate occurred over its provisions; the debate that did occur focused on the expense of the executive branch).

^{421.} CROWLEY & HEFFRON, supra note 420, at 16, 21.

^{422.} See id. at 100-01.

^{423.} See IDAHO CONST. art. II, § 1.

 $^{424.\;}$ Williams, supra note 405, at 197 (quoting Kuhn v. Curran, 61 N.E.2d 513, 517–18 (N.Y. 1945)).

^{425.} See Crowley & Heffron, supra note 420, at 15–16 (noting that the main opposition to ratification came from disenfranchised members of the LDS faith, those that felt the state lacked sufficient economic resources to survive as a state, and the annexationists in Nez Percé County in northern Idaho).

Finally, and most importantly for this discussion, the Idaho Supreme Court explicitly rejected the canon of expressio unius est exclusio alterius⁴²⁶ in constitutional construction in Eberle v. Nielson, 427 and thus the Idaho State Constitution is construed as a limitation, not a grant of power. 428 While the court was interpreting the state constitution with respect to legislative power, it did not explicitly confine this constitutional construction to the legislative branch. 429 Indeed, no Idaho case has ever directly held that the governor possesses or lacks a plenary executive power similar to the plenary legislative power held by the legislature. 430 However, the courts of several other states with constitutional structures and provisions that vest the executive power similar to that of Idaho have held that the language used does, in fact, vest the executive branch, and thereby the governor with the plenary executive power. 431 As noted by Justice Taylor in In re The Petition of Idaho State Fed'n of Labor, as a matter of logic, "[n]o reason appears, or has been advanced for the application of a different rule to the powers of the executive and judicial departments of the state government, than that applied to the legislative department."432 Thus, absent any arguments to the contrary by the Idaho judiciary, the enumeration of powers for the executive department should be treated not as an exclusion of other powers—an interpretation expressly rejected by the Idaho Supreme Court—but as a limitation on the otherwise plenary executive power of the department consistent with the applicable interpretation of the legislature's power.

Thus, while far from clear, the above analysis tends to suggest that Article IV, Section 5, of the Idaho Constitution does indeed grant a broad executive power to the governor, which includes an implied authority to use any constitutional means to effectuate the efficient execu-

^{426. &}quot;Express enumeration of powers excludes others not named."

^{427.} Eberle v. Nielson, 78 Idaho 572, 306 P.2d 1083 (1957).

⁴²⁸. *Id.* at 578, 306 P.2d at 1086 (recognizing that the concept is "generally accepted throughout the United States").

^{429.} *Id.*

^{430.} But see In re The Petition of Idaho State Fed'n of Labor (AFL), 75 Idaho 367, 380, 272 P.2d 707, 715 (1954) (Taylor, J., dissenting) (finding that the rule usually applied to the legislative department that the state constitution is a limitation of power, and not an enumeration of power, to be applicable to the executive and judicial departments, as well).

^{431.} See, e.g., Straus v. Governor, 592 N.W.2d 53, 57 (Mich. 1999) (interpreting art. I, sections 2 and 3 of the Michigan Constitution as granting to the governor "nearly plenary" power "limited only by constitutional provisions that would inhibit the legislature itself"); Great N. Utilities Co. v. Pub. Serv. Comm'n, 293 P. 294, 304 (Mont. 1930) ("The Constitution of Montana is not a grant of power, but rather a limitation upon powers exercised by the several departments of the state government.") (emphasis added); Fritts v. Kuhl, 17 A. 102, 107 (N.J Sup. Ct. 1889) (applying the maxim that state constitutions are a limitation, not an enumeration, of powers to the context of executive appointments, finding that the power was not reserved to the people and could not be exercised by the judiciary or by the legislature when not in session, and thus had to reside with the chief executive, even though it was not an enumerated power).

^{432.} In re The Petition of Idaho State Fed'n of Labor (AFL), 272 P.2d at 716.

IDAHO

tion of the laws, including the executive order. As mentioned before, if this is the case, the executive order is indeed a powerful tool, constrained only by the constitution and laws of Idaho.

2. The Statutory Grant of Authority

The question of whether Article IV, Section 5, of the Idaho Constitution grants a broad executive power may be a mere technicality, as the legislature has explicitly recognized (or granted, depending on whether one takes the "weak governor" or "strong governor" view) the governor's ability to issue executive orders consistent with the executive power granted to the governor in the Idaho Constitution. 433 The Idaho Legislature amended Idaho Code § 67-802 on February 21, 1974, explicitly granting the governor broad authority to issue executive orders "within the limits imposed by the constitution and laws of this state." 434 This section of the Idaho Code deals with the duties of the governor, and enumerates twelve powers and duties in addition to those listed in the constitution, including the power "[t]o supervise the official conduct of all executive and ministerial officers."435 As a result, the governor does, in fact, have the power to issue executive orders to effectuate the enumerated statutory supervisory power as expressly provided in the broad statutory grant in the same section of the Idaho Code.

Indeed, the only limits placed on the governor's power to issue executive orders are those specifically enumerated in the Idaho Constitution and those limits placed on the governor by the laws of the state. As indicated previously, the constitutional enumeration of powers likely act only as guidelines for exercising the otherwise broad executive power granted by Article IV, Section 5, of the Idaho Constitution. ⁴³⁶ Virtually all of the statutory provisions affecting the governor's use of the executive order act merely as limitations on the broad grant of authority, in that they specify how the governor must use the executive order in specific circumstances, none of which involve the supervision of executive or ministerial officers. ⁴³⁷ Thus, as there is no specific statute directing the

^{433.} See IDAHO CODE ANN. § 67-802 (2011) ("In order that he may exercise a portion of the authority so vested [by the Idaho Constitution], the governor is authorized and empowered to implement and exercise those powers and perform those duties by issuing executive orders from time to time which shall have the force and effect of law when issued in accordance with this section and within the limits imposed by the constitution and laws of this state.") (emphasis added).

^{434. 1974} Idaho Sess. Laws 592, 596.

^{435.} IDAHO CODE ANN. § 67-802 (2011).

^{436.} See supra notes 413-432 and accompanying text.

^{437.} See, e.g., IDAHO CODE ANN. \S 67-5807 (2012) (allowing for executive orders or proclamations by the governor declaring a state of disaster emergency in response to threats posed by Canadian gray wolf); \S 46-1008 (2003) (providing for executive orders to declare

governor's use of the executive order to supervise the conduct of all executive and ministerial officers, the governor must simply comply with the general requirements of Idaho Code \S 67-802⁴³⁸ and any other limitations in the Idaho Constitution.

Moreover, because the legislature has the power to control the otherwise valid discretion of political subdivisions of the state, which includes executive agencies, the governor—through the delegation of this power under Idaho Code § 67-802—also has that power. As a result, it seems explicitly clear that the governor does indeed have the power to direct state agencies in their exercise of discretion over whether to implement the discretionary portions of the PPACA, and thus—at least to this extent—Governor Otter's executive order acted well within his constitutional and statutory authority. The question remains, however, whether the executive order has any power to prevent implementation of the mandatory provisions of the PPACA.

C. The Gubernatorial Executive Order as a Means of Nullification

1. Nullification is Constitutionally Invalid, Regardless of the Form Used

As shown from the discussion in Part I, the theory of nullification has no grounding in the United States Constitution or the legal history or precedent of the United States. Its claim of state interpretive supremacy on matters of federal law undermines the Framers' original understanding of the Constitution as being ordained and established by "the *People of the United States*" to create "a more perfect *Union*."

more generalized states of disaster emergency and specifying the requirements for and limits of those orders); § 46-1005A (2003) (allowing the governor, by executive order, to transfer general state money to the disaster emergency account, limited only by his judgment that enough money will remain in the general account for the current fiscal year); § 67-3512A (2006) (allowing governor, by executive order, to temporarily reduce spending authority of any department, institution, or office of the state, and specifying the requirements for and limitations of the order); § 50-2804 (2009) (specifying how the governor is to implement and administer through executive order the allocation formula for the Idaho Private Activity Bond Ceiling Allocation Act).

- 438. The only requirements imposed by this statute for the general use of the gubernatorial executive order is that executive orders must be signed by the governor, filed with the secretary of state and a register of them maintained in the same manner as legislation, and published in the Idaho Administrative Bulletin if required under Chapter 52, Title 67 of the Idaho Code. IDAHO CODE ANN. § 67-802 (2011).
- 439. The only potentially applicable limitation on the use of the executive order is the separation of powers provision in Article II, Section 1, of the Idaho Constitution. However, even this limitation is limited, as executive forays into the legislative realm are not entirely prohibited, especially when explicitly provided for by the Idaho Constitution or statute. See Sweeney v. Otter, 804 P.2d 308, 313, 199 Idaho 135, 140 (1990) ("[T]he separation of powers concept is not an all or nothing proposition. The intrusion of one constitutional department of government into the powers of another department is not a violation of the separation of powers clause of the constitution if that intrusion is authorized by the constitution itself.").
 - 440. See Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 362-64 (2009).
 - 441. U.S. CONST. pmbl. (emphasis added).

1

Thus, unlike the three branches of the federal government, which operate coordinately as a result of their "common commission" to the whole people of the United States, ⁴⁴² the individual states have no such common commission from the whole Union, but only from their own states and thereby have essentially no claim to interpretive authority, even as pertaining to how federal law will affect citizens within their own state. ⁴⁴³

Thus, nullification theory originated as and has remained a fringe political tactic infrequently used by groups that feel unfairly oppressed by the federal government, but who are in reality merely political losers at one stage or another of the legitimate process. Groups that turn to nullification opt to extricate themselves from a political and legal process that they see as inherently unfair (at the moment, that is, when they are not in the majority) and simply declare their political position as righteous and enforceable without exploring the legal alternatives available to them—and there are always legal alternatives available. Indeed, even unfavorable Supreme Court decisions are not set in stone and may be superseded by statute or later overturned as history has proven time and again. Similarly, unconstitutional statutes can and often are overturned by the Supreme Court, modified to correct the constitutional deficiencies, or repealed entirely by a subsequent Congress. Advocates of nullification exhibit an unwillingness to patiently utilize these legal processes available to them, refusing to play the part of losers in the system of give and take that has sustained the political system of the United States for more than two centuries.

Furthermore, a gubernatorial claim of authority to nullify *any* law, including federal law, through executive order alone is tantamount to the claim made by the English Monarchs of a prerogative power to suspend laws. The Framers completely and fundamentally rejected the idea of a prerogative power in the executive, finding it antithetical to the entire concept of having a written constitution. ⁴⁴⁴ Moreover, the tyrannical excesses of the colonial governors, who acted largely from prerogative, having few limitations, was a direct cause of the initially limited nature of the state office of governor. ⁴⁴⁵ Thus, regardless of actual legal effect,

^{442.} THE FEDERALIST NO. 49, at 339 (James Madison) (Jacob E. Cooke ed., Wesleyan University Press 1961).

^{443.} See 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 380–82 (1833) (arguing that the Calhounian style nullification theory that states have interpretive supremacy would affect the Union as a whole through a lack of interpretive uniformity to such a degree that it would destroy federal power of any kind and inevitably lead to dissolution of the Union).

^{444.} Adler, supra note 362, at 87, 98-101.

^{445.} Gubernatorial Executive Orders as Devices for Administrative Direction and Control, supra note 366, at 82.

Governor Otter's claim to authority to nullify federal law through executive order amounts to a claim to a power that the Framers rejected and the states feared. Indeed, it is eminently ironic that Otter or any other advocate of nullification would imply such authority while simultaneously invoking the Framers for support of the proposition.

As a result, nullification is legally and constitutionally invalid, and whether it is engaged in by legislative, judicial, or executive means does nothing to change this invalidity. Indeed, the different branches of state government that have tried to use nullification to obstruct and defy federal law does nothing but change slightly the manner of evidence needed to refute it as constitutionally unsupportable, legally ineffective, and politically dangerous.

2. Activities Attempting Nullification May Retain Some Rhetorical Value

Nullification and interposition tactics may not be entirely without value, however. On the contrary, nullification and interposition tactics, even if legally unenforceable, may be valuable as expressing the codification of state values and opinions. Indeed, state laws attempting to nullify the various portions of the PPACA, such as the individual mandate, can be understood as strong pronouncements to the federal government that the people of the enacting state regard health insurance as a matter of individual responsibility that is immune from federal government interference. Codifying such dissent and opposition to unpopular and arguably unconstitutional federal legislation helps to maintain the opposition in the public mind and give permanency to what might otherwise be regarded as a transitory expression of discomfort or frustration to federal legislation in previously unexplored areas. This only works, however, if two preconditions exist.

First, there must be no enforcement provisions that require implicitly or explicitly the use of force against federal or state actors to effect compliance with the policy position within the state. This requires the conclusion that nullification, as currently practiced and usually espoused, is not a valuable rhetorical political tool since it inevitably requires the use of force in some form to effect its declaration that a law is unconstitutional and is null and void within the state. 449

Second, declaratory interposition actions must be taken through a political body that has the most legitimate claim to representing the people of the whole state—the legislature. When utilized by the governor in the form of an executive order, such declarations of state policy

^{446.} Leonard, supra note 350, at 166; see also MCCOY, supra note 25, at 141-42.

^{447.} Leonard, *supra* note 350, at 167.

^{448.} See id. at 165–66.

^{449.} See supra Part II and notes 281, 285–86 and accompanying text.

IDAHO

through nullification actions lose legitimacy, becoming the tool of one man or woman to rule by fiat. 450

The question becomes whether these conditions are met in Governor Otter's use of Executive Order No. 2011-03 as a means of claimed nullification. First, this executive order is not nullification; instead, it is closer to interposition, as it lacks a declaration of unconstitutionality and specifically avoids stating that the law is null and void in the state. Additionally, it contains no explicit or implicit requirement or allowance of using force to effect its provisions. Thus, the executive order may still have some rhetorical and political value.

Second, the Governor of Idaho is empowered by Idaho Code § 67-802(4) to act as "the sole official organ of communication between the government of this state and the government of any other state or territory, or of the United States." This common executive power, however, does not imply an ability to speak on behalf of the people of the state of his own accord, but is akin to the correct understanding of the "sole organ doctrine" at the federal level; that is, the ability to speak on behalf of the people with other sovereigns occurs only *after* policy has been formulated by the representative branch of government—the state legislature. Thus, in Idaho, the governor must be able to point to some legislative directive or indication of what the policy position of the state is or should be before he can claim to be speaking on behalf of the people of the state.

In the context of Idaho's opposition to the PPACA, this is not a difficult thing to find. Beginning with the IHFA, the stated purpose of the bill was to "codif[y] as state policy that every person in the state of Idaho is and shall continue to be free from government compulsion in the selection of health insurance options, and that such liberty is protected by the Constitutions of the United States and the State of Idaho."455 Furthermore, the bill prohibited all state employees, officials, and agents from implementing or enforcing the PPACA—a stance almost identical to that taken by Governor Otter in Executive Order No. 2011-03. 456 Additionally, Executive Order 2011-03 avoided using the incendiary language of H.B. 117, which pronounced the PPACA "void and of no effect"

453. IDAHO CODE ANN. § 67-802(4) (2011).

^{450.} See Cooper v. Aaron, 358 U.S. 1, 19 (1958) (per curiam); Sterling v. Constantin, 287 U.S. 378, 397–98 (1932).

^{451.} See generally Exec. Order No. 2011-03, supra note 13.

^{452.} Id.

^{454.} Cf. Louis Fisher, Congressional Access to National Security Information, 45 Harv. J. on Legis. 219, 226–28 (2008).

^{455.} CLARK, supra note 284.

^{456.} Compare H.B. 391, 60th Leg., 2d Reg. Sess. (Idaho 2010) (codified at IDAHO CODE ANN. § 39-9001 et seq. (2011)) with Exec. Order No. 2011-03, supra note 13, at 16.

and subsequently failed in the Idaho Senate. 457 Instead, Governor Otter adopted language similar to H.B. 298, both in the pronouncement of state policy and in the enforcement through direction of subordinate state entities. 458 Although he did expand the scope of Executive Order No. 2011-03 to encompass a prohibition on enacting any provision of the PPACA, whether discretionary or mandatory, thereby going beyond the scope of H.B. 298's prohibition on enacting only the discretionary portions, this alone is not sufficient to say that Executive Order 2011-03 is not declaring the policy position of the state as garnered from the actions and statements of the representative branch of government. On the contrary, this merely expands in a logical and rather limited way upon the statements of the legislature without contradicting the legislature's stated policy. One could argue that Executive Order 2011-03 tends more toward the policy stated in H.B. 117, which was subsequently killed in an Idaho Senate committee, and thus Governor Otter's executive order is more representative of a public policy rejected by the legislature. While there are indeed similarities between the two, they are different in precisely the places that initially caused H.B. 117 to fail: Executive Order 2011-03 neither declares the PPACA unconstitutional and void within the state nor attempts enforcement beyond its proper sphere of state officials.

As a result, there is indeed rhetorical value in Governor Otter's use of Executive Order No. 2011-03 as a means of opposing the PPACA. Nevertheless, his actions are otherwise without legal effect, as neither he nor any state entity can legally block the implementation of the PPACA's mandatory provisions, such as the individual mandate, since it is entirely self-executing and requires no assistance from the states. Furthermore, Governor Otter's actions are both politically and legally dangerous. Thus, although Governor Otter had the legal power and political authority to issue Executive Order 2011-03, and while it has rhetorical value as a statement of state opposition to the principles presented by the PPACA, it has ultimately failed to live up to claims that it is a nullification of the PPACA, and thankfully so.

IV. CONCLUSION

While nullification has been proven time and again to be a doctrine devoid of constitutional or legal foundation, it by no means is a doctrine

 $^{457. \}quad Compare$ H.B. 117, 61st Leg., 1st Reg. Sess. \$1(6) (Idaho 2011) with Exec. Order No. 2011-03, supra note 13, at 16.

^{458.} Compare H.B. 298, 61st Leg., 1st Reg. Sess. §§ 1-2 (Idaho 2011) with Exec. Order No. 2011-03, supra note 13, at 16-17.

^{459.} See Leonard, supra note 350, at 155-58.

^{460.} I.e., they risk the loss of Medicaid funding and will potentially delegitimize Idaho as a political actor in the federal system.

^{461.} I.e., they set the stage for a legal showdown between the federal government and the state that the state cannot win.

IDAHO

without practical value. Indeed, as shown by the nullifiers during the Embargoes of 1808-1809, by South Carolina in 1832, and by Wisconsin in 1858, nullification and interposition efforts, as originally manifested by James Madison as a means of effecting noncooperation and voicing unified opposition, can be extremely effective in deterring the federal government from unconstitutional activities. The problem is that the theory of nullification is being presented as a legally sound and historically constitutional means of opposing such actions, which is patently false and has been repeatedly refuted.

Nevertheless, national reaction to the REAL ID Act has shown that the tactics of uncooperative federalism can in fact affect federal policy and implementation of national laws. Indeed, the activities associated with uncooperative federalism—resisting federal laws by refusing to aid in implementation—are closer to Madison's original conception of interposition, which called for resistance to seemingly unconstitutional federal law through all constitutional means. As a result, if supporters of nullification and interposition activities can take hold of this historical understanding and realize that using the inflammatory label of nullification can only harm their cause by delegitimizing it, and if they can realize that actual nullification activities are antithetical to the very foundations of constitutional government, they can share in the rhetorical and practical effectiveness of uncooperative—but constitutional—state activities, thereby still achieving their ultimate goal of actively resisting unfavorable federal laws.

Thus, while Governor Otter's use of the executive order to engage in uncooperative federalism (albeit unintentionally) and make public the policy position of the state of Idaho on the issue of health care is constitutionally sound and an effective political tactic insofar as it relates to discretionary portions of the PPACA, it is by no means clothed with constitutional garb as to any further claims of nullification. On the contrary, insofar as his executive order attempts to block implementation of mandatory provisions of the PPACA, it is patently invalid. However, his executive order will not present an issue, as the individual mandatethe portion of the PPACA upon which its enforcement relies and that Governor Otter and those like him find most objectionable—requires no assistance from the state to enact. Indeed, the federal government already has in place through the Internal Revenue Service a method for enforcing the penalties for noncompliance with the individual mandate. Furthermore, Governor Otter's executive order lacks any enforcement provision, and so even if it did claim an ability to block implementation of the PPACA in the state, it provides no means of doing so. As a result, Governor Otter's executive order prohibiting state employees, officials, and agencies from implementing any provisions of the PPACA within Idaho is quite limited in its effectiveness and legal impact. Although he

went further in some respects than H.B. 298 by attempting to prohibit implementation of any provision of the PPACA, Governor Otter's executive order has essentially no more effect than H.B. 298 would have had.

That said, Governor Otter's executive order lacks even the few merits that a legislative attempt at nullification—even if not actually nullification—can claim, such as having been issued from the representative body of the people. Indeed, Governor Otter's action lacks the legitimacy of having been produced by a deliberative process and instead replaces validly passed legislation with the directives of one man, even if those directives are in line with the spirit of the vetoed legislation. Moreover, the executive order itself attempts to take regulation of Idaho's nullification efforts out of the hands of the people and places it squarely in the hands of Otter himself, as he is the only one that can issue a waiver to his own executive order. Thus, Otter impliedly attempts to lay claim to the discredited prerogative power to suspend and dispense with laws, something that is antithetical to all constitutional principles and history.

As a result, Governor Otter's executive order, while procedurally authorized under the Idaho Constitution, nonetheless fails to produce its desired substantive effect of blocking implementation of the PPACA, and it instead serves merely as a policy statement and an order of agency direction and control. Thus, though somewhat novel in its approach, Governor Otter's executive order is nonetheless not nullification, but merely unintentional uncooperative federalism devoid of the benefits usually attending that legitimate action, making it an action "full of sound and fury, [s]ignifying nothing."

Ryan S. Hunter*

^{462.} WILLIAM SHAKESPEARE, MACBETH act 5, sc. 5.

^{*} J.D. Candidate, University of Idaho College of Law, May 2013. I would like to thank my family for their continuing love, support, and encouragement. I would also like to thank Dr. David Gray Adler for his thoughtful insight and feedback, which was critical in helping this project to reach its full potential. Fellow law student Alison Hunter and the staff of the *Idaho Law Review* also provided timely and helpful edits. Finally, I would like to thank my loving wife Aisha, whose unflagging support and unending love gives me the strength to push myself harder than I ever thought possible.