COMPACT THEORY AND MODERN NULLIFICATION

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ABSTRACT: *This paper will argue that compact theory should not be rejected due to its negative consequences in American history, but rather that it should be rejected for theoretical reasons based in American constitutional law and history. With this established, the paper will then consider the relevance of this conclusion to the modern state nullifications of federal marijuana laws and, finally, will argue that since compact theory is false, state legalization of marijuana is legally groundless regardless of whether marijuana legalization would be beneficial or not.*

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Few issues in the history of the United States have been as consistently and as damagingly divisive as compact theory and its implications of nullification and secession. From the ratification of the Constitution till the present day, these issues have plagued the nation. This paper will argue that one should not reject compact theory and its implications because of the consequences they have produced, but rather, because of the theoretical and legal fact that the ratification conventions did not form a compact. This paper's argument will proceed in five steps. First, it will provide definitions of compact theory, nullification, and secession. Second, it will briefly survey the historical wrongs to which compact theory has become inextricably tied. Third, it will argue that the consequences of compact theory, whether they are good or bad, provide no good reason for rejecting or accepting it; one should instead accept or reject it on theoretical grounds. Fourth, it will argue on theoretical grounds that compact theory is false. And last, it will argue that because consequences do not affect the truth of compact theory and because compact theory is false for legitimate, theoretical reasons,

one should reject the modern-day uses and permissions of it, such as some states nullifying the existing federal legislation banning marijuana.

What exactly is compact theory? It is the theory that, fundamentally, the ratification of the Constitution formed a compact not between the American people of the United States but between sovereign states themselves.[1] The most famous and influential statement of compact theory is in the Virginia and Kentucky Resolutions written by Thomas Jefferson and James Madison. They drafted these resolutions to provide arguments for states' nullification of John Adams' infamous Alien and Sedition Acts of 1798, which limited speech and protested the government's policies. The theoretical undergirding of their arguments is compact theory. Madison writes:

> That this Assembly doth... declare that it views the powers of the Federal government as resulting from the compact, to which the States are parties, as limited by the plain sense and intention of the instrument constituting that compact, as no further valid than they are authorized by the grant

1 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 228.

> enumerated in that compact, and that in case of [an]... exercise of powers not granted by the said compact, the States... have the right, and are in duty bound, to interpose for arresting the profess of the evil, and for maintaining within their respective limits, the authorities, rights, and liberties appertaining to them.[2]

Because the Constitution is a compact, Jefferson and Madison argued, the states do not necessarily have to submit to the federal government; the government is not the final arbiter of disputes. Each state is an equal co-party with the other states, and each state has the power to interpret the Constitution for itself, as is the case of contracts between individuals.

This theory's implications are drastic and far-reaching. Jefferson, its chief proponent, wrote in a letter to Edward Everett, "The constitution of the United States is a compact of independent nations subject to the rules acknowledged in similar cases, as well that of amendment provided within itself, as, in case of abuse, justly dreaded

2 James Madison and Thomas Jefferson, *Virginia and Kentucky Resolutions (1978), in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 164, 164-6.

but unavoidable *ultimo ratio gentium*."[3] Jefferson believed that this theory implies a state's right to forcefully resist a government perceived as encroaching upon its rights. Historically, the theory gave rise to the doctrines of nullification and secession. Nullification is the idea that a state legislature can nullify a federal law because it deems it contradictory to a constitutional right. Secession is the idea that a state can exit the compact because of breaches of compact by other parties.

Regardless of whether one thinks compact theory is true or not, it is a fact that compact theory's reputation has been tainted historically. It has repeatedly been on the "wrong side of history," as it were. This is due to its strong association with the southern states and the southern states' strong association with slavery and racism. For over a hundred years, compact theory was the theory behind the use, or threatened use, of secession and the nullification of federal laws contrary to southern policies favoring slavery and racism. There are two primary examples of this trend:

3 Thomas Jefferson, *To Edward Everett (1826),* in 12 THE WORKS OF THOMAS JEFFERSON: CORRESPONDENCE AND PAPERS 1816-1826, (Paul Leicester Ford ed., G. P. Putnam's Sons 1905), 469, 469.

the secession of the South from the Union in 1860 and the opposition movements to desegregation in the 1950s. In the South Carolina Ordinance of Secession, the South Carolina legislature's argument for their right to secede proceeds as follows. They first assert that the Declaration of Independence acknowledged the states as sovereign. The states retained this sovereignty even after the formation of the Constitution, which is fundamentally a compact between themselves. They then state its implications:

> We maintain that in every compact between two or more parties, the obligation is mutual; that the failure of one of the contracting parties to perform a material part of the agreement, entirely releases the obligation of the other; and that where no arbiter is provided, each party is remitted to his own judgement to determine the fact of failure, with all its consequences.[4]

In the Ordinance, they quote the Fugitive Slave Clause within the fourth article of the Constitution and then state that the breach of contract on the part of the northern states was their consistent refusal to return fugitive slaves. By the

4 *South Carolina Ordinance of Secession, in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 277, 277-9.

time of the Civil War, slavery had come to be the South's primary economic and political interest, and compact theory provided a means by which the southern states could protect this interest. The other slaveholding states in the South soon accepted South Carolina's rationale for secession.[5]

Compact theory was again on the wrong side of history during the desegregation movements in the 1950s. In 1954, the Supreme Court ruled in *Brown v. Board of Education* that state laws allowing for segregation in the states' public-school systems are unconstitutional; they effectively overturned the infamous 1896 *Plessy v. Ferguson* "separate but equal" decision. Many of the southern states, however, rejected this decision as unconstitutional. Compact theory again became an expedient means to combat the perceived encroachment upon the southern states' rights. Inspired directly by the writings of Jefferson, Madison, and Calhoun, James J. Kilpatrick, an editorialist from the South, for example, resurrected the idea of interposition, another logical

5 *Id.*

entailment of compact theory. This idea claims that multiple states jointly can legitimately nullify federal law. "Our thought here," Kilpatrick wrote, "is that if six or seven—or hopefully, nine or ten—Southern States should unite in a common front, all of them undertaking to nullify the Court's mandate... the Supreme Court would be faced with a truly formidable problem in enforcing its orders."[6] Kilpatrick routinely denounced African-Americans as inferior to whites and feared that their presence in desegregated schools might hurt the education and morals of white children. With compact theory again providing intellectual grounds for racism, in the 1950s and 1960s there were massive protests against desegregation throughout the South which often turned violent.[7]

Compact theory's legacy has thus been inseparably tied to racism. Although compact theory has indeed often been on the wrong side of history, this fact is irrelevant to its truth or falsity. Compact theory is a legal theory

6 William P. Hustwit, *From Caste to Color Blindness: James J. Kilpatrick's Segregationists Semantics,* 77 THE JOURNAL OF SOUTHERN HISTORY No. 3, 639, 648 (2011).

7 *Id.* at 639-70.

and, as such, one must accept or reject it on theoretical grounds. An example from science may help to clarify this point. Social Darwinists in the late nineteenth century and early twentieth century used Charles Darwin's theory of natural selection to justify all manner of evils, such as racism, eugenics, imperialism, and unjust violence.[8] Clearly though, none of these unfortunate consequences of Darwin's theory has any legitimate bearing upon whether or not Darwin was doing good biology when he developed his theory. One should accept or reject his theory upon scientific, biological grounds, not consequential ones. Similarly, the question of compact theory boils down to this simple dilemma: either the state ratification conventions in 1787 formed a compact between the states or they did not. The question is a legal one confined to the historical facts leading up to the drafting of the Constitution in 1787 until the last state's decision to ratify it in 1791. Its consequences in the nineteenth and twentieth centuries ought to have no bearing on which horn of the dilemma is correct. If

8 Dennis Rutledge, *Social Darwinism, Scientific Racism, and the Metaphysics of Race,* 64 THE JOURNAL OF NEGRO EDUCATION, No. 3, 243-52 (1995).

compact theory is true, it is still true today, even if the consequences have historically been problematic.

One can reject both good ideas and bad ideas for bad reasons. Having dispensed with the fallacious thinking that rejects compact theory on the grounds of consequences, there still are legitimate reasons for rejecting compact theory. They are as follows: first, the consistent precedent of the Supreme Court; second, historical reasons to think the states were never individually sovereign entities; and finally, the actual text of the Constitution.

Given that the United States follows the tradition of common law, consistent precedent bears much weight in the discussion of the legitimacy of an idea. A brief survey of Supreme Court decisions is sufficient to show that precedent has always clearly been against compact theory and states' sovereignty. In the 1793 case of *Chisholm v. Georgia,* the majority of the Court ruled against Georgia's claim to sovereign immunity, by which they claimed a right not to be sued by individuals. The reasons the Court did so include an assertion of the falsity of compact theory. Justice James Wilson, for example, says, "To the Constitution of

the United States the term Sovereign, is totally unknown. There is but one place where it could have been used with propriety... [The people] might have announced themselves the 'Sovereign' people of the United States."[9]

In 1819, in what is one of the most significant and cited cases in the history of the United States, *McCulloch v. Maryland,* the Court unanimously argued for the constitutionality of a national bank and the unconstitutionality of a state's right to tax that bank. In the Court's decision, Chief Justice John Marshall rejects compact theory as well. He writes, "The government proceeds directly from the people; is 'ordained and established' in the name of the people..."[10] He continues by arguing that after the states' governments' Constitutional Convention had submitted their draft of a constitution, "The people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not

9 *Chisholm v. Georgia, in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 158, 160.

10 *McCulloch v. Maryland, in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 129, 130-4.

be negated, by the state governments. The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties."[11]

In 1869, the Supreme Court granted an injunction permitting the federal government not to pay bondholders who purchased bonds from Texas during the Civil War. In the Court's decision, Chief Justice Samuel Chase commented upon secession and the nature of the union historically. He writes, "The Union of the States never was a purely artificial and arbitrary relation... By [the Articles of Confederation] the Union was solemnly declared to 'be perpetual'... the Constitution was ordained 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?"[12]

A final example is that of the Supreme Court's decision in *Aaron v. Cooper* in 1958. Regarding the

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11 *Id.*

12 *Texas v. White, in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 290, 291-22.

rejection within the state of Arkansas of the famous *Brown v. Board of Education* decision, Chief Justice Warren argues on the grounds of the Fourteenth Amendment that "the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in *Brown* can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly..."[13] In this case the Supreme Court ruled specifically against a state legislature's right to nullify a Supreme Court decision.

From this brief survey of pivotal Court decisions ranging over 150 years, it is clear that the Supreme Court has ruled consistently against compact theory and its implications of nullification, interposition, and secession. However, proponents of compact theory would obviously reject this argument based upon precedent for the reason that it might seem in the interest of the Supreme Court to reject a theory that takes power away from themselves. Even if one rejects the argument from judicial precedent,

13 *Cooper v. Aaron, in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 440, 440-2.

however, there are still historical and textual reasons for rejecting compact theory and its implications.

An essential premise within compact theory is the claim that with the signing of the Declaration of Independence the states declared themselves to be individual, sovereign entities from Britain. If this were not the case, they could not have formed a compact wherein they each remained equal co-parties and in which no member or government could be above any other. Compact theorists routinely look to the Declaration of Independence and the Articles of Confederation as evidence that the states were independent sovereignties. The South Carolina Ordinance of Secession, for instance, quotes the Declaration of Independence's statement, "that [the colonies] are, and of right ought to be, FREE AND INDEPENDENT STATES...," and it quotes the Articles of Confederation's second article which declares, "that each State retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States,

in Congress assembled."[14] This may seem to be conclusive evidence. However, there is reason to think that this *sine qua non* of compact theory is simply historically false; these claims are actually out of their historical context. There has always existed a perpetual union among the states.

Abraham Lincoln, for example, argues that the Union began while the colonies were still under the authority of Britain.[15] This happened through the drafting of the Articles of Association in 1774. In these Articles, the delegates from the thirteen colonies at the First Continental Congress agreed upon a series of fourteen articles relating to commerce with Britain. The Articles conclude by saying, "And we do solemnly bind ourselves and our constituents, under the ties aforesaid, to adhere to this association, until such parts of the several acts of parliament passed since the close of the last war... are repealed."[16] Through

14 *South Carolina Ordinance of Secession, in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 277, 278.

15 Abraham Lincoln, *First Message to Congress: Message to Congress in Special Session 1861,* (Boston, Directors of the Old South Work, 1902), 10.

16 1 ANNALS OF CONG. 975 (1790).

these Articles, the colonies bound themselves together indefinitely; they were united at least until Parliament retracted its detested laws, or until the Continental Congress reconvened to determine once again the status of the Union.

With the context of the thirteen colonies having formed a kind of unity against Britain, the above-quoted section of the Declaration of Independence takes on a new meaning. Lincoln writes, "The object plainly was not to declare their independence of one another or of the Union, but directly the contrary, as their mutual pledge and their mutual action before, at the time, and afterwards abundantly show."[17] They were declaring themselves to be states within a Union, as opposed to colonies within a Union. The colonies created the Union, but the Union created the states and won independence for them.

This in turn helps make sense of the Articles of Confederation's assertion of perpetuity in its thirteenth article, which says, "Every State shall abide by the

17 Abraham Lincoln, *First Message to Congress: Message to Congress in Special Session 1861,* (Boston, Directors of the Old South Work, 1902), 10.

determination of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual."[18] This article clearly sets forth two legal realities contrary to compact theory. First, the states were not equal co-partners in the confederation; the Articles established a government above the states whose decisions were final. Second, the Articles declared the Union of the states to be perpetual. The first clearly excludes the implication of nullification, and the second excludes secession.

Thus, sovereign states did not ratify the Constitution. The Constitution was formed within a Union which predated the states, and the Union's purpose in the drafting and ratification of the Constitution was "to create a more perfect union." Through replacing the Articles of Confederation, the Union was perfecting itself.[19] The states were never sovereign entities, and without this essential

18 ARTICLES OF CONFEDERATION of 1781, art. XIII.

19 Abraham Lincoln, *First Inaugural Address,* in LINCOLN: POLITICAL WRITINGS AND SPEECHES, (Terence Ball ed., Cambridge Univ. Press 2012), 115-23.

premise compact theory fails.

Suppose, however, for the sake of argument, that the original states did at some point exist as sovereign entities. Even if that were the case, there still remain textual reasons which are strong enough alone to falsify compact theory. The opening words of the Constitution are extremely telling: "We the People of the United States, in Order to form a more perfect Union... do ordain and establish this Constitution for the United States of America."[20] After months of debate in the Constitutional Convention, these were the words chosen to open the Constitution. It is important to note both which words were chosen and which words were not.

First, it says, "We the People of the United States." It does not say, "We the States," nor does it say, "We the People of the States." These wordings would have made clear the sovereignty of the individual states and their compacting together, but this is not the language the Founders chose nor that which the People ratified. Justice Jay wrote in his decision in *Chisholm v. Georgia,* "From

20 U.S. CONST. pmbl.

the crown of Great Britain, the sovereignty of their country passed to the people of it... 'We the People of the United States...' Here we see the people acting as sovereigns of the whole country."[21] Only this explanation can make sense of the historical fact that the state legislatures did not ratify the Constitution; totally separate ratification conventions occurred, and the people choose their own delegates. They were acting, as the Constitution says, as the "People of the United States," not as the "People of the sovereign States."[22]

Second, the Constitution says, "do ordain and establish," not "contract and agree to." The clear import of these words is that the sovereign "People of the United States" were declaring what fundamental law would be for the United States; they were not bargaining upon a contract. Only this interpretation of the chosen wording can explain the exact similarity of language between the Constitution and many of the state constitutions. The

21 Justice Jay, *Chisholm v. Georgia, in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 158, 161.

22 Joseph Story, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, (Boston, Hilliard, Gray, and Company 1833).

1776 Constitution of Virginia, for example, says, "We therefore, the delegates and representatives of the good people of Virginia... do ordain and declare the future form of government of Virginia."[23] The 1780 Constitution of Massachusetts similarly states, "We, therefore, the people of Massachusetts... DO agree upon, ordain and establish, the following Declaration of Rights, and Frame of Government, as the CONSTITUTION of the COMMONWEALTH of MASSACHUSETTS."[24] No one doubts that the people of the states did not establish a merely convenient contract, but a fundamental law which compels obedience. The use of the same language in the case of the states and the nation necessarily implies the same legal creation: a declaration of fundamental law, not a contract.[25]

Third, it says, "Constitution," not "compact" or "confederation." The definitions of the latter two terms imply the idea of multiple, equal co-parties contracting

23 VA. CONST. § 1.

24 MASS. CONST. pmbl.

25 Joseph Story, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, (Boston, Hilliard, Gray, and Company 1833).

together for some purpose. Being equal, each party may interpret its own rights and duties and leave at its pleasure; it does not imply permanence. The definition of a "constitution," on the other hand, is a much stronger term. It implies only one party—namely, the People of the United States. The word also implies that once it has been accepted by the party in question, it is perpetual, obligatory, and fundamental law.[26] Therefore, having carefully examined each of the significant wordings in the Preamble of the Constitution, it is overwhelmingly evident that none of them even remotely gives proof for compact theory. And thus, all three of the considerations—precedent, history, and the text of the Constitution—create together a very strong case for declaring compact theory false on purely legal and theoretical grounds.

Lastly then, the preceding conclusions of this paper's argument have very significant, practical implications for contemporary law, specifically, for marijuana legalization. One should reject compact theory for theoretical reasons, and one should not reject it

26 *Id.*

because of its bad consequences. However, to be logically consistent, neither should one accept compact theory because of perceived good consequences. In the recent decades, nullification has been reappearing, only this time it is often on the "right side of history," as many see it; because of this, the state and federal governments have permitted its existence. The realm of laws that states have been nullifying is massive and includes the following subjects: health insurance, experimental medicines, gun control, sports gambling, and immigration.[27] For the sake of space, this paper will look at a single, primary modern-day instance: state legalization of marijuana. The possession or use of marijuana is a federal offence. According to the *Comprehensive Drug Abuse Prevention and Control Act of 1970,* marijuana is a "Schedule 1" drug. This means it has a high potential for abuse and no significant medicinal potential. It is a federal crime to possess, buy, sell, or use marijuana, and those convicted of a crime involving marijuana are punishable with up to 30 years in prison, a

27 Ernest A. Young, *Modern-Day Nullification: Marijuana and the Persistence of Federalism in an Age of Overlapping Regulatory Jurisdiction,* 65 CAS. W. RES. L. REV. 769, 772 (2015).

50,000 dollar fine, or both.[28]

Despite federal law, dozens of states have legalized the medicinal use of marijuana; some have even legalized its recreational use – most notably and ironically, the District of Columbia. These states are blatantly and willfully violating Congress's laws.[29] Colorado, for example, led the way in 2012, by legalizing recreational marijuana through the passage of Amendment 64 to their state constitution. In this amendment, the legislature acknowledges their infringement of federal law:

> Although the use of marijuana for medical purposes is not authorized under federal law, Colorado and several other states have enacted legislation allowing the use of medical marijuana. To date, state regulation of medical marijuana establishments has generally been allowed to occur, although the federal government has ordered some businesses to close.[30]

The states are aware of their abuse of the federal law, but they simply do not care. And, as is evidenced by their

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28 H. R. 18583, 91st Cong. 1970.

29 Ernest A. Young, *Modern-Day Nullification: Marijuana and the Persistence of Federalism in an Age of Overlapping Regulatory Jurisdiction,* 65 CAS. W. RES. L. REV. 770-1 (2015).

30 CO. CONST. amend. LXIV.

consistent refusal to seriously resist these laws, neither do the federal officials.

These actions of the states are nothing other than modern-day nullifications, which only have a leg to stand on if compact theory is true. Since compact theory is false, as demonstrated in the above arguments, the federal and state government officials have either been justifying their actions by a false theory, which the federal government has historically rejected, or they have been performing their actions by no concrete, legal principles at all. Rather, the mere, arbitrary wills of those in power has been determining action. Either of these options is a poor justification.

This issue is so pressing because it is setting dangerous precedents: namely, that states can nullify federal laws that they think the federal government will not care much about, and that the federal government can simply choose not to care about the abuses of its law. History shows, however, that the United States fought a Civil War to stop precedents based upon false theory. Perhaps marijuana should be legal, but if this is the case,

it ought only to be allowed on legitimate, constitutional grounds, not expedient, false theory or the arbitrary whims of government officials. To live in a government of laws and not of men, as John Adams dreamed, requires at the bare minimum that men take those laws seriously.