

The Resurrection of State Nullification—and the Degradation of Constitutional Rights: SB8 and the Blueprint for State Copycat Laws

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In Whole Woman’s Health v. Jackson, the Supreme Court resurrected the zombie doctrine of nullification—and called into question the ability of our constitutional structure to effectively enforce the supremacy of federal rights. The case centered on Texas’s Senate Bill 8 (SB8), which prohibits abortion at approximately six weeks of pregnancy. Texas enacted SB8 in straightforward violation of Roe v. Wade’s central holding that the Constitution prohibits abortion bans before viability, generally around twenty-four weeks. Yet on December 10, 2021, over six months before the Court issued an opinion in Dobbs v. Jackson Women’s Health Organization overturning Roe v. Wade, the Court largely upheld SB8’s scheme to avoid pre-enforcement judicial review, providing Texas with a path forward to continue to undermine what was then a federal constitutional right.

This Essay finds that in at least one respect, SB8 is not unprecedented: it is far from the first state attempt to nullify federal law in U.S. history. This Essay begins by describing state efforts to nullify federal rights from the Founding through the present day. It finds that over centuries, states have invoked nullification to voice their opposition to federal law, at times to significant practical effect. But in each significant nullification crisis before Whole Woman’s Health v. Jackson, our constitutional structure checked state attempts to actually nullify federal law.

This Essay is the first to demonstrate how Whole Woman’s Health v. Jackson broke from that constitutional tradition. The Court’s decision not only permitted Texas to largely insulate its nullification of a federal right from pre-enforcement review, but went a step further in providing states with a blueprint to ensure that any copycat laws are entirely unreviewable by federal courts before taking effect. By its logic, the Court’s decision in Whole Woman’s Health v. Jackson imperils the range of federal rights Americans hold dear, as the states in our divided nation move forward armed with a toolkit to nullify federal rights.

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INTRODUCTION

In *Whole Woman's Health v. Jackson*,¹ the Supreme Court effectively decided that states may enact laws designed to nullify federal constitutional rights within their borders. The case involved a challenge to Texas's restrictive abortion law,² known as the Senate Bill 8 (SB8), but the logic of the Court's ruling imperils a range of constitutional rights that Americans hold dear—not only reproductive rights, but freedom of speech, freedom of religion, the right to privacy, equal protection, due process rights, and the Second Amendment.

For decades, courts had uniformly enjoined bans like SB8—which prohibits abortion after six weeks of pregnancy—as violations of nearly fifty years of Supreme Court precedent holding that the U.S. Constitution prohibits a state from banning abortion before viability, which generally occurs around twenty-four weeks.³ But over a year before the Court overturned this precedent in *Dobbs v. Jackson Women's Health Organization*,⁴ Texas set out not only to pass an unconstitutional law, but to make it stick, despite its unconstitutionality. Texas pursued this goal by forbidding state officials from enforcing the law, allowing it to evade traditional checks by the courts or the Executive Branch.⁵ Instead, SB8 assigns enforcement exclusively to the general public, offering a minimum of \$10,000 to “any person” who could prove a violation of the law, and stripping people charged with violations of SB8 of the defenses typically available in court.⁶ Because SB8 exclusively delegates enforcement power to the population at large, parties wishing to challenge the law's constitutionality in court before it took effect would struggle to identify a proper defendant.⁷ So long as

¹ 142 S. Ct. 522 (2021).

² S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021) (codified at TEX. HEALTH & SAFETY CODE ANN. ch. 171).

³ See, e.g., *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 269 (5th Cir. 2019) (“In an unbroken line dating to *Roe v. Wade*, the Supreme Court's abortion cases have established (and affirmed, and re-affirmed) a woman's right to choose an abortion before viability. States may regulate abortion procedures prior to viability so long as they do not impose an undue burden on the woman's right, but they may not ban abortions.”); *Edwards v. Beck*, 786 F.3d 1113, 1116–17 (8th Cir. 2015) (per curiam); *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 772–73 (8th Cir. 2015); *McCormack v. Herzog*, 788 F.3d 1017, 1028–29 (9th Cir. 2015); *Isaacson v. Horne*, 716 F.3d 1213, 1217 (9th Cir. 2013); *Women's Med. Pro. Corp. v. Voinovich*, 130 F.3d 187, 201 (6th Cir. 1997); *Jane L. v. Bangerter*, 102 F.3d 1112, 1117–18 (10th Cir. 1996); *Sojourner T v. Edwards*, 974 F.2d 27, 29, 31 (5th Cir. 1992); *Guam Soc'y of Obstetricians & Gynecologists v. ADA*, 962 F.2d 1366, 1368–69, 1373, 1373 n.8 (9th Cir. 1992).

⁴ *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, 2022 WL 2276808 (June 24, 2022).

⁵ TEX. HEALTH & SAFETY CODE ANN. §§ 171.204(a), 171.207(a), 171.208(a)(2), (3); see also Georgina Yeomans, *Ordering Conduct Yet Evading Review: A Simple Step Toward Preserving Federal Supremacy*, 131 YALE L.J.F. 513, 525–26 (2021) (describing the legislation's design to evade judicial review).

⁶ See HEALTH & SAFETY § 171.208(a)–(b).

⁷ See *infra* Part III and Section IV.A; see also Ian Millhiser, *The Staggering Implications of the Supreme Court's Texas Anti-Abortion Ruling*, VOX (Sept. 2, 2021), <https://www.vox.com/22653779/supreme-court-abortion-texas-sb8-whole-womans-health-jackson-roe-wade> [<https://perma.cc/JS95-H3ZM>] (“The law normally prevents situations like this by allowing a party who faces an imminent risk of legal harm to sue to block a law before it is brought to bear against them. But, of course, SB 8 was drafted to frustrate such lawsuits.”); Yeomans, *supra* note 5, at

SB8 remains law, though, the threat of litigation—and, by the legislation’s design, the threat of potentially unlimited personal and professional liability by any health care provider, or indeed anyone in a patient’s support network—chills the exercise of the constitutional right.⁸

At oral argument, Texas admitted the startling implications of its defense of the nonreviewability of SB8 for the supremacy of federal constitutional rights. When asked by Justice Kavanaugh whether “Second Amendment rights, free exercise of religion rights, free speech rights, could be targeted by other states” following the same scheme as SB8, Texas’s Solicitor General conceded that such laws would not be reviewable by federal courts, even if they were designed to subvert constitutional rights.⁹ In Texas’s view, state laws like SB8 could never be challenged before enforcement in federal court, and thus they would be free to take effect, undisturbed, in carrying out their purpose of burdening a federal constitutional right into oblivion.¹⁰ Writing separately in dissent, Justice Sotomayor described SB8’s design as “a brazen challenge to our federal structure.”¹¹ SB8, she wrote, “echoes the philosophy of John C. Calhoun, a virulent defender of the slaveholding South who insisted that States had the right to ‘veto’ or ‘nullif[y]’ any federal law with which they disagreed.”¹²

This Essay is the first to conduct a historical review to examine the novelty of SB8’s act of nullification within our federal constitutional system. It finds that in one important respect, SB8 is not unprecedented: SB8 is far from the first state law to attempt to nullify federal law in U.S. history. But it is the first to succeed. Until *Whole Woman’s Health v. Jackson*, our constitutional structure had not sanctioned a genuine act of nullification as Jefferson envisioned it, rendering a federal mandate invalid and without force, akin to an injunction on federal law within a state’s borders. In *Whole Woman’s Health v. Jackson*, the Court broke new ground in at least two important ways. The Court accepted Texas’s argument that SB8 was mostly not reviewable

514–15 (“[B]ecause of the Court’s standing and sovereign-immunity precedents, [SB8 and copycat] legislative efforts are difficult to challenge pre-enforcement.”).

⁸ See *infra* Section IV.A; see also Brief of Leading Medical Organizations at 11, *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522 (2021) (Nos. 21-463 & 21-588).

⁹ Transcript of Oral Argument at 73–74, *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522 (2021) (No. 21-463) (Justice Kavanaugh continued: “[S]ay everyone who sells an AR-15 is liable for a million dollars to any citizen . . . [w]ould that kind of law be exempt from pre-enforcement review in federal court?” Texas’s lawyer replied: “[W]hether or not federal court review is available does not turn on the nature of the right.”).

¹⁰ See generally Brief for Respondents at 16–39, *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522 (2021) (Nos. 21-463 & 21-588) (arguing that Texas can insulate from federal court review a law that prohibits the exercise of a constitutional right by delegating enforcement authority exclusively to private parties); see also Kate Zernike & Adam Liptak, *Texas Supreme Court Shuts Down Final Challenge to Abortion Law*, N.Y. TIMES (Mar. 11, 2022), <https://www.nytimes.com/2022/03/11/us/texas-abortion-law.html> (“By empowering everyday people and expressly banning enforcement by state officials, the law, known as S.B. 8, was designed to escape judicial review in federal court.”).

¹¹ See *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 550 (2021) (Sotomayor, J., concurring in part and dissenting in part).

¹² *Id.* at 550–51.

before taking effect, providing Texas with a path forward to continue to opt out of a federal right. But the Court also went a step further in providing a blueprint for states to ensure that any future copycat laws entirely escape federal court review before taking effect. For the first time, the Court armed states with a toolkit to actually nullify federal rights.

Before *Whole Woman's Health v. Jackson*, there was a scholarly consensus that nullification is “zombie constitutionalism”: not a power the states possess so much as a rhetorical device invoked by states’ rights advocates seeking to resist federal law.¹³ This Essay reexamines this accepted wisdom. It concludes that *Whole Woman's Health v. Jackson* has resurrected the zombie doctrine of nullification. By its logic, the Court’s opinion poses fundamental questions about the ability of our constitutional structure to effectively enforce the supremacy of federal rights. But the full implications of the Court’s opinion will only be realized if the Court were to apply the same reasoning to permit a state to copy SB8’s structure to nullify a federal constitutional right that it favors. What is left, then, is profound uncertainty about the reviewability of state laws that mimic SB8—and the future of state nullification of federal constitutional rights.

Part I reviews the history of key state attempts to nullify federal law from the Founding through the present day. In events ranging from Senator John C. Calhoun’s campaign to nullify federal tariffs established by Congress, to northern protest of federal fugitive slave laws in the lead up to the Civil War, to the southern campaign to undermine the force and effect of *Brown v. Board of Education*, states have repeatedly invoked the doctrine of state nullification—at times to significant practical effect. But in each nullification crisis before the modern era, checks in our constitutional system rejected attempts to actually nullify federal law.

Part II considers contemporary attempts at nullification. It finds that states in the modern era have deployed nullificationist rhetoric when seeking to undermine federal programs like the Affordable Care Act, the REAL ID Act, and federal gun control laws, or to criticize state medical marijuana laws and sanctuary city policies. States also actively engage in “uncooperative federalism,” an effective form of resistance to

¹³ See generally Ryan S. Hunter, *Sound and Fury, Signifying Nothing: Nullification and the Question of Gubernatorial Executive Power in Idaho*, 49 IDAHO L. REV. 659 (2013) (providing a history of nullification in the United States and concluding that modern efforts to deploy nullification to resist the REAL ID Act and the Affordable Care Act do not amount to nullification); see also Sanford Levinson, *The Twenty-First Century Rediscovery of Nullification and Secession in American Political Rhetoric: Frivolousness Incarnate or Serious Arguments to be Wrestled With?*, 67 ARK. L. REV. 17, 28–29 (2014) (describing state efforts to “nullify” federal gun control laws as “dinosaur” or “zombie” constitutionalism); NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT (Sanford Levinson ed., 2016) (collecting essays analyzing the history and future of nullification and secession); Lorraine Marie A. Simonis, *Sanctuary Cities: A Study in Modern Nullification?*, 8 BRIT. J. AM. LEGAL STUD. 37, 49–50 (2019) (exploring the history of nullification); Robert S. Claiborne, Jr., *Why Virginia’s Challenges to the Patient Protection and Affordable Care Act Did Not Invoke Nullification*, 46 U. RICH. L. REV. 917, 927 (2012) (describing efforts at nullification and concluding that Virginia’s statute outlining its approach to health insurance market did not constitute nullification).

federal law in which states refuse to voluntarily implement and enforce discretionary aspects of federal programs established by statute.¹⁴ But before *Whole Woman's Health v. Jackson*, efforts at both forms of contemporary recalcitrance—rhetorical nullification and acts of uncooperative federalism—fell short of actually nullifying federal law within a state's borders.

Part III explores the role of the federal courts and federal law enforcement agencies in acting as a check to unconstitutional acts of state nullification. Federal courts act as a critical check on states seeking to nullify federal law—a check that the Supreme Court bolstered in establishing an exception to sovereign immunity permitting pre-enforcement suits against state officials to enjoin the enforcement of unconstitutional state laws under *Ex parte Young*.¹⁵ As the historical review in Parts II and III shows, too, federal law enforcement agencies play an important role in checking states that fail or decline to enforce federal law.

Part IV examines SB8's design to evade traditional checks on state nullification. It considers the implications of the Court's decision in *Whole Woman's Health v. Jackson* for states wishing to copy SB8's design to nullify other federal rights.

I. A BRIEF CONSTITUTIONAL HISTORY OF NULLIFICATION

State nullification is associated with America's history of slavery and segregation. As Justice Sotomayor noted in *Whole Woman's Health v. Jackson*, Senator John C. Calhoun, the white supremacist champion of the slaveholding South, promoted the country's "Nullification Crisis" that preceded the Civil War.¹⁶ Calhoun's intellectual successor, James Jackson Kilpatrick, led southern resistance to *Brown v. Board of Education* more than a century later. But in the years before the Civil War, northern states, too, sought to undermine federal law requiring the return of alleged enslaved persons to the South. Nullification first took center stage in protest to the authoritarian Sedition Act, which threatened to imprison anyone whose loyalties to the government were in question. As explored in the next Section, in the modern era, state efforts at nullificationist rhetoric or uncooperative federalism are varied in their policy goals and range from state efforts to undermine the Affordable Care Act and federal gun control law, to sanctuary cities and medical marijuana laws. A brief analysis of significant standoffs between states and the federal government reveals, though, that no such significant, genuine effort to nullify a federal mandate within a state's borders—to

¹⁴ See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1256 (2009).

¹⁵ 209 U.S. 123, 159 (1908).

¹⁶ See, e.g., Senator John C. Calhoun, Speech at the U.S. Senate on Abolition Petitions (Feb. 6, 1837) (transcript available at <https://teachingamericanhistory.org/document/slavery-a-positive-good/> [<https://perma.cc/W53V-WTD2>]) ("Never before has the black race of Central Africa, from the dawn of history to the present day, attained a condition so civilized and so improved, not only physically, but morally and intellectually. . . . [T]he relation now existing in the slaveholding States between the two [races], is, instead of an evil, a good—a positive good.").

effectively enjoin actual enforcement of a federal law within the state—has succeeded in our constitutional structure.

A. ORIGINS

The first nullification conflict arose less than a decade after the Bill of Rights. Revolutionary France had escalated a naval conflict directed at American ships, and the possibility of war with France loomed over the Adams Administration.¹⁷ President John Adams and the Federalist-controlled Congress wanted to quell conflict within the country—and weaken Republicans in Congress, who sympathized with France and relied on the immigrant vote.¹⁸ In the Alien Acts, the Federalists passed measures that made it harder to become a U.S. citizen and empowered the President to deport any foreigner whom he considered a threat to the country.¹⁹ In the Sedition Act, any person who expressed anything false, scandalous, or malicious against the government, Congress, or the President (but, not the Vice President) could face imprisonment and a significant fine.²⁰ Prosecutors swiftly enforced the Sedition Act, convicting several offenders and permanently closing opposition presses.²¹

Most Republicans opposed the federal statutes, which veered too close to the monarchy that America had just shed. Thomas Jefferson, then sitting as Adams' Vice President, and James Madison, who had recently left Congress, exchanged furious letters decrying the Acts as unconstitutional and illegitimate.²² Jefferson and Madison then penned draft resolutions condemning the Acts, which were placed in state legislatures under conditions of anonymity, with Jefferson and Madison's authorship revealed years later.²³

Jefferson's draft Resolution adopted an absolutist vision of a state's authority to nullify federal law. To Jefferson, states are independent parties to a federal compact, and the federal government is the agent that derives its power from the consent of the individual states. Where the federal government assumes powers "which have not been delegated" to it, he wrote, "a nullification of the act is the rightful remedy."²⁴ Under

¹⁷ See Simonis, *supra* note 13, at 49–50.

¹⁸ See Jonathan Gienapp, *How to Maintain a Constitution: The Virginia and Kentucky Resolutions and James Madison's Struggle with the Problem of Constitutional Maintenance*, in *NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT* 53, 56–58 (Sanford Levinson ed. 2016).

¹⁹ See *id.*

²⁰ See *id.* (describing the Sedition Act).

²¹ See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 925 (1985).

²² See H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 VA. L. REV. 689, 717 (1994).

²³ See Gienapp, *supra* note 18, at 55–58; see also Hunter, *supra* note 13, at 665–66.

²⁴ H.R. Res. 96, 26th Cong., 2d Sess. (Ky. 1798), reprinted in 30 THE PAPERS OF THOMAS JEFFERSON, 1 JANUARY 1798 TO 31 JANUARY 1799, at 536–43 (Princeton Univ. Press 2003), <https://jeffersonpapers.princeton.edu/selected-documents/jefferson%E2%80%99s-draft> [<https://perma.cc/MXF7-MJPY>].

Jefferson's theory, states have a right to invalidate unconstitutional federal law akin to issuing an injunction against the law.²⁵

Madison's Virginia Resolution took a more moderate approach. Madison wrote that when the federal government engages in an illegitimate act, the states have a right and the duty to "interpose": to opine on the constitutionality of federal laws, to oppose or denounce them, or even to undermine their enforcement.²⁶ To Madison, states should have the right to draw attention to constitutional infidelities.²⁷ But, departing from Jefferson, Madison believed that states lacked the ability to actually invalidate or enjoin federal law.²⁸

To even the more temperate Madison's disappointment, though, the Resolutions failed to mobilize opposition to the "reign of witches" brought about by the Alien and Sedition Acts.²⁹ No other state endorsed the resolutions condemning the Acts, and several other legislatures wrote resolutions opposing the right of states to declare federal statutes null and void.³⁰ The Alien and Sedition Acts sunsetted in 1801, before the Supreme Court could pass on their constitutionality. The influential writings of Jefferson and Madison may have shaped popular opinion of the Acts, and they certainly served as inspiration (and justification) for states seeking to nullify federal law through the present day.³¹ But the Resolutions fell short of actually enjoining or invalidating the Act, as Jefferson had hoped. In the first nullification conflict in U.S. history, southern states failed to nullify unpopular federal statutes.

B. THE NULLIFICATION CRISIS

Thirty years later, another nullification crisis harbingered secessionist intent before the Civil War. For decades following the Founding, Congress had imposed tariffs to support burgeoning industry in the North. Over time, agrarian-minded southern states grew opposed to the tariffs. Their opposition hit a breaking point when Congress passed the 1828 tariff, referred to as the "Tariff of Abominations" amid an economic downturn in the South.³²

Southern Senator and future Vice President John C. Calhoun gave voice to South Carolina's fury. Like Jefferson and Madison, Calhoun first laid out his argument

²⁵ See *id.*; see also Levinson, *supra* note 13, at 18–19.

²⁶ See *Virginia Resolutions, 21 December 1798*, NAT'L ARCHIVES: FOUNDERS ONLINE (last visited July 9, 2022), <https://founders.archives.gov/documents/Madison/01-17-02-0128> [<https://perma.cc/76KP-R6CT>], in 17 THE PAPERS OF JAMES MADISON, 31 MARCH 1797–83, MARCH 1801 AND SUPPLEMENT 22, JANUARY 1778–79, at 185–91 (1991).

²⁷ See *id.*

²⁸ See *id.*; see also Gienapp, *supra* note 18, at 55–56, 59–60.

²⁹ See Powell, *supra* note 21, at 927.

³⁰ See *id.* at 927–28.

³¹ See Levinson, *supra* note 13, at 21 (describing "a number of proposals in American state legislatures that 'deliberately echo[]' the ur-text of nullificationist arguments, Thomas Jefferson's Kentucky Resolutions of 1798").

³² See Simonis, *supra* note 13, at 43; Hunter, *supra* note 13, at 675.

anonymously, secretly placing his *Exposition and Protest* in the South Carolina legislature.³³ Calhoun's *Exposition* relied heavily on Jefferson's writings in arguing that the right of the states to judge federal law was "an essential attribute of sovereignty of which the states cannot be divested, without losing their sovereignty itself."³⁴

Despite Calhoun's reliance on Jefferson, in practice, Calhoun's *Exposition* carried out Madison's model of interposition, as it was purely rhetorical. Rather than actually nullifying the tariff within the state's borders, Calhoun's *Exposition* galvanized more rhetoric in leading to one of the most famous Senate floor speeches in U.S. history, a three-hour polemic against nullification by Senator Daniel Webster.³⁵ Webster acknowledged that "a great majority" of people in South Carolina "are opposed to the tariff laws."³⁶ "That a great majority," Webster said, "conscientiously believe these laws unconstitutional, may probably also be true."³⁷ "But that any majority holds to the right of direct state interference at state discretion, the right of nullifying acts of Congress by acts of state legislation," Webster observed, "is more than I know, and what I shall be slow to believe."³⁸ The question of the constitutionality of the tariff must be decided "by the judicial tribunals of the United States."³⁹

Calhoun did not back down following Webster's speech, and his theoretical exposition grew into an actual assertion of the right to nullify in South Carolina's Nullification Ordinance of 1832.⁴⁰ The Ordinance declared the tariff "null and void" within the state, prohibited appeals regarding the tariff's validity to the Supreme Court, and threatened secession if the federal government tried to compel enforcement.⁴¹ President Jackson, known to be a strong advocate of states' rights, condemned the Nullification Ordinance, going so far as to send a bill to the Senate to authorize enforcement of the tariff using military force.⁴² In turn, the South Carolina legislature authorized its own forces to resist. President Jackson declared that if a "blow is struck" in South Carolina within three weeks, he would "place fifty thousand troops" within the state.⁴³

³³ See Hunter, *supra* note 13, at 675.

³⁴ See JOHN C. CALHOUN, EXPOSITION AND PROTEST REPORTED BY THE SPECIAL COMMITTEE OF THE HOUSE OF REPRESENTATIVE ON THE TARIFF 30 (1828), https://dc.statelibrary.sc.gov/bitstream/handle/10827/21911/HOUSE_CR_Exposition_and_Protest_1828-12-19.pdf?sequence=1&isAllowed=y [<https://perma.cc/H764-X5EU>].

³⁵ See ROBERT A. CARO, MASTER OF THE SENATE: THE YEARS OF LYNDON JOHNSON 17–19 (2002).

³⁶ See Senator Daniel Webster, *Second Reply to Hayne*, at 64 (Jan. 26–27, 1830),

<https://www.senate.gov/artandhistory/history/resources/pdf/WebsterReply.pdf> [<https://perma.cc/TE38-UBKX>], reprinted in THE GREAT SPEECHES AND ORATIONS OF DANIEL WEBSTER 227–69 (1880).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 69.

⁴⁰ See An Ordinance to Nullify Certain Acts of the Congress of the United States, Purporting to be Laws, Laying Duties and Imposts on the Importation of Foreign Commodities, S.C. (Nov. 24, 1832), https://avalon.law.yale.edu/19th_century/ordnull.asp [<https://perma.cc/RH9R-ZTWD>].

⁴¹ See *id.*

⁴² See CARO, *supra* note 35, at 18.

⁴³ See *id.* at 16, 18.

Despite reaching this fever pitch, South Carolina's Nullification Ordinance—like the expositions of Jefferson and Madison—also failed to actually nullify federal law within its borders. Instead, Senator Henry Clay, already known as the “Great Compromiser,” brokered a compromise tariff that was swiftly passed in 1833,⁴⁴ and South Carolina dropped its nullificationist intent.⁴⁵ On the brink of actual nullification, and with sectional tensions at a full gear, a state once again backed down before it achieved actual nullification of a federal law.

C. PERSONAL LIBERTY LAWS

Northern states also sought to undermine federal law that required the return of alleged enslaved persons to the South as sectional tensions rose before the Civil War. In two successive cases, the Supreme Court checked the northern states' efforts.

The Fugitive Slave Act of 1793 was designed to give persons a remedy to exercise the Constitution's repugnant Fugitive Slave Clause, which guaranteed the return of enslaved persons who had crossed state lines in pursuit of their freedom.⁴⁶ In 1826, Pennsylvania set out to undermine the federal law by passing a “personal liberty law” that prohibited local officers from granting removal of an alleged enslaved person unless heightened evidentiary standards were met.⁴⁷ After passage, Pennsylvania courts found the agent of an alleged slave owner guilty of violating the law.⁴⁸

When the agent's case reached the Supreme Court in *Prigg v. Pennsylvania*, the Court reversed. The Court unanimously held that Pennsylvania's personal liberty law was preempted by the 1793 Fugitive Slave Act, and held that Congress—not the states—had exclusive power to enforce the Constitution's Fugitive Slave Clause.⁴⁹ While the Court made clear that states were prohibited from passing laws conflicting with federal law, it also noted an important wrinkle in the federal–state relationship: states were not obligated to cooperate with the federal statute or aid in its enforcement. Writing for the Court, Justice Story said that the Court's decision did not pass on whether state magistrates are bound to enforce the Fugitive Slave Act if they are not prohibited by state law—instead, the federal government would be obliged to enforce.⁵⁰ In a presage to the anti-commandeering doctrine, Justice Story wrote that it

⁴⁴ See *id.* at 18–19.

⁴⁵ See *id.*; Hunter, *supra* note 13, at 679.

⁴⁶ See U.S. CONST., art. IV, § 2, cl. 3.; James A. Kraehenbuehl, *Lessons from the Past: How the Antebellum Fugitive Slave Debate Informs State Enforcement of Federal Immigration Law*, 78 U. CHI. L. REV. 1465, 1474 (2011) (describing northern states' creation of “jurisdictions of underenforcement of the Fugitive Slave Act”); see also William J. Aceves, *Amending a Racist Constitution*, 170 U. PA. L. REV. ONLINE 1, 6, 8–10 (2021) (describing how the Thirteenth Amendment ended the relevance of the Clause and describing the importance of formally repealing this vestige of slavery from the Constitution).

⁴⁷ See *Prigg v. Pennsylvania*, 41 U.S. 539, 539, 543, 557–58 (1842).

⁴⁸ See *id.* at 539.

⁴⁹ See *id.* at 541–42.

⁵⁰ See *id.* at 558.

“might well be deemed” unconstitutional “to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted to them by the constitution.”⁵¹

In the wake of *Prigg*, northern states passed a new slate of personal liberty laws seizing upon Justice Story’s dicta and prohibiting state magistrates and other state officials from actively enforcing the 1793 Fugitive Slave Act.⁵² In 1850, Congress responded by passing a new statute requiring alleged slaves to appear before a federal commissioner incentivized to return suspected slaves to the South.⁵³ The 1850 Act carried with it heavy penalties for interfering with enforcement of the federal law.⁵⁴

After a suspected fugitive, Joshua Glover, was captured pursuant to the Fugitive Slave Act of 1850, the journalist and abolitionist Sherman Booth broke into jail and released him.⁵⁵ Following Booth’s arrest, the Wisconsin Supreme Court declared the Fugitive Slave Act of 1850 to be unconstitutional, and released him from federal custody.⁵⁶ The court tried to shield its decision from Supreme Court review, going so far as to refuse to send its record to the Supreme Court.⁵⁷ A federal district court concurrently ruled that Booth was guilty of aiding and abetting a slave.⁵⁸ The Supreme Court granted review of the Wisconsin Supreme Court’s decision.

Until then, crises on the legitimacy of nullification had centered on states’ interpretation of a federal statute—Jefferson and Madison opposed the Sedition Act, Calhoun the federal tariffs, and Pennsylvania the 1793 Fugitive Slave Act. In opposing not only the Fugitive Slave Act of 1850, but also the persuasive precedent of the Supreme Court’s decision *Prigg*, the Wisconsin courts had broken new ground.⁵⁹

Unsurprisingly, the Court used the opportunity to forcefully reassert the primacy of its precedents. In a unanimous ruling, the Court upheld the constitutionality of the Fugitive Slave Act of 1850 “in all of its provisions” and held that state courts could not “reverse[] and annul[] the judgment of [a] District Court of the United States.”⁶⁰ If a state had such a power, “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

⁵¹ *Id.* at 541.

⁵² See Ernest A. Young, *Marijuana, Nullification, and the Checks and Balances Model of Federalism*, in *NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT* 125, 137–38 (Sanford Levinson ed. 2016).

⁵³ See Fugitive Slave Act of 1850, Pub. L. No. 31–60, 9 Stat. 462 (1850) (repealed 1864).

⁵⁴ See *id.*

⁵⁵ See *Ableman v. Booth*, 62 U.S. 506, 507–08 (1858).

⁵⁶ See *In re Booth*, 3 Wis. 157, 198, 199–200, 212 (Wis. 1854).

⁵⁷ See Jeffrey Schmitt, *Rethinking Ableman v. Booth and States’ Rights in Wisconsin*, 93 VA. L. REV. 1315, 1316–17 (2007).

⁵⁸ See *id.* at 1339.

⁵⁹ See Hunter, *supra* note 13, at 680 (observing that the Fugitive Slave Act “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*”).

⁶⁰ *Booth*, 62 U.S. at 518, 520–26.

indeed as praiseworthy, in another.”⁶¹ No one would suppose that the Union “could have lasted a single year” with such a patchwork of federal law.⁶²

Like the Sedition Act affair and the Nullification Crisis of 1832, the northern attempt to nullify the Fugitive Slave Acts ultimately failed, this time on the eve of southern secession. But the clash between northern and southern states over the issue of fugitive slaves “heightened the polarization that led to secession and war.”⁶³ In South Carolina’s 1860 declaration of secession, the state that had once championed nullification of the tariff complained that the northern states had effectively “nullified” the fugitive slave law it considered indispensable.⁶⁴

D. BACKLASH TO *BROWN*

Nullification also played a central role in the southern states’ campaign of massive resistance to school desegregation following *Brown v. Board of Education*.⁶⁵ After *Brown*, many southerners criticized the decision for infringing on states’ rights, ignoring precedent, and serving as a form of judicial activism on an issue properly reserved to the Legislative Branch.⁶⁶ Though the Court in *Brown II* instructed school boards to desegregate “with all deliberate speed,”⁶⁷ eight of eleven southern governors met and vowed “not to comply voluntarily with the Supreme Court’s decision.”⁶⁸

The southern states found an intellectual leader in the southern newspaperman James J. Kilpatrick, who decried the “inept fraternity of politicians and professors known as the United States Supreme Court [who] chose to throw away the established law.”⁶⁹ Kilpatrick offered a model nullification bill for state legislatures seeking to resist that echoed Jefferson’s Kentucky Resolution and South Carolina’s Nullification Ordinance in its absolutist claim that *Brown* had no effect within an adopting state’s borders.⁷⁰ Three years following *Brown*, four southern states—Alabama, Georgia,

⁶¹ *Id.* at 515.

⁶² *See id.*

⁶³ Levinson, *supra* note 13, at 25.

⁶⁴ *See* James H. Read & Neal Allen, *Living, Dead, and Undead: Nullification Past and Present*, in *NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT* 91, 111 (Sanford Levinson ed. 2016).

⁶⁵ 347 U.S. 483 (1954).

⁶⁶ *See* Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 487 (2005).

⁶⁷ *Brown v. Board of Education II*, 349 U.S. 294, 301 (1955).

⁶⁸ *See* Judith A. Hagley, *Massive Resistance—The Rhetoric and the Reality*, 27 N.M. L. REV. 167, 191 (1997).

⁶⁹ *See* Michael J. Klarman, *Windsor and Brown: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 142 n.119 (2013).

⁷⁰ *See* Claiborne Jr., *supra* note 13, at 937; Austin Raynor, *The New State Sovereignty Movement*, 90 IND. L.J. 613, 623 (2015) (observing that “[s]upporters of Massive Resistance frequently cited the Virginia and Kentucky Resolutions, as well as the theoretical arguments articulated by Calhoun”).

Florida, and Mississippi—issued resolutions mirroring Kilpatrick’s model, declaring that *Brown* was “null and void” within state bounds.⁷¹

The Supreme Court rejected such efforts in *Cooper v. Aaron*.⁷² The case arose not in one of the four states that adopted Kilpatrick’s blueprint for Jeffersonian nullification, but in Arkansas, which too engaged in nullificationist resistance to *Brown*, culminating in a militarized confrontation between the state and federal government in Little Rock.⁷³

In 1956, the Arkansas legislature passed a state constitutional amendment that commanded the Arkansas General Assembly to resist in “every Constitutional manner the Un-constitutional desegregation decisions.”⁷⁴ When the school board initiated the first stage of the state’s desegregation program the following year, the governor of Arkansas summoned the Arkansas National Guard to prevent it.⁷⁵ A federal district court held that the school board was required to proceed with desegregation.⁷⁶ President Eisenhower responded by federalizing the Arkansas National Guard and sending army troops to Little Rock, who remained at the school for the remainder of the year—along with eight Black students.⁷⁷ Citing “extreme public hostility” brought about by the “official attitudes and actions of the Governor and the Legislature,” the Little Rock School Board petitioned the federal district court to postpone the desegregation program, and the case made its way to the Supreme Court.⁷⁸

A unanimous Court repudiated the school board’s request to postpone desegregation in defiance of *Brown*. In contrast to the Court’s formalist approach to a nullificationist scheme in *Whole Woman’s Health v. Jackson*, the Court took a decidedly functionalist approach to the state’s involvement in the case. The Court noted that although the school board officials were the state’s parties to the litigation, they “stand in this litigation as the agents of the State,” including the governor and executive officials.⁷⁹ The “constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case,” the Court wrote, “can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted ingeniously or

⁷¹ See Levinson, *supra* note 13, at 46 (“Kilpatrick had immense intellectual influence on Southern segregationists—with whose racism and zealous desire to preserve white supremacy he fully shared—precisely because he had constructed a ‘nullification’ theory that traced back to the sacred icons of Jefferson and Madison and precluded one from mentioning race while focusing instead on the rights of sovereign states within the American constitutional order. Four states—Alabama, Florida, Georgia, and Mississippi—declared *Brown* ‘null and void, and the Mississippi legislature forbade public employees from complying with desegregation orders.’”).

⁷² 358 U.S. 1 (1958).

⁷³ See *id.* at 4–13.

⁷⁴ See *id.* at 8.

⁷⁵ See *id.* at 9–11.

⁷⁶ See *id.* at 11.

⁷⁷ See *id.* at 12.

⁷⁸ See *id.* at 12–13.

⁷⁹ See *id.* at 16.

ingenuously.”⁸⁰ The misconduct by the governor and state legislature, the Court decided, did not relieve the school board of its obligation to follow the Constitution as interpreted by the Supreme Court in *Brown*.⁸¹

In *Cooper v. Aaron*, as in *Ableman*, the Court once again rejected states’ rights to nullify a Supreme Court decision setting forth a federal constitutional right. The Court had the opportunity to reiterate its rejection of state nullification two years later, declaring definitively that it is “clear that interposition is not a *constitutional* doctrine. If taken seriously, it is illegal defiance of constitutional authority.”⁸²

II. NULLIFICATION IN THE MODERN ERA

Modern efforts of state resistance to federal law fall in roughly two, overlapping categories: uncooperative federalism, in which states voluntarily refuse to enforce discretionary aspects of federal programs, and attempts to actually nullify federal law. Acts of uncooperative federalism can make it harder and more expensive for the federal government to implement its policy goals, but leave intact federal laws that may be enforced if the federal government is willing devote sufficient resources. And while states have purported to nullify federal law, contemporary efforts are at best properly characterized as Madisonian attempts to interpose between their citizens and the federal government in voicing their opposition to federal law—not Jeffersonian attempts to stop the very possibility of enforcement. Before *Whole Woman’s Health v. Jackson*, contemporary efforts at both forms of recalcitrance fell short of actually nullifying federal law.

A. UNCOOPERATIVE FEDERALISM

Many modern acts of state resistance to federal law are properly characterized not as nullification but as acts of “uncooperative federalism.”⁸³ A state’s ability to be uncooperative flows from the cooperative model of many modern federal programs in which state officials voluntarily carry out the implementation and enforcement of federal laws.⁸⁴ Under the anti-commandeering doctrine, however, Congress is not permitted to force state officials to participate in federal programs, and therefore it depends on states’ cooperation to carry out its programs.⁸⁵ This cooperative structure “facilitates uncooperative state action.”⁸⁶

Uncooperative federalism is not a purely modern innovation: Justice Story suggested an uncooperative model in *Prigg*, for example, in observing that state magistrates might decline to implement the federal Fugitive Slave Acts when

⁸⁰ See *id.* at 17 (internal quotations omitted) (emphasis added).

⁸¹ See *id.* at 17–18.

⁸² See *United States v. Louisiana*, 364 U.S. 500, 501 (1960) (internal quotations omitted).

⁸³ See Bulman-Pozen & Gerken, *supra* note 14.

⁸⁴ See *id.* at 1258–64.

⁸⁵ See *Printz v. United States*, 521 U.S. 898, 933 (1997).

⁸⁶ See Bulman-Pozen & Gerken, *supra* note 14, at 1284.

permitted by state law.⁸⁷ When northern states followed suit, Congress resorted to federal enforcement power, sending federal commissioners north to implement the acts.⁸⁸ Today, states can follow such a model in refusing to implement discretionary aspects of federal programs. Examples of uncooperative federalism range from state resistance to implementing the REAL ID Act's requirements,⁸⁹ to state laws decriminalizing marijuana use,⁹⁰ to state efforts to undermine enforcement of the Affordable Care Act,⁹¹ to sanctuary cities.⁹² Because states' authority not to cooperate depends on an exercise of discretion, this model often arises in the context of federal programs, rather than as a means to undermine federal constitutional rights, which by their nature permit no such discretion.

States engaging in uncooperative federalism often assert a policy disagreement with federal law as opposed to claiming that federal law is unconstitutional or illegitimate, let alone "null and void." For example, states fought a "spirited battle" against the REAL ID Act's additional requirements for state forms of identification.⁹³ Half of the states refused to cooperate with implementation, either by passing resolutions or asking Congress to appeal the Act or anti-REAL ID Act legislation.⁹⁴ But none of the state statutes or resolutions purported to pass on the constitutionality of the REAL ID Act, and none declared the law null and void.⁹⁵ The same is true of state laws decriminalizing marijuana. The federal Controlled Substances Act of 1970 criminalizes marijuana, but for years nearly all—99%—of marijuana arrests were made at the state level.⁹⁶ State laws decriminalizing marijuana do not assert the illegitimacy of the Controlled Substances Act but rather serve as acts of noncooperation in enforcement.⁹⁷ This may result in an unstable structure that is

⁸⁷ See *Prigg v. Pennsylvania*, 41 U.S. 539, 615–16, 622 (1842) ("The clause is found in the national constitution, and not in that of any state. It does not point out any state functionaries, or any state action, to carry its provisions into effect. The states cannot, therefore, be compelled to enforce them; and it might well be deemed an unconstitutional exercise of the power of interpretation, to insist, that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted to them by the constitution As to the authority so conferred upon state magistrates, while a difference of opinion has existed, and may exist still, on the point, in different states, whether state magistrates are bound to act under it, none is entertained by this court, that state magistrates may, if they choose, exercise that authority, unless prohibited by state legislation.").

⁸⁸ See *infra*, Section I.C.

⁸⁹ See Bulman-Pozen & Gerken, *supra* note 14, at 1282.

⁹⁰ See *id.* at 1282–84.

⁹¹ See Hunter, *supra* note 13, at 692–706; Claiborne, Jr., *supra* note 13, at 917; Abbe R.

Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 581 (2011).

⁹² See Simonis, *supra* note 13, at 46–47, 62–64, 79–80; see also Kraehenbuehl, *supra* note 46, at 1465 ("[S]tate and local governments create jurisdictions of under- and overenforcement depending on their policy preferences.").

⁹³ Bulman-Pozen & Gerken, *supra* note 14, at 1282.

⁹⁴ See John Dinan, *Contemporary Assertions of State Sovereignty and the Safeguards of American Federalism*, 74 ALB. L. REV. 1637, 1643 (2010).

⁹⁵ See Hunter, *supra* note 13, at 691–92.

⁹⁶ See Bulman-Pozen & Gerken, *supra* note 14, at 1283–84.

⁹⁷ See Young, *supra* note 52, at 139–40.

subject to the enforcement priorities of the federal government, but it does not nullify the federal Controlled Substances Act.⁹⁸

B. FAILED ATTEMPTS AT NULLIFICATION

In rarer instances, states in the modern era have purported to actually nullify federal law. Thomas E. Woods, Jr., a zealous modern advocate for nullification's promises to "resist federal tyranny,"⁹⁹ and the Tenth Amendment Center, a far-right group linked to Woods,¹⁰⁰ have catalyzed nullificationist rhetoric in the states by drafting and shopping model nullification legislation. Following the passage of the Affordable Care Act (ACA), for example, fifteen states introduced bills purporting to nullify the law, ten of which copied the exact language from the Center's model legislation and three of which used significant parts of it.¹⁰¹ Only one of the fifteen bills passed, in North Dakota, and the final version dropped both the criminal penalties for enforcing the ACA and the pretense that the law was "null and void" within the state.¹⁰² Instead, the final version of the North Dakota law was an exercise in interposition, declaring that the ACA "likely" violates the Constitution and that the North Dakota legislature "may" pass laws to prevent enforcement of the ACA within the state.¹⁰³

Woods likewise urged passage of "firearms freedom acts" that purport to nullify federal gun control laws within a state.¹⁰⁴ Nine states enacted such laws, declaring that federal gun control laws are unconstitutional insofar as the Commerce Clause reserves for states the right to intrastate commercial activities relating to firearms within a state.¹⁰⁵ But these state statutes ultimately amounted to declarations of noncooperation or assertions of a federal law's invalidity, rather than acts of actual nullification. For example, the Idaho law declined to declare federal gun control laws null and void. Instead, it declared that state officials will not enforce federal gun control laws, without saying anything about the federal government's authority to enforce its laws—

⁹⁸ See *id.* at 139 ("Modern-day nullification by states like Colorado thus has a fundamentally different formal structure from the right asserted by John C. Calhoun's South Carolina. Colorado has not purported to determine for itself that the federal CSA is unconstitutional . . . and it has not sought to block any federal effort to enforce the act within its boundaries. Rather, Colorado has simply gone on strike as an implementer of federal marijuana policy.").

⁹⁹ See generally THOMAS E. WOODS, JR., NULLIFICATION: HOW TO RESIST FEDERAL TYRANNY IN THE 21ST CENTURY 3–21 (2010) (suggesting use of the dormant nullification theory to resist federal laws).

¹⁰⁰ See Levinson, *supra* note 13, at 29–30.

¹⁰¹ See Hunter, *supra* note 13, at 693–96.

¹⁰² See Read & Allen, *supra* note 64, at 92, 94.

¹⁰³ See *id.* at 92; Hunter *supra* note 13, at 693 n.271.

¹⁰⁴ See WOODS, *supra* note 99, at 3, 12 ("Nullification is being contemplated in many other areas of American life as well—and not just in health care," including passage of "Firearms Freedom Act[s].") ("This is the spirit in which the Jeffersonian remedy of state interposition or nullification is once again being pursued.").

¹⁰⁵ See Read & Allen, *supra* note 64, at 93; Barak Y. Orbach, Kathleen S. Callahan & Lisa M. Lindemann, *Arming States' Rights: Federalism, Private Lawmakers, and the Battering Ram Strategy*, 52 ARIZ. L. REV. 1161, 1178 (2010).

a classic case of uncooperative federalism.¹⁰⁶ In response to Kansas' Firearms Freedom Act, which purported to nullify federal firearms requirements and penalize state officials for enforcing federal law, then-Attorney General Eric Holder wrote a letter to the Governor of Kansas making clear that federal law enforcement officers within the state "will continue to execute their duties to enforce all federal firearms laws and regulations."¹⁰⁷

C. CONCLUSION

In the most significant conflicts between the states and the federal government over nullification from the Founding through the modern era, the federal government has thwarted attempts at rendering federal law null and void. In conflicts over the Alien and Sedition Acts and the federal tariff, states failed to actually nullify recent federal statutes, and Congress resolved the underlying policy debate by allowing legislation to lapse and passing compromise legislation, respectively. The Supreme Court asserted the supremacy of its decisions passing on the meaning of the U.S. Constitution and federal statutes in response to a state personal liberty law in *Ableman v. Booth*, and again in requiring adherence to *Brown v. Board of Education* in *Cooper v. Aaron*. In recent years, too, state assertions of nullification have failed to actually render federal law without force within a state's borders. At each juncture, the branches of our federal government have proven effective at checking state attempts to actually negate conflicting federal rights.

III. CHECKS ON STATE NULLIFICATION

Checks on state attempts at nullification are rooted in the Supremacy Clause of Article VI, which establishes that the U.S. Constitution and federal statutes "shall be the supreme Law of the Land," and shall have the power to negate contrary state laws.¹⁰⁸ Supreme Court decisions passing on the meaning of the Constitution and federal statutes, moreover, are widely understood to be part of the "supreme" federal law under the Supremacy Clause.¹⁰⁹ The historical review of nullification attempts in the United States reveals that our constitutional system has imposed important checks

¹⁰⁶ S.B. 1332, 62nd Leg., 2d Reg. Sess. (Idaho 2014) <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2014/legislation/S1332.pdf> [<https://perma.cc/HTP7-2PSG>].

¹⁰⁷ See Letter from Eric H. Holder, U.S. Att'y Gen., to Sam Brownback, Kan. Governor (Apr. 26, 2013), <https://www.documentcloud.org/documents/695506-attorney-general-holder-letter-to-kans-gov> [<https://perma.cc/ZE25-3R6X>].

¹⁰⁸ See U.S. CONST. art. VI, cl. 2.

¹⁰⁹ See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 17–18 (1958); Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 877 (2011) ("Most scholars also conclude that state courts must abide by Supreme Court decisions as part of the 'supreme' federal law under the Supremacy Clause."). A minority of scholars, including one of the authors of SB8, would adopt a view of *stare decisis* that distinguishes between the text of the Constitution and Supreme Court precedent interpreting the Constitution. See Grove, *supra*, at 877 n.33; see also Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 3–4 (2011) (conceding that "the Supremacy Clause still allows for a significant, though limited, role for *stare decisis* in constitutional adjudication," and that the Supreme Court may rely on *stare decisis* in "controversial cases" and in reviewing contradictory state laws).

on state attempts at nullifying federal law—namely, judicial review by the courts and, alternatively, by the Executive Branch through federal law enforcement. Congress can act as a check as well, if it chooses to mitigate or resolve underlying policy disputes between states and the federal government—though congressional action should not be necessary to protect a preexisting federal right.

A critical check on attempts at state nullification is, of course, judicial review, and the power of federal courts to assert the supremacy of federal law over conflicting state law. Five years after the nullification debates surrounding the Alien and Sedition Acts, in *Marbury v. Madison*, the Supreme Court rejected Jefferson’s theory that the states were arbiters of what the Constitution requires. The Constitution is the “fundamental and paramount law of the nation,” and “[i]t is emphatically the province and duty of the judicial department to say what the law is.”¹¹⁰ If the state legislatures were permitted to “annul the judgments” of federal courts in exercising that function, “and destroy the rights acquired under those judgments,” the Court later wrote, “the constitution itself becomes a solemn mockery.”¹¹¹ The Court’s comfort with asserting judicial supremacy in interpreting the Constitution was even more apparent by 1819, when the Court declared in *McCulloch v. Maryland* that “by this tribunal alone can the decision be made” about the central issue of Congress’s authority to charter a bank of the United States.¹¹² The Court cited no support for this claim, seeming to suggest that judicial supremacy over disputes between the federal government and the states was a self-evident fact of our constitutional order.¹¹³

Congress and the federal courts have implemented safeguards to ensure that courts can hold states accountable for violations of federal law before enforcement. After southern states failed to protect the constitutional rights of Black Americans during the Ku Klux Klan’s reign of violence and terror during Reconstruction,¹¹⁴ Congress passed the first version of Section 1983, ensuring that persons can bring suit in federal court against not only state officials but anyone acting under the color of state law who violated their constitutional rights.¹¹⁵ Proponents of Section 1983 noted that “the state courts were [either] powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights.”¹¹⁶ The “very purpose” of

¹¹⁰ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

¹¹¹ *United States v. Peters*, 9 U.S. 115, 136 (1809)

¹¹² *See McCulloch v. Maryland*, 17 U.S. 316, 401 (1819).

¹¹³ *See id.*

¹¹⁴ *See Mitchum v. Foster*, 407 U.S. 225, 240 (1972) (“[S]tate courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights.”); Kevin J. Hamilton, *Section 1983 and the Independent Contractor*, 74 GEO. L.J. 457, 460 (1985) (“The Southern state courts’ passive reaction to the campaign of organized violence against blacks during the Reconstruction era demonstrated their unwillingness to enforce blacks’ civil rights Section 1983 was first enacted as section one of the Civil Rights Act of 1871, also known as the ‘Ku Klux Klan Act.’ The legislative history of the bill demonstrates that Congress intended to remedy the turmoil and near anarchy in the Southern states.”).

¹¹⁵ 42 U.S.C. § 1983.

¹¹⁶ *See Foster*, 407 U.S. at 240.

Section 1983 was “to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial.”¹¹⁷

Decades later, in *Ex parte Young*, the Supreme Court carved out an exception to sovereign immunity permitting suits against state officials in their official capacities that seek to enjoin the enforcement of unconstitutional state laws before they take effect.¹¹⁸ In *Ex parte Young*, the Court permitted a railroad company’s stockholders to sue a state attorney general to prevent him from enforcing an allegedly unconstitutional state law allowing reduced rates.¹¹⁹ The state law was designed to evade review: it provided no option for the stockholders to challenge rates without violating the state law and risking “enormous penalties.”¹²⁰ The Court rejected the law’s scheme, reasoning that a state official who performs an unconstitutional act “proceed[s] without the authority of . . . the State” and “comes into conflict with the superior authority of [the] Constitution,” such that he is “stripped of his official or representative character.”¹²¹ Reflecting on the doctrine a century later, the Court observed that “the availability of prospective relief” against allegedly unconstitutional laws “gives life to the Supremacy Clause.”¹²² *Ex parte Young* thus acts as a check to state nullification because it provides an avenue to prospective relief before the violation takes place.

The Executive Branch, too, plays a critical role in checking state attempts to render a federal law invalid within its borders. When a state declines to enforce federal law, the President can impose a check by exercising his authority to “take Care” to faithfully execute the law,¹²³ including by delegating enforcement to federal law enforcement officials to ensure that there is no actual nullification. In writing a letter to the Governor of Kansas informing him that federal law enforcement officers would continue to enforce federal gun control laws over state assertions of nullificationist intent, for example, Attorney General Holder engaged in precisely such a check on uncooperative federalism.¹²⁴ President Eisenhower engaged in a more aggressive version of the Executive check in federalizing the state national guard and sending army troops to Little Rock to ensure school integration, following the state’s effort to undermine *Brown v. Board of Education*.¹²⁵

Congress can also check state attempts at nullification. Congress played a role in resolving Jefferson and Madison’s efforts at nullifying the Alien and Sedition Acts, for example, by letting the unpopular, recently passed statutes lapse.¹²⁶ It similarly resolved a policy dispute over the federal tariff in 1828: after Congress passed a

¹¹⁷ *Id.* at 242 (internal quotations omitted).

¹¹⁸ 209 U.S. 123, 159–60 (1908).

¹¹⁹ *See id.* at 123–24.

¹²⁰ *See id.* at 144–45.

¹²¹ *Id.* at 159–60.

¹²² *Green v. Mansour*, 474 U.S. 64, 68 (1985).

¹²³ U.S. CONST. art. 2, § 3.

¹²⁴ *See* Letter from Eric H. Holder, *supra* note 107.

¹²⁵ *See Cooper v. Aaron*, 358 U.S. 1, 12–13 (1958).

¹²⁶ *See infra*, Section I.A.

compromise tariff in 1834, South Carolina dropped its nullificationist intent.¹²⁷ But while legislative action to resolve such policy disputes is firmly Congress's prerogative, individuals should not have to rely on Congress to take action to avail themselves of an existing federal right. Justice Kagan summarized this dynamic well at oral argument in *Whole Woman's Health v. Jackson*. When Texas's lawyer offered that Congress could pass a law to try to rectify the nonreviewability issues posed by SB8, an incredulous Justice Kagan interjected: "isn't the point of a [constitutional] right that you don't have to ask Congress?" to vindicate it?¹²⁸

In recent years, we have seen states seeking to push the boundaries of federal law, or even flout federal rights, test the willingness of the checks in our system to enforce the Supremacy Clause by proposing state laws that conflict with federal law but are designed to anticipate or influence future changes in judicial interpretation. The nascent firearms freedom acts fall into this category, as did state efforts to undermine the ACA. But perhaps nowhere in the modern era is this dynamic more prevalent than with respect to abortion. For years, states have passed laws testing the boundaries of the federal constitutional right protected by *Roe*,¹²⁹ an effort that has only increased as the Supreme Court has grown more conservative.¹³⁰ In dissent in *Dobbs*, Justices Breyer, Kagan, and Sotomayor described these efforts: states issuing pre-viability bans, they explained, "knew exactly what they were doing in ginning up new legal challenges to *Roe* and *Casey*."¹³¹ The dissenters quoted a Mississippi state senator championing a pre-viability abortion ban, who "said the obvious out loud": "'finally, we have' a conservative Court 'and so now would be a good time to start testing the limits of *Roe*.'"¹³²

Responding to the rise in nullificationist rhetoric in response to the ACA and federal gun control law in the models offered by the Tenth Amendment Center, the constitutional scholar Sanford Levinson recalled a lecture by Oliver Wendell Holmes in which he answered the question of "[w]hat constitutes the law?" as "[t]he prophecies of what the courts will do in fact, and nothing more pretentious."¹³³ Writing in 2014, Levinson observed that "we can say with absolute confidence" in the modern

¹²⁷ See *infra*, Section I.B.

¹²⁸ Transcript of Oral Argument at 75, *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021) (No. 21-463).

¹²⁹ See Dinan, *supra* note 94, at 1655 ("Abortion is the most prominent policy area where states have sought, with some success, to pass statutes that have generated cases presenting the Court with an opportunity to relax earlier precedents so as to return some discretion to state elected officials.").

¹³⁰ See Elizabeth Nash, *State Policy Trends 2021: The Worst Year for Abortion Rights in Almost Half a Century*, GUTTMACHER INST. (Jan. 5, 2022), <https://www.guttmacher.org/article/2021/12/state-policy-trends-2021-worst-year-abortion-rights-almost-half-century> [<https://perma.cc/LWP7-GT3T>] ("The 108 abortion restrictions enacted in 2021 far surpasses the previous post-*Roe* record of 89, set in 2011. A total of 1,338 abortion restrictions have been enacted since *Roe v. Wade* was handed down in 1973—44% of these in the past decade alone.").

¹³¹ *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 2022 WL 2276808, at *94 (June 24, 2022) (Breyer, Kagan, and Sotomayor, J., dissenting).

¹³² *Id.*

¹³³ Levinson, *supra* note 13, at 31 (quoting Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897)).

era “that any suggestion of so-called ‘sovereign states’ having the power to ‘nullify’ federal law is utter nonsense.”¹³⁴ “No federal judge (or, for that matter, all but the most deviant state counterpart),” he wrote, “is going to uphold state authority against the Supremacy Clause in Article VI, which clearly and unequivocally gives all laws passed pursuant to the Constitution the power to negate any state laws—or, indeed, state constitutions—to the contrary.”¹³⁵

IV. *WHOLE WOMAN’S HEALTH V. JACKSON* AND SANCTIONED NULLIFICATION

What was unimaginable in 2014 has come to pass. In *Whole Woman’s Health v. Jackson*, the Supreme Court greenlighted a state law designed to undermine a federal constitutional right. Following the Court’s decision, states wishing to nullify federal law have a blueprint from the Supreme Court’s decision: simply copy SB8’s design and prohibit state executive officers from enforcement, instead delegating enforcement to the population at large.

A. SB8’S DESIGN TO EVADE JUDICIAL REVIEW

Although SB8 is far from the first attempt to nullify a federal right, in many other ways the law is, as Chief Justice Roberts described, “not only unusual, but unprecedented.”¹³⁶ Under Texas’s SB8, abortion is prohibited in the state of Texas at six weeks after a woman’s last menstrual period, with no exceptions for rape, sexual abuse, or incest.¹³⁷ When Texas passed SB8, the six-week abortion ban contravened *Roe v. Wade* and its progeny’s holding that the Constitution prohibits pre-viability abortion bans.¹³⁸

On June 24, 2022, over six months after the Court’s final merits decision in *Whole Woman’s Health v. Jackson*, the Supreme Court overruled *Roe* and *Casey* in *Dobbs v. Jackson Women’s Health Organization*.¹³⁹ Under the Court’s decision in *Dobbs*, Texas was permitted to enact a pre-viability abortion ban.¹⁴⁰ Despite this subsequent ruling, the fact remains that when Texas passed SB8 in May 2021, and when the Court allowed it to take effect in a shadow docket ruling in September 2021 and greenlighted

¹³⁴ *Id.*

¹³⁵ *Id.* at 31–32.

¹³⁶ See *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494, 2496 (2021) (Roberts, C.J., dissenting).

¹³⁷ See TEX. HEALTH & SAFETY CODE ANN. § 171.204(a), § 171.201(1), (3), (7); Maggie Astor,

Here’s What the Texas Abortion Law Says, N.Y. TIMES (Sept. 9, 2021),

<https://www.nytimes.com/article/abortion-law-texas.html> (“The law, Senate Bill 8, bans most abortions after about six weeks — before many people know they are pregnant — and authorizes citizens to enforce it. Abortion providers in Texas said that 85 to 90 percent of the procedures they previously performed were after the six-week mark.”).

¹³⁸ 410 U.S. 113, 163–64 (1973); *Planned Parenthood of Southeast Pa. v. Casey*, 505 U.S. 833, 879 (1992); *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2120, 2135 (2020) (plurality opinion) (Roberts, C.J., concurring).

¹³⁹ *Dobbs v. Jackson Women’s Health Organization*, No. 19-1392, 2022 WL 2276808, at *7 (June 24, 2022).

¹⁴⁰ See *id.* The Court’s majority decision, ruling on Mississippi’s fifteen-week abortion ban, said nothing about the other unusual features of Texas’s SB8.

its evasion of judicial review in a final merits opinion in December 2021, *Roe* and its progeny remained binding precedent.

In May 2021, over a year before *Dobbs*, Texas set out not only to pass an unconstitutional law, but to ensure the law would stand to challenge, despite its unconstitutionality. What is novel about SB8, then, are the extreme measures that it takes to avoid pre-enforcement judicial review—and the measures it takes to stack the deck against defendants once a lawsuit is filed. By nullifying a constitutional right through its legislative design, but purporting to track the constitutional standard, SB8 is distinct in style from attempts at nullification reviewed in Parts I and II: rather than declaring outright that *Roe v. Wade* and its progeny are null and void, Texas relied on the structure of SB8 to isolate its attempt at nullification from being checked by federal courts before it takes effect. At the same time, SB8 purports to track the constitutional standard under *Roe* and *Casey* by providing persons sued under the law with a cramped version of the “undue burden” defense.¹⁴¹ In giving the impression of obsequiousness to federal law while undermining it, SB8 is properly understood as a form of “uncivil obedience”: a category of legal dissent that feigns obedience by purporting to follow formal rules.¹⁴²

Relying on a law review article setting forth ways for a “statute to remain effective despite the judiciary’s opposition,”¹⁴³ SB8 carried out Texas’s goal of uncivil obedience by making SB8 difficult to challenge before taking effect. SB8 prohibits state officials from enforcing it,¹⁴⁴ making challenges against state officials pursuant to *Ex parte Young* to restrain unconstitutional conduct by the state complex.¹⁴⁵ Instead, the law empowers “any person” to sue “any person” who performs, induces, assists, or intends to assist an abortion in violation of Texas’s six-week ban.¹⁴⁶ Potential plaintiffs are incentivized to do so by the promises of “not less than \$10,000” in damages per abortion, which must be paid by the defendant sued.¹⁴⁷ Under the text of SB8, your neighbor can sue the clinic’s receptionist for scheduling your appointment after six weeks. A complete stranger can sue the ride-sharing driver who drove you to the clinic. Your rapist can sue your sister for taking you to an abortion clinic. For a pregnant person seeking an abortion, her neighbors are deputized as her enemies, incentivized to track her and sue anyone who helped her for a sizable bounty.¹⁴⁸ The effect of this structure is to isolate pregnant Texans seeking an abortion by making

¹⁴¹ TEX. HEALTH & SAFETY CODE ANN. §§ 171.209(b)(2), (d)(2). SB8 provides that if the Supreme Court overturns *Roe* or *Planned Parenthood v. Casey*, the undue burden defense is no longer available. *Id.* § 171.209(e).

¹⁴² See Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. 809, 819–26 (2015) (describing a category of political dissent that achieves change by formal hypercompliance with the law, sometimes with the goal of undermining the law).

¹⁴³ Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 1000, 1001 n.270 (2018).

¹⁴⁴ HEALTH & SAFETY §§ 171.204(a), 171.207(a), 171.208(a)(2), (3).

¹⁴⁵ See *supra* Part III.

¹⁴⁶ HEALTH & SAFETY § 171.208(a).

¹⁴⁷ *Id.* § 171.208(b)(1), (2).

¹⁴⁸ See *id.* (providing that those that provide such support constitutes “aid[ing] and abet[ing]”).

anyone in their support network potentially liable for \$10,000 or more in damages and attorney's fees.

Once one of the millions of uninjured persons pursues such a case, SB8 rigs the case in their favor. Consider the hypothetical of a pregnant person's neighbor who sues a receptionist at an abortion clinic for scheduling the appointment. Under SB8, if the neighbor wins the case, the receptionist must foot the bill for the lawsuit, plus attorney's fees.¹⁴⁹ If the receptionist prevails, however, she must pay for the costs of her own defense—no matter how frivolous the lawsuit.¹⁵⁰ Under SB8, the receptionist must appear in any court in any county in which the neighbor lives, no matter how onerous.¹⁵¹ Even if the receptionist prevails in defending against a lawsuit, *any* person other than that particular neighbor is free to sue her, her colleagues, or anyone else who helped again, for the same conduct, because the law forecloses nonmutual collateral estoppel and *res judicata*.¹⁵²

Under this structure, even a single morning of providing abortion care could mire a physician, nurse, or technician in years of litigation and immense liability. The American College of Obstetricians and Gynecologists explained that SB8 “forces clinicians into an untenable position of facing potentially unlimited personal and professional liability if they provide care consistent with their best medical judgment, scientific evidence, and moral and ethical duty.”¹⁵³ Given this choice, the very existence of SB8, even absent a lawsuit brought under the law, forces clinics in Texas to stop providing abortion care after six weeks. With the threat of limitless litigation looming, the net effect of SB8's extraordinary threat of enforcement thus chills the exercise of a constitutional right. As the Supreme Court has recognized, a law that deters the exercise of a constitutional right through the threat of enforcement can amount to a “deprivation” of that right.¹⁵⁴

Defenders of SB8 argued that while clinics—and other potential defendants to private enforcement—are barred from challenging SB8 before it takes effect, they are free to challenge the constitutionality of the law once they are in court defending against a private enforcement action.¹⁵⁵ Once in court, SB8 states that defendants can rely on the “undue burden” defense, which purported to track the then-existing constitutional standard established by *Roe* and *Casey*.¹⁵⁶ But there are several

¹⁴⁹ *Id.* § 171.208(b)(3).

¹⁵⁰ *Id.* § 171.208(i).

¹⁵¹ *Id.* § 171.210(a)(4).

¹⁵² *Id.* § 171.208(e)(5); *see also* § 178.208(c) (limiting the issuance of monetary damages, but not other relief, against the same defendant for the same conduct).

¹⁵³ Brief of Leading Medical Organizations, *supra* note 8, at 11.

¹⁵⁴ *See Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392–93 (1988) (finding standing for a pre-enforcement challenge where a statute's “very existence” may cause persons to stop engaging in constitutionally protected acts).

¹⁵⁵ *See, e.g., Mitchell*, *supra* note 143, at 1002 (“Of course, the defendants in these private enforcement actions can reassert the constitutional objections to the statute—and perhaps they will persuade the court to follow the reasoning of the courts that have disapproved the statute.”).

¹⁵⁶ HEALTH & SAFETY §§ 171.209(b)(2), (d)(2).

problems with this defense of SB8's act of uncivil obedience. First, the undue burden defense did not affect the strong incentives providers faced to comply with SB8's six-week ban. While the Constitution requires a court to assess the cumulative effect of a burden on abortion access,¹⁵⁷ SB8 requires state courts to focus on the effect of the law on the parties.¹⁵⁸ So while the cumulative effect of SB8 is to dramatically limit abortion access in the state of Texas,¹⁵⁹ a court may well find that the burden of the law on a particular defendant, including not only the clinician but also the receptionist or rideshare driver, is not "undue." More fundamentally, defenders of SB8 are incentivized to maintain a dynamic in which SB8 is in effect, chilling the exercise of a constitutional right through the threat of immense liability, but exercising restraint in the actual enforcement of SB8 so that the law is not evaluated by a court on the merits in an as-applied challenge. In other words, the very existence of SB8 and its limitless threat of liability achieves the goal of dramatically limiting abortion access in Texas. But if the law were actually tested on the merits following an as-applied challenge, SB8 may well have been struck down as unconstitutional.

SB8's structure evades checks by the Executive Branch as well. In response to state attempts at nullification, the Executive Branch can step in and enforce the supremacy of federal law—as we saw when Attorney General Holder pledged to enforce federal gun control law over state threats of nullification, or when President Eisenhower federalized enforcement of school integration under *Brown v. Board of Education*. But in deputizing the population at large, and prohibiting state officers from enforcement, SB8 limits the Executive Branch's ability to step in to enforce federal constitutional rights over state executive officials. Under SB8, it is the state courts that are engaging in the unconstitutional act, issuing judgments contrary to federal constitutional law. SB8's evasive design makes the availability of pre-enforcement judicial review by federal courts all the more essential—without it, the Court greenlighted Texas in flouting what was then a federal constitutional right.

B. GREENLIGHTING STATE NULLIFICATION: *WHOLE WOMAN'S HEALTH V. JACKSON*

In prohibiting abortion after six weeks, in clear contravention of what was then binding precedent, SB8 violated a foundational principle of our federal system that states may not nullify federal rights through "evasive schemes" designed to foreclose federal judicial review.¹⁶⁰ But on two occasions, the Supreme Court largely approved of SB8's efforts to evade judicial review—first, on what has come to be known as the Court's "shadow docket,"¹⁶¹ and second, on its merits docket.

¹⁵⁷ See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2298–2312 (2016).

¹⁵⁸ See HEALTH & SAFETY §§ 171.209(b)(2), (d)(2).

¹⁵⁹ See Nathaniel Weixel, *Texas Abortions Dropped 60 Percent After Heartbeat Law Took Effect*, HILL (Feb. 10, 2022), <https://thehill.com/policy/healthcare/593770-texas-abortions-dropped-60-percent-after-heartbeat-law-took-effect/> [<https://perma.cc/E9LA-866P>] (citing Texas Health Department statistics showing that abortions in Texas dropped nearly sixty percent in the first month that SB8 was in effect).

¹⁶⁰ See *Cooper v. Aaron*, 358 U.S. 1, 17–18.

¹⁶¹ See William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 3–5 (2015).

Texas abortion providers sought to enjoin SB8's enforcement before it went into effect on September 1, 2021. The providers named as defendants a private person deputized to enforce the ban, the Texas attorney general, named state licensing officials, and clerks and judges of Texas state courts.¹⁶² When the case first reached the Court on the groups' motion for certiorari before judgment, nearly two months after the law had taken effect, a 5-4 Court issued a one-paragraph summary order allowing the law to remain in place, citing novel questions about the appropriate defendants for a pre-enforcement challenge.¹⁶³ Following the Court's order, people in the state of Texas sat on a constitutional island, no longer enjoying a constitutional right that, at that time, applied in the rest of the country.

When the case returned to the Supreme Court on its merits docket, the Court was called to consider whether a state can insulate from judicial review a law that prohibits the exercise of a constitutional right by delegating enforcement to the public at large.¹⁶⁴ The Court decided that Texas was mostly free to do so. Decades away from the functional view of school board officials as "agents of the State" with respect to school integration in *Cooper v. Aaron*,¹⁶⁵ the Court took a formalist view that allowed the state to feign to insulate itself from enforcement. Writing for the Court, Justice Gorsuch concluded that the lawsuit may only proceed against the state licensing officials, as only they were executive officers who might properly be sued under an exception to *Ex parte Young* that permits individuals to sue state licensing officials.¹⁶⁶

Justice Gorsuch's reasoning in the majority opinion turned on the specific text of SB8—permitting any future state wishing to nullify a federal constitutional law to simply add a line to their statute making clear that no executive officials have enforcement authority.¹⁶⁷ Nowhere in the majority opinion was reflected the concern expounded in *Cooper v. Aaron* that Supreme Court precedent as to federal constitutional rights might be "nullified openly and directly by state legislators or state executive or judicial officers" or "nullified indirectly by them through evasive schemes . . . whether attempted ingeniously or ingenuously."¹⁶⁸ The majority opinion in *Whole Woman's Health v. Jackson* ignored legal foundations for an exception to sovereign immunity to permit suit, as in *Ex parte Young* when the Court permitted plaintiffs to sue state officials in their official capacities in order to check unconstitutional conduct.¹⁶⁹ The Court could have permitted suit, for example, by carving out an exception to sovereign immunity to permit suit against state court

¹⁶² See *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 531 (2021).

¹⁶³ See *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495-96 (2021).

¹⁶⁴ See *Whole Woman's Health*, 142 S. Ct. at 530.

¹⁶⁵ See *Cooper*, 358 U.S. at 16.

¹⁶⁶ See *Whole Woman's Health*, 142 S. Ct. at 535.

¹⁶⁷ See *id.* at 535-36 (concluding that the licensing officials "may or must take enforcement actions" against the abortion clinics "if they violate the terms of Texas's Health and Safety Code, including S.B. 8").

¹⁶⁸ See *Cooper*, 358 U.S. at 17 (internal quotations omitted).

¹⁶⁹ 209 U.S. 123 (1908); see also *Yeomans*, *supra* note 5, at 514-15, 524-25.

judges “when legislation implicates the exercise of fundamental rights, but does not admit of a clear path to pre-enforcement review.”¹⁷⁰

In separate dissents, Chief Justice Roberts and Justice Sotomayor confronted the implications of the majority’s opinion. Just as in *Ex parte Young*, Chief Justice Roberts wrote, the design of SB8 was to harass “in an endeavor to enforce penalties under an unconstitutional enactment.”¹⁷¹ To Chief Justice Roberts, SB8’s “clear purpose and actual effect” was plain: to “annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments.”¹⁷² If state legislatures may annul such judgments at will, “the constitution itself becomes a solemn mockery.”¹⁷³ “The nature of the federal right infringed does not matter,” he concluded. “[I]t is the role of the Supreme Court in our constitutional system that is at stake.”¹⁷⁴

SB8, Justice Sotomayor agreed, “is a brazen challenge to our federal structure.”¹⁷⁵ The unavailability of constitutional rights in the state of Texas “echoes the philosophy of John C. Calhoun, a virulent defender of the slaveholding South who insisted that States had the right to ‘veto’ or ‘nullif[y]’ any federal law with which they disagreed.”¹⁷⁶ The Court “rewarded” Texas’s “effort at nullification” by allowing an unconstitutional law to stand, with “catastrophic consequences for women seeking to exercise their constitutional right to an abortion in Texas.”¹⁷⁷ Even worse, she continued, by prohibiting the providers from suing the Texas attorney general and state court officials, “the Court clears the way for States to reprise and perfect Texas’ scheme in the future to target the exercise of any right recognized by this Court with which they disagree.”¹⁷⁸

C. THE NULLIFICATIONIST’S PLAYBOOK

The day the Court’s opinion was announced in *Whole Woman’s Health v. Jackson*, Justice Sotomayor’s fear had already begun to pass: in the months that had transpired since the Court’s shadow docket order allowing SB8 to stand, “legislators in several States have discussed or introduced legislation that replicates its scheme to target locally disfavored rights.”¹⁷⁹ SB8’s copycat laws are not limited, of course, to the abortion context. Following *Whole Woman’s Health v. Jackson*, states red and blue had a blueprint to effectuate plans to opt out of locally disfavored federal law within their borders. Because the Court’s decision that the plaintiffs were permitted to narrowly pursue their lawsuit against executive licensing officials turned on SB8’s statutory language, moreover, states seeking to nullify federal mandates could, by the

¹⁷⁰ See Yeomans, *supra* note 5, at 515.

¹⁷¹ *Whole Woman’s Health*, 142 S. Ct. at 544 (Roberts, C.J., concurring in part and dissenting in part).

¹⁷² *Id.* at 545.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 550 (Sotomayor, J., concurring in part and dissenting in part).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 551.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

logic of the Court’s opinion, simply draft their copycat laws to ensure that *no* executive officials have enforcement authority, halting the specter of prospective relief.¹⁸⁰

The Court was on notice that allowing SB8 to evade review would serve as a model for states to undermine federal constitutional rights outside of the abortion context. At oral argument, Texas’s Solicitor General conceded that a range of federal rights—including rights to the free exercise of religion, rights to free speech, and Second Amendment rights—would not be reviewable by federal courts before taking effect.¹⁸¹ The Firearms Policy Coalition filed an amicus brief in the case arguing that “[t]his case is important not because of its specific subject matter of abortion, but instead for Texas’s cavalier and contemptuous mechanism for avoiding federal review of a scheme intentionally designed to chill the exercise of constitutional rights as determined by this Court’s precedents.”¹⁸² New York, the Firearms Policy Coalition explained, was “already experimenting with private enforcement of anti-gun laws and will no doubt gladly incorporate the lessons of this case to insulate its future efforts to suppress the right to keep and bear arms.”¹⁸³ Beyond gun rights, a state copycat law could easily be drafted by “[s]tates still mad” about *Obergefell v. Hodges* or even *Loving v. Virginia*, offering private bounties against people facilitating same-sex or interracial marriage.¹⁸⁴ “It is one thing,” the Firearms Policy Coalition wrote, “to disagree with precedents and seek their revision or reversal through judicial, congressional, or constitutional avenues; it is another simply to circumvent judicial review by delegating state action to the citizenry at large and then claiming, with a wink and a nod, that no state actors are involved.”¹⁸⁵ Constitutional law scholars filed another amicus brief warning that a declaration from the Court that SB8’s enforcement scheme was not reviewable “would be as if a State in 1870 had passed a law purporting to delegate to private individuals the ability to sue Black people who exercised their right to vote; promising a bounty as a reward; providing unique and previously unknown litigation advantages to such vigilantes; and designing the law deliberately to evade any meaningful pre-enforcement review.”¹⁸⁶

In the months following *Whole Woman’s Health v. Jackson*, SB8’s delegation of enforcement to “bounty hunters” has proven particularly popular for nationally divisive cultural issues, like gun control and classroom speech. Florida, for example, passed the “Stop W.O.K.E. Act” which incentivizes parents to sue school districts if teachers appear to be teaching critical race theory.¹⁸⁷ At least sixty-six other such

¹⁸⁰ See *id.* at 535.

¹⁸¹ See Millhiser, *supra* note 7.

¹⁸² Brief of Firearms Policy Coalition as Amicus Curiae in Support of Petitioners at 18, *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522 (2021) (No. 21-463).

¹⁸³ *Id.* at 3.

¹⁸⁴ See *id.* at 11.

¹⁸⁵ *Id.* at 18.

¹⁸⁶ See Brief of Constitutional Law, Federal Courts, Civil Rights, and Civil Procedure Scholars as *Amici Curiae* in Support of Petitioners at 3, *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522 (2021) (No. 21-463).

¹⁸⁷ *Governor DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations*, FL GOV. (Dec. 15, 2021),

“educational gag laws” have been introduced across the country.¹⁸⁸ As the Firearms Policy Coalition previewed, New York is working on an SB8-style law that will allow residents to file suit against persons violating the state’s ban on assault weapons.¹⁸⁹ In May 2022, California’s Senate passed an SB8-style law that empowers Californians to bring lawsuits for \$10,000 in damages against any person who manufactures an assault weapon—or brings one into the state.¹⁹⁰

These SB8 copycat laws are a creature of, and threaten to further contribute to, ever-increasing polarization. By turning private parties into the policemen of divisive culture war issues, such SB8-style laws turn neighbors against neighbors, families against families, and drive Americans further apart. It is not yet clear, however, how the Court would apply its ruling in *Whole Woman’s Health v. Jackson* to rights beyond the reproductive rights context, including to rights that it favors. Describing California’s copycat law for assault weapons in the *New Republic*, the writer Matt Ford explained: “S.B. 8 involved a right that is clearly disfavored by a majority of the justices,” where California’s assault weapon law “targets one that they have recently shown greater interest in protecting.”¹⁹¹ If California passes its assault weapons bounty-hunter bill into law, the Court “may eventually have to choose between letting the states hollow out constitutional rights through procedural trickery or recognizing that they made a mistake” in *Whole Woman’s Health v. Jackson*.¹⁹²

CONCLUSION

Following the Court’s December 2021 decision in *Whole Woman’s Health v. Jackson*, the availability of a pre-enforcement lawsuit against the licensing officials was described as a “narrow victory” for reproductive rights.¹⁹³ But what remained of the clinics’ lawsuit against the state licensing officials was swiftly relegated in the

<https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations/> [https://perma.cc/FAU3-N9SF]; John Kennedy, *DeSantis Signs Into Law ‘Stop WOKE Act’ to Restrict Race Discussions in Florida*, TALLAHASSEE DEMOCRAT (Apr. 22, 2022),

<https://www.tallahassee.com/story/news/politics/2022/04/22/florida-governor-desantis-stop-woke-act-race-bill-law-sign-discussions-republicans/7403239001/> [https://perma.cc/4KFG-CHCX].

¹⁸⁸ See Jon D. Michaels & David L. Noll, *Vigilante Federalism*, CORNELL L. REV. (forthcoming) (draft manuscript at 12).

¹⁸⁹ See Abby Monteil, *Letitia James Says New York Will Follow Suit With California Gun Law on ‘The View’: ‘I Am Sick and Tired of Prayers*, DECIDER (Dec. 14, 2021), <https://decider.com/2021/12/14/letitia-james-new-york-follow-suit-california-gun-laws-the-view/> [https://perma.cc/HKB8-9TBT].

¹⁹⁰ Matt Ford, *Taking Cues From Texas, California Proposes Its Own Bounty Law—Against Guns*, NEW REPUBLIC (May 27, 2022), <https://newrepublic.com/article/166641/bounty-law-guns-supreme-court>.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ See, e.g., Emily Wax-Thibodeaux, Casey Parks & Caroline Kitchener, *Supreme Court Ruling on Texas Abortion Ban is a Narrow Victory for Abortion Rights*, WASH. POST (Dec. 10, 2021), <https://www.washingtonpost.com/dc-md-va/2021/12/10/reaction-texas-abortion-supreme-court-ruling/>.

lower courts. The Fifth Circuit certified the question of whether SB8 indeed authorizes executive officials to take disciplinary or adverse action against individuals that violate SB8 to the Texas Supreme Court,¹⁹⁴ and the Texas Supreme Court answered in the negative: “Texas law does not grant the state-agency executives named as defendants in this case any authority to enforce the Act’s requirements, either directly or indirectly.”¹⁹⁵ Without using the words “null and void,” SB8 was more successful at nullifying a federal right within its borders than prior attempts at nullification.

Going forward, states seeking to copy SB8’s structure to insulate violations of federal constitutional rights might avoid even this sliver of a doubt about a pre-enforcement challenge by exempting executive officials entirely from the enforcement of a state copycat law. As Justice Sotomayor warned in dissent, states could “reprise and perfect Texas’ scheme in the future to target the exercise of any right recognized by this Court with which they disagree.”¹⁹⁶ The damage of the Court’s opinion—if applied by its logic—thus extends beyond reproductive rights, placing at risk the full range of federal rights that might be locally disfavored.

The implications of the logic of the Court’s opinion in *Whole Woman’s Health v. Jackson* are seismic, as states in our divided nation move forward with a tool to nullify federal rights within their borders. It remains an open question, though, how the Court would apply its own precedent to a copycat law seeking to nullify a federal constitutional right outside of the abortion context—especially with respect to a constitutional right that it favors. If the latter set of preferences is what cabins the specter of state nullification of federal constitutional rights, it is cold comfort indeed.

¹⁹⁴ See *Whole Woman’s Health v. Jackson*, 23 F.4th 380, 389 (5th Cir. 2022).

¹⁹⁵ See *Whole Woman’s Health v. Jackson*, 642 S.W.3d 569, 583 (Tex. 2022).

¹⁹⁶ See *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 551 (2021) (Sotomayor, J., concurring in part and dissenting in part).