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Reverse Nullification and Executive Discretion

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ARTICLES

REVERSE NULLIFICATION AND EXECUTIVE DISCRETION

Michael T. Morley

The President has broad discretion to refrain from enforcing many civil and criminal laws, either in general or under certain circumstances. The Supreme Court has not only affirmed the constitutionality of such under-enforcement, but extolled its virtues. Most recently, in Arizona v. United States, it deployed the judicially created doctrines of obstacle and field preemption to invalidate state restrictions on illegal immigrants that mirrored federal law, in large part to ensure that states do not undermine the effects of the President's decision to refrain from fully enforcing federal immigration provisions.

Such a broad application of obstacle and field preemption is inconsistent with the text and original understanding of the Supremacy Clause and unnecessarily aggrandizes the practical extent of executive authority. The Supremacy Clause prohibits states from attempting to nullify or ignore federal laws that they believe are unconstitutional or unwise. It should not bar states from engaging in "reverse nullification" by enacting statutes that mirror federal law to ameliorate the effects of executive under- or non-enforcement. Far from undermining the "law of the land," reverse nullification reinforces it by ensuring that the President cannot effectively amend or nullify federal law by declining to enforce it. The Court should craft an exception to its obstacle and field preemption doctrines to accommodate reverse nullification, and Congress should generally include an exception permitting reverse nullification in statutes' express preemption provisions.

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INTRODUCTION

The Constitution requires the President to “take Care that the Laws be faithfully executed,”¹ yet the Supreme Court repeatedly has affirmed that the executive branch generally may decline to enforce federal criminal and civil laws as a matter of policy in cases in which they disputably would apply.² Presidents have exercised this discretion vigorously in recent years to enforce only partially or selectively, or even refrain from enforcing, laws they have been unable to change through traditional legislative channels.³ Some have defended such under-enforcement as a form of self-help against congressional intransigence,⁴ an exercise of “stewardship” by the President,⁵ a component of the President’s “completion power”⁶ or “enforcement power,”⁷ or an “extra-legislative veto.”⁸

¹ U.S. CONST. art. II, § 3.

² See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (“[A]n agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to [its] absolute discretion.”); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“[T]he decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor’s] discretion.”); see, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) (holding that the executive branch may decline to enforce immigration laws in particular cases based on “immediate human concerns” and the “equities of an individual case”).

³ See David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 18–19 (2014) (discussing how the actions of President Bush and President Obama “drew significant attention” to questions of Presidential authority to refrain from enforcing or defending the constitutionality of federal legislation); see also Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 673–74 (2014) (describing some of President Obama’s nonenforcement policies). Scholars have taken opposing views regarding the legitimacy of President Obama’s Deferred Action for Childhood Arrivals (“DACA”), which will allow nearly two million undocumented aliens to remain in the country despite their failure to comply with immigration law and Congress’s refusal to enact the DREAM Act. Compare Lauren Gilbert, *Obama’s Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform*, 116 W. VA. L. REV. 255, 306 (2013) (defending DACA’s constitutionality), with Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 785 (2013) (challenging DACA’s constitutionality).

⁴ Pozen, *supra* note 3, at 18–19.

⁵ Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 94 B.U. L. REV. 105, 107–08 (2014) (defending the President’s refusal to enforce federal immigration law under DACA as an exercise of his “stewardship” power to “protect both ‘intending Americans’ and resident foreign nationals from violations of law by nonfederal sovereigns”).

⁶ Jack Goldsmith & John F. Manning, *The President’s Completion Power*, 115 YALE L.J. 2280, 2282, 2293–95 (2006) (explaining the President’s completion power as “an Article II power of some uncertain scope to complete a legislative scheme,” in part by exercising discretion over enforcement).

⁷ Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1039 (2013) (arguing that, under the President’s “enforcement power,” he “acts permissibly when he uses

The President's broad authority to refrain from enforcing federal statutes is bolstered by a range of ancillary doctrines that further insulate his decisions from judicial review, such as restrictions on Article III standing to challenge non-enforcement decisions,⁹ judicial reluctance to allow aggrieved parties to enforce statutes themselves by recognizing implied rights of action,¹⁰ and refusal to recognize a due process right to adequate enforcement of the law.¹¹ Some prominent scholars in recent years have come to embrace and even celebrate the near-limitless discretion for the Executive that results.¹²

In our federal system of government, states share sovereignty with the federal government over most aspects of domestic life.¹³ As separate sovereigns—a substantial number of which invariably will be controlled by officials not of the President's political party¹⁴—states present a potentially viable alternative for enforcing many federal laws that the executive branch will not. When the executive branch undermines or effectively nullifies a federal law by refusing to enforce it, a state may engage in “reverse nullification” by enforcing materially comparable or identical state laws. Whereas states historically engaged in traditional nullification by ignoring and undermining federal laws they believed to be unconstitutional, reverse nullification

enforcement discretion and prioritization—including nonenforcement—to advance policy goals,” so long as he can “articulate a reasonable statutory basis” for his actions).

- 8 Michael Sant’Ambrogio, *The Extra-Legislative Veto*, 102 GEO. L.J. 351, 361 (2014) (arguing that the President may exercise an “extra-legislative veto” by “not enforcing a law, either in whole or in part,” with the goal of “checking, weakening, or curbing a statutory mandate”).
- 9 *Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973) (“[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.”).
- 10 *See Alexander v. Sandoval*, 532 U.S. 275, 288–89 (2001) (establishing a three-prong test for recognizing implied rights of action); *see, e.g., Brunner v. Ohio Republican Party*, 555 U.S. 5, 6 (2008) (per curiam) (rejecting challenge to Ohio Secretary of State’s refusal to update voting records as required by the Help America Vote Act because that statute did not create a private right of action); *see also Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002) (applying similar test for plaintiffs seeking to sue state officials under § 1983 for refusing to enforce laws).
- 11 *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005) (holding that the police did not violate a woman’s procedural due process rights by failing to enforce a restraining order against her husband); *see also DeShaney v. Winnebago Cnty. Dept. Soc. Servs.*, 489 U.S. 189 (1989) (holding that a county department of social services did not violate a child’s substantive due process rights by failing to protect him from his father’s violence).
- 12 *See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 5 (2010) (embracing broad executive power).
- 13 *See Jessica Bulman-Pozen, Partisan Federalism*, 127 HARV. L. REV. 1077, 1082 (2014) (examining state power).
- 14 *Id.* at 1080 (“States oppose federal policy because they are governed by individuals who affiliate with a different political party than do those in charge at the national level, not because they are states as such.”).

enables states to implement federal requirements and prohibitions that federal executive officials would allow to languish ignored.

Modern preemption doctrine, however, hinders states' ability to play this role. A federal law naturally preempts state law when it expressly supersedes or prohibits states from enacting certain types of provisions (express preemption),¹⁵ or when it is impossible for a person to comply with both a federal and state mandate (conflict preemption).¹⁶ Federal law also precludes enforcement of state law when a court determines that Congress implicitly intended to "occupy the field," so as to bar state legislation concerning a particular area (field preemption),¹⁷ or that a certain state law may frustrate or impede the objectives of the federal statute (obstacle preemption).¹⁸ Field preemption and obstacle preemption prevent states from enacting laws that are fully consistent with—or even simply reiterate—federal requirements. These doctrines indirectly enhance the Executive's enforcement discretion by guaranteeing the Executive a monopoly on the enforcement of many standards and prohibitions set forth in federal law.

This Article argues that field preemption and obstacle preemption should be abandoned, at least insofar as they prohibit states from enacting and enforcing requirements or prohibitions that mirror federal ones. Preemption arises under the Supremacy Clause, from the notion that federal statutes comprise part of "the supreme Law of the Land."¹⁹ The Clause prevents states from nullifying or ignoring federal law, although they generally remain free to attempt to oppose and undermine it in less direct ways.²⁰ When states enforce their own

¹⁵ See *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203 (1983) ("It is well established that within constitutional limits Congress may pre-empt state authority by so stating in express terms."); see also *English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990) (noting the same).

¹⁶ See *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963) ("[A] holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility.").

¹⁷ See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (stating that field preemption occurs when an "Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject").

¹⁸ See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (explaining "obstacle preemption"); see also *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (same).

¹⁹ U.S. CONST. art. VI, § 2.

²⁰ See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258–59 (2009) (noting that states engage in "uncooperative federalism" when they attempt to frustrate the implementation of federal law); see also Ernest A. Young, *A Research Agenda for Uncooperative Federalists*, 48 TULSA L. REV. 427, 428 (2012) (same).

parallel mandates in the face of federal under- or non-enforcement, however, they are not undermining or nullifying federal law. To the contrary, they are engaging in reverse nullification: enforcing federally established requirements or prohibitions despite the federal Executive's inability or refusal to do so.

State enforcement of parallel state-level mandates can be an effective alternate means of enforcing federal requirements, neatly circumventing the substantial doctrinal and practical obstacles to compelling the Executive to enforce them.²¹ The Supreme Court's

In recent years, a burgeoning body of scholarship has arisen concerning the extent to which efforts by many states to oppose perceived overreach by the Obama administration constitutes nullification. See 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, 27–28 (2014) (arguing that recent “nullification-like actions” are based on “‘zombie’ constitutional arguments” that were “thought to be long dead,” but are “stalking us and threatening our brains”); see also Keely N. Kight, Comment, *Back to the Future: The Revival of the Theory of Nullification*, 65 MERCER L. REV. 521, 524 (2014) (“[R]ecently the nullification doctrine has grown in popularity as political disunion reaches new heights and as states respond to the expansion of the federal government.”); cf. Kris W. Kobach, *Immigration Nullification: In-State Tuition and Lawmakers Who Disregard the Law*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 473, 521 (2006/2007) (“The decision of ten states to violate 8 U.S.C. § 1623 is more than just an interesting sideshow in the larger theater of U.S. immigration policy; it is a preempted action that should be invalidated by the courts reviewing the statutes in question.”).

State opposition to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010), as amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, has emerged as a particular focal point of much of the literature about nullification. Compare Ryan Card, Comment, *Can States “Just Say No” to Federal Health Care Reform? The Constitutional and Political Implications of State Attempts to Nullify Federal Law*, 2010 B.Y.U. L. REV. 1795, 1829 (“This opposition effort by states against health care reform constitutes state nullification of federal law . . . [and] is an unconstitutional exercise of state power.”), with Ryan S. Hunter, *Sound and Fury, Signifying Nothing: Nullification and the Question of Gubernatorial Executive Power in Idaho*, 49 IDAHO L. REV. 659, 663 (2013) (“Executive Order No. 2011-03 is not actual nullification, but is merely an act of uncooperative federalism done as part of a larger effort to interpose the state between its citizens and the federal government to prevent, or at least slow, implementation of the [Affordable Care Act].”), and Robert S. Claiborne, Jr., Comment, *Why Virginia’s Challenges to the Patient Protection and Affordable Care Act Did Not Invoke Nullification*, 46 U. RICH. L. REV. 917 (2012) (arguing that Virginia’s constitutional challenges to the Affordable Care Act were not exercises of nullification).

²¹ See *supra* notes 2, 9–11; see also Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 748 (2011) (“Enforcement authority creates a state-level check against underenforcement by federal agencies.”); Amanda M. Rose, *State Enforcement of National Policy: A Contextual Approach (with Evidence from the Securities Realm)*, 97 MINN. L. REV. 1343, 1345, 1356–57 (2013) (“The benefit of concurrent enforcement most emphasized in this recent literature is the ability of state regulators to remedy under-enforcement by potentially captured federal agencies.”); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 290 (2005) (“[R]egulatory redundancy constitutes a fail-safe mechanism—an additional source of protection if one or the other government should fail to offer adequate safeguards.”).

current approach to field and obstacle preemption, however, treats the Executive's unilateral decision to decline to enforce a federal statute in certain cases as constitutionally equivalent to the underlying statute itself, entitled to respect as the law of the land.²² This understanding bolsters executive discretion beyond its already generous bounds, and extends the Supremacy Clause to the Executive's mere policy determinations that do not, in fact, rise to the level of "law." While the Executive may seldom be compelled to enforce federal requirements or prohibitions against its will, its reticence should not preclude other sovereigns from doing so.

Of course, when a federal law affirmatively licenses or authorizes a particular act, state interference—including the imposition of identical standards at the state level—would directly contradict the statute. In the absence of such express federal authorization, however, when a federal statute imposes particular requirements or prohibits certain conduct, and the executive branch simply declines to enforce those provisions, the Executive's acts do not amount to implicit federal authorization. States are not bound to defer to such executive policy determinations, but rather are free to enact their own parallel provisions to help to enforce the true "law of the land": the underlying federal statute.²³

Part I begins by exploring traditional state nullification of federal law throughout American history. True nullification, unlike reverse nullification, is a squarely unconstitutional attempt by a state to ignore federal laws or declare them void. Part II explores the drafting history of the Supremacy Clause and the Framers' intent underlying it, demonstrating that reverse nullification is consistent with the original understanding of the Constitution. Part III analyzes the various preemption doctrines the Supreme Court has crafted to implement the Supremacy Clause. It explains why the Court should modify its field and obstacle preemption doctrines to permit states to engage in reverse nullification by enacting requirements that are materially identical to—and do not contravene—federal statutes, with special emphasis on the Supreme Court's recent invalidation of Arizona's immigration statutes in *Arizona v. United States*.²⁴ Part IV concludes by addressing potential objections to reverse nullification, including concerns under the Take Care Clause.²⁵

²² See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2502–07 (2012).

²³ Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 SUP. CT. REV. 31, 37.

²⁴ *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012).

²⁵ U.S. CONST. art. II, § 3.

Federalism and separation of powers generally are studied as separate mechanisms for limiting the Government's power and protecting individual freedom.²⁶ Through reverse nullification, federalism also can help bolster separation of powers, allowing separate sovereigns to enforce the standards set forth in congressional enactments despite the reticence of the federal Executive. In an age when separation of powers is seen in legal realist terms as little more than a vehicle for competition and conflict between the two major political parties,²⁷ reverse nullification harnesses such rivalry to ensure the enforcement of federal requirements and prohibitions and help check the Executive's nearly limitless power and discretion.²⁸

I. NULLIFICATION

Revisiting states' periodic attempts throughout American history to unconstitutionally nullify federal law can yield insight into the validity of reverse nullification. The earliest attempts at nullification came shortly after the Constitution was ratified. In 1798, the Federalist Congress enacted the Alien and Sedition Acts,²⁹ which made it a crime, among other things, to "defame" the Government, the President, or either House of Congress; "bring them . . . into contempt or disrepute"; or "excite . . . hatred" against them through "false, scandalous and malicious" writings.³⁰

The Kentucky and Virginia legislatures enacted resolutions asserting that states had the right to declare the Acts unconstitutional and void. The first Kentucky resolution was secretly drafted by Anti-Federalist and Democratic-Republican Thomas Jefferson while he was Vice President.³¹ It declared that any act of the federal Government that exceeds the "certain definite powers" that the Constitution

²⁶ See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 3 (2d ed. 2002) (discussing federalism and separation of powers as performing separate functions, independent of each other).

²⁷ See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2327 (2006) (demonstrating that the different branches of federal government "serve a politically contingent role as vehicles for party competition").

²⁸ See POSNER & VERMEULE, *supra* note 12, at 112–13 ([T]he basic aspiration of liberal legalism to constrain the executive through statutory law has largely failed.)

²⁹ Act of July 14, 1798, 5 Cong. Ch. 74, 1 Stat. 596; An Act Respecting Alien Enemies, 5 Cong. Ch. 66, 1 Stat. 577 (July 6, 1798); An Act Concerning Aliens, 5 Cong. Ch. 58, 1 Stat. 570 (June 25, 1798).

³⁰ Act of July 14, 1798, 5 Cong. Ch. 74, 1 Stat. 596, 596.

³¹ ANDREW C. McLAUGHLIN, *A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 435 (1935).

grants to it is “unauthoritative, void, and of no force.”³² It further specified that each State “has an equal right to judge for itself” whether the Government is acting unconstitutionally.³³ The Alien and Sedition Acts both exceeded Congress’s Article I powers and violated the First Amendment, and therefore were “altogether void and of no force.”³⁴ The resolution concluded by declaring that Kentucky would not “submit to undelegated & consequently unlimited powers,” and asked the other states of the Union to “concur in declaring these acts void and of no force.”³⁵ Jefferson elsewhere elaborated that, because the Constitution creates a “compact” of independent states, “every single one” of them has “an equal right” to interpret the Constitution “and to require its observance.”³⁶ Consequently, a federal law should be deemed nullified if two-thirds of the state legislatures in the nation declare it to be unconstitutional.³⁷

Virginia’s resolution was drafted by James Madison,³⁸ who was a Federalist at the time the Constitution was drafted, but later became a Democratic-Republican and would go on to become Secretary of State and President. The resolution declared that when the federal government engages in a “deliberate, palpable, and dangerous exercise” of powers that the Constitution denies it, the states “have the right, and are in duty bound, to interpose for arresting the pro(gress) [sic] of the evil, and for maintaining . . . [their] authorities, rights and liberties”³⁹ It further specified that the Sedition Act was “expressly and positively forbidden” by the First Amendment.⁴⁰ Taken together, the Kentucky and Virginia Resolutions argued that “the constitutional powers of Congress should be strictly construed and that states had some role to play in checking overexertions of congressional power.”⁴¹

Interestingly, this first assertion of a nullification power was largely rejected. No other states concurred with or endorsed the resolutions,

³² Kentucky Resolutions of 1798, para. I (Nov. 10, 1798), *reprinted in* 30 THE PAPERS OF THOMAS JEFFERSON: 1 JANUARY 1798 TO 31 JANUARY 1799, at 529, 550 (Barbara B. Oberg & J. Jefferson Looney eds., 2003).

³³ *Id.* para. I, at 551.

³⁴ *Id.* para. II–III, at 552–53.

³⁵ *Id.* para. IX, at 555–56.

³⁶ MERRILL D. PETERSON, THOMAS JEFFERSON AND THE NEW NATION: A BIOGRAPHY 994–95 (1970).

³⁷ *Id.*

³⁸ Virginia Resolutions of 1798, *reprinted in* 17 THE PAPERS OF JAMES MADISON 185, 188 (David B. Mattern et al. eds. 1991) [hereinafter MADISON PAPERS].

³⁹ *Id.* para. 3, at 189.

⁴⁰ *Id.* para. 5, at 189.

⁴¹ ANTHONY J. BELLIA JR., FEDERALISM 47 (2011).

“and several Federalist legislatures adopted statements expressly condemning the Resolutions and endorsing the constitutionality of the Alien and Sedition Acts.”⁴² The Kentucky legislature responded by enacting a second, much shorter resolution.⁴³ It reaffirmed that, when the federal government enacts laws that violate the Constitution, the “several states who formed that instrument, being sovereign and independent, have the unquestionable right to judge of its infraction, and . . . nullification, by those sovereignties, of all unauthorized acts . . . is the rightful remedy.”⁴⁴

Similarly, the Virginia legislature approved a committee report penned by Madison explaining and defending its resolution.⁴⁵ Characterizing the Constitution as a compact among the states, it declared that the states themselves must “decide in the last resort” questions concerning its meaning.⁴⁶ The report explained that states must have the authority to “interpos[e]” themselves to “arrest the progress of the evil” caused by unconstitutional federal laws, preserve the Constitution, “provide for the safety of the parties to it,” and prevent the government from usurping power and violating individual rights.⁴⁷

The resolutions did not have any immediate legal effect and were unsuccessful in blocking enforcement of the Alien and Sedition Acts.⁴⁸ They nevertheless laid out a theory of constitutional interpretation and the nature of the federal system that the Democratic-Republican party embraced. With Jefferson and then Madison serving as President, these resolutions “assumed an increasingly important role as the canonical statements of the Republicans’ constitu-

42 H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 VA. L. REV. 689, 705 (1994); see also Daniel A. Farber, *Judicial Review and Its Alternatives: An American Tale*, 38 WAKE FOREST L. REV. 415, 434 (2003) (“None of the other states supported the Resolutions, and several condemned them.”); Kenneth M. Stampp, *The Concept of a Perpetual Union*, 65 J. AM. HIST. 5, 22 (1978) (“Nine states, all controlled by the Federalists, responded with assertions that the federal judiciary was the proper judge of the constitutionality of acts of Congress.”).

43 See Kentucky Resolutions of 1799 (Nov. 14, 1799), reprinted in 4, DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 544, 545 (Jonathan Elliot ed., 2d ed. 1836).

44 *Id.*

45 The Report of 1800, reprinted in MADISON PAPERS, *supra* note 38, at 317 [hereinafter Report of 1800]; see also Kurt T. Lash, *James Madison’s Celebrated Report of 1800: The Transformation of the Tenth Amendment*, 74 GEO. WASH. L. REV. 165, 185–86 (2006) (discussing the report’s significance).

46 Report of 1800, *supra* note 45, at 317.

47 *Id.*

48 See Claiborne, *supra* note 20, at 932–33; see also *supra* note 42 and accompanying text.

tional vision.”⁴⁹ Indeed, throughout their terms as President, both men generally adhered to the resolutions’ narrow vision of the scope of the federal government’s authority.⁵⁰

The Supreme Court’s rulings over the decades that followed flatly rejected the notion of nullification. The Court invalidated state laws and state supreme court rulings that it concluded violated the Constitution, even when states claimed to be faithfully applying their own independent interpretations of it. The foundation for this authority, of course, lies in *Marbury v. Madison*.⁵¹ Although that case dealt with a federal statute, the Court’s reasoning applies equally to state laws: “It is emphatically the province and duty of the judicial department to say what the law is [As] the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.”⁵²

In *Fletcher v. Peck*, the Court overturned the State of Georgia’s attempt to engage in what might be called “self-nullification.”⁵³ Several members of the state legislature had been bribed into voting for a law through which the state sold land to certain investors.⁵⁴ Those investors, in turn, sold the land to third parties who purchased it in good faith.⁵⁵ After the bribery scheme was publicly revealed, the legislators were voted out of office. Their successors enacted a new statute repealing the original law on the grounds that the corruption surrounding it rendered it unconstitutional.⁵⁶ The latter statute was entitled, “AN ACT declaring null and void a certain usurped act.”⁵⁷

As Gerald Leonard explains:

49 Powell, *supra* note 42, at 705; *see also* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 927 (1985) (“[T]he Resolutions proved to be among the most influential extraconstitutional, nonjudicial texts in American constitutional history.”).

50 *See* DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 213–14 (1994) (analyzing Jefferson’s exercises of Executive power); *see, e.g.*, James Madison, *Veto Message* (Mar. 3, 1817) (vetoing public works bill because of the “insuperable difficulty I feel in reconciling the bill with the Constitution”), *reprinted in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 584, 584 (James D. Richardson ed., 1896) [hereinafter *PAPERS OF THE PRESIDENTS*].

51 5 U.S. (1 Cranch) 137, 177–78 (1803).

52 *Id.*

53 10 U.S. (6 Cranch) 87 (1810); *see also* Gerald Leonard, *Fletcher v. Peck and Constitutional Development in the Early United States*, 47 U.C. DAVIS L. REV. 1843 (2014) (discussing the circumstances surrounding the case).

54 *Fletcher*, 10 U.S. (6 Cranch) at 129.

55 *Id.* at 129–30.

56 *See* Leonard, *supra* note 53, at 1845 (explaining aftermath of the corruption).

57 C. PETER McGRATH, *YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC: THE CASE OF FLETCHER V. PECK* 127–29 (1966) (reprinting text of repealing act).

Georgia's action—almost unintelligible to us today—asserted the legislature's right to review the constitutionality of legislation, without recourse to the courts and regardless of the federal constitutional protection for contracts. The 1796 Act was not a conventional repeal but a finding and declaration that the 1795 Act had never been law . . . [T]he people and their delegates in the legislature reviewed the original Act and declared the land grant void—without effect from the moment of its supposed enactment—on the basis of the fraud and other constitutional defects.⁵⁸

Following the repeal, the third-party purchasers sued the original investors from whom they had purchased the land. The purchasers claim that the investors had breached their sale contract because, due to the repeal, they had failed to convey good title to the land.⁵⁹ The purchasers were thus arguing against the validity of their own title.⁶⁰

The Supreme Court rejected their claim and sided with the investors. It held that the initial statute constituted a contract between the state and the original investors, and so the subsequent law purporting to repeal it impaired the state's contractual obligations⁶¹ in violation of the U.S. Constitution's Contracts Clause.⁶² In doing so, the Court rejected the view that either the Georgia legislature or the public that specifically elected legislators who would nullify the sale had the authority to make a final, binding decision as to whether either of the statutes at issue was constitutional.

Three years later, the Court went even further in *Martin v. Hunter's Lessee*.⁶³ It overturned the Virginia Supreme Court's application of a federal treaty, as well as that court's subsequent attempt to ignore the Supreme Court's ruling on constitutional grounds. The Treaty of 1794 between the United States and Great Britain guaranteed the right of British subjects to own land in the United States.⁶⁴

⁵⁸ Leonard, *supra* note 53, at 1845–46.

⁵⁹ *Fletcher*, 10 U.S. (6 Cranch) at 131–32.

⁶⁰ Some commentators have opined that the suit was collusive. Under this view, the original investors induced third-party purchasers to sue in hope that the court would reject their breach of contract claims, to establish a precedent that would confirm the validity of the investor's title to other lands they had purchased pursuant to the original statute. MCGRATH, *supra* note 57, at 53–54; Leonard, *supra* note 53, at 1853; cf. Lindsay G. Robertson, "A Mere Feigned Case": *Rethinking the Fletcher v. Peck Conspiracy and Early Republican Legal Culture*, 2000 UTAH L. REV. 249, 259–60, 264 (suggesting that the plaintiffs' claim might have involved "legal fictions" to avoid onerous pleading obstacles and obtain an adjudication on the merits of an important issue).

⁶¹ *Fletcher*, 10 U.S. (6 Cranch) at 139.

⁶² U.S. CONST. art. I, § 10, cl. 1.

⁶³ 14 U.S. (1 Wheat) 304 (1816); see also *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 620–21, 627 (1813), *on remand sub nom. Hunter v. Martin*, 18 Va. (1 Munf.) 1 (1815), *rev'd sub nom. Martin*, 14 U.S. (1 Wheat) 304.

⁶⁴ Treaty of Amity, Commerce & Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116, Art. IX.

The Virginia Supreme Court had held that the treaty did not apply to a British claimant who had been devised land years before the it went into effect, because ownership of the land had passed to the Commonwealth at the time of the devise.⁶⁵ The Supreme Court reversed, holding that the land had not automatically passed to the Commonwealth by operation of law at that time.⁶⁶ And the Treaty of 1794 now precluded the Commonwealth from attempting to confiscate it.⁶⁷ That treaty, “being the supreme law of the land, confirmed the title to [the British claimant and] his heirs and assigns, and protected him from any forfeiture by reason of alienage.”⁶⁸ Any inchoate claim that the Commonwealth may have possessed “has by the operation of the treaty become ineffectual and void.”⁶⁹

On remand, rather than implementing the Supreme Court’s ruling, the Virginia Supreme Court unanimously “declined” its “obedience” to the Supreme Court’s mandate.⁷⁰ It opined that § 25 of the Judiciary Act of 1789, which granted the Supreme Court jurisdiction to hear appeals from state supreme courts, was unconstitutional. The Supreme Court therefore had lacked jurisdiction to overturn the Virginia Supreme Court’s earlier judgment.⁷¹ Thus, the state supreme court claimed the authority to be the final arbiter in the case of the Treaty’s meaning.⁷²

The case returned to the U.S. Supreme Court, which held that Article III allows it to hear appeals in federal-question cases from state courts.⁷³ Embracing a vision of federal judicial supremacy, the Court pointed out that federal courts may hold a state’s legislative and executive acts “to be of no legal validity” if “they are found to be contrary to the constitution.”⁷⁴ The “exercise of the same right over [a state’s] judicial tribunals is not a higher or more dangerous act of sovereign power.”⁷⁵

⁶⁵ *Hunter v. Fairfax’s Devisee*, 15 Va. (1 Munf.) 218, 229–30 (1810), *rev’d sub nom. Fairfax’s Devisee*, 11 U.S. (7 Cranch) 603, *on remand sub nom. Hunter*, 18 Va. (1 Munf.) 1, *rev’d sub nom. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304.

⁶⁶ *Fairfax’s Devisee*, 11 U.S. (7 Cranch) at 620–21.

⁶⁷ *Id.* at 627.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Hunter v. Martin*, 18 Va. (1 Munf.) 1, 58–59 (1815), *rev’d sub nom. Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 323–24 (1816).

⁷¹ *Id.* at 58.

⁷² *Id.* at 58–59.

⁷³ *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 342, 351 (1816).

⁷⁴ *Id.* at 344.

⁷⁵ *Id.*

A few years later, the Supreme Court confirmed its ability to review state supreme courts' rulings concerning the U.S. Constitution and federal laws in criminal cases, as well, in *Cohens v. Virginia*.⁷⁶ The Court explained that it must possess authority to review state courts' interpretations of the U.S. Constitution and federal laws to avoid "prostrat[ing] . . . the government and its laws at the feet of every State in the Union" and allowing "the course of the government" to be, "at any time, arrested by the will of one of its members."⁷⁷ It further recognized that "[d]ifferent States may entertain different opinions on the true construction of the constitutional powers of Congress."⁷⁸ The Constitution therefore "confer[s] on the [federal] judicial department the power of construing the constitution and laws of the Union in every case, in the last resort."⁷⁹ Together, *Hunter's Lessee* and *Cohens* precluded state courts from ignoring federal laws and treaties based on their own, independent constructions of the Constitution.

Taxation disputes over the Bank of the United States led Ohio to resort to armed violence to defend its asserted prerogative to interpret the Constitution for itself. In *McCulloch v. Maryland*, the Supreme Court had held that it was unconstitutional for states to tax the bank.⁸⁰ Several states, including Ohio, declared they would nevertheless continue to do so.⁸¹ After the bank obtained a federal court order prohibiting Ohio from collecting its tax, state officers raided the bank's Chillicothe branch and seized over \$120,000.⁸² Federal agents, in response, raided the Ohio Treasury and took nearly \$100,000; the bank obtained a federal judgment for the remaining funds, which the Supreme Court affirmed.⁸³

Throughout this period, states periodically enacted resolutions proclaiming their authority to oppose and ignore federal actions that they believed violated the Constitution.⁸⁴ These resolutions generally

76 19 U.S. (6 Wheat.) 264 (1821).

77 *Id.* at 385.

78 *Id.* at 386.

79 *Id.* at 388.

80 17 U.S. (4 Wheat.) 316 (1819).

81 ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 276 (5th ed. 2007).

82 *Id.*

83 *Id.* In *Osborne v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 828 (1824), the Court held that Article III permitted Congress to grant federal courts jurisdiction over any lawsuits the national bank initiates.

84 *See, e.g.*, Pennsylvania House of Representatives, Report on the Governor's Message Relative to the Mandamus of the Supreme Court of the United States, in the case of Gideon Olmstead (Mar. 1, 1809) (declaring that, "as guardians of State rights," states "cannot permit an infringement of those rights, by an unconstitutional exercise of power in the

were politically motivated, enacted to oppose measures that would disadvantage the enacting state in some way. Massachusetts, for example, issued a resolution declaring the government's decision to compromise with Great Britain over the nation's northeastern boundaries "wholly null and void, and in no way obligatory upon the government or people" of Massachusetts or Maine, because it deprived Massachusetts of "large tracts of land."⁸⁵

The Governor of Pennsylvania relied on the theory underlying the Virginia Resolution in an appeal to then-President Madison concerning a dispute between the federal government and Pennsylvania over proceeds from the sale of a prize vessel.⁸⁶ A federal prize court had awarded Captain Gideon Olmstead a judgment entitling him to the proceeds from the sale of a captured vessel from the Revolutionary War.⁸⁷ The Pennsylvania legislature, believing the state to be entitled to a portion of those proceeds, enacted a statute requiring the Governor to "call out an armed force to prevent the execution" of that judgment.⁸⁸ Fearing armed violence, the district court judge declined to issue any orders to enforce his judgment.

The U.S. Supreme Court granted Olmstead a writ of mandamus ordering the trial court to enforce the judgment.⁸⁹ The Court stated,

If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery; and

United States Courts" by the federal government), *reprinted in* THE VIRGINIA AND KENTUCKY RESOLUTIONS OF 1798 AND '99; WITH JEFFERSON'S ORIGINAL DRAUGHT THEREOF, ALSO, MADISON'S REPORT, CALHOUN'S ADDRESS, RESOLUTIONS OF THE SEVERAL STATES IN RELATION TO STATE RIGHTS, WITH OTHER DOCUMENTS IN SUPPORT OF THE JEFFERSONIAN DOCTRINES OF '98, at 74, 75 (Jonathan Elliot ed., 1832) [hereinafter JEFFERSONIAN DOCTRINES OF '98].

85 Massachusetts Legislature, Resolution Declaring the Late Treaty with Great Britain Relative to the North-Eastern Boundary "Null and Void" (Feb. 9, 1830), *reprinted in* JEFFERSONIAN DOCTRINES OF '98, *supra* note 84, at 79 (emphasis omitted); *see also* Legislature of Maine, Report and Recommendation (Feb. 28, 1831) (resolving that the Government's negotiations "tended to violate the Constitution of the United States, and to impair the sovereign rights and powers of the State of Maine, and that Maine is not bound by the Constitution to submit to the decision which is or shall be made"), *reprinted in* JEFFERSONIAN DOCTRINES OF '98, *supra* note 84, at 79.

86 Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137, 1153–54 & 1154 n.78 (2011); *see also* FORREST MCDONALD, STATES' RIGHTS AND THE UNION: IMPERIUM IN IMPERIO, 1776–1876, at 63–65 (2000) (discussing the incident in greater detail).

87 MCDONALD, *supra* note 86, at 63–64.

88 United States v. Peters, 9 U.S. (5 Cranch) 115, 115 (1809).

89 *Id.* at 115, 141.

the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals.⁹⁰

It held that the Eleventh Amendment did not bar the federal courts from hearing the case, since the state of Pennsylvania itself was not actually a party to any of the proceedings.⁹¹ The Court concluded by expressing “extreme regret” at the need for its involvement.⁹²

Pennsylvania Governor Thomas McKean persisted in ignoring the Court’s ruling, and ordered the state militia to protect the home of the state treasurer, who held the contested funds.⁹³ The U.S. Marshal for the district, in response, “summoned a posse of two thousand men, setting the stage for a bloody showdown.”⁹⁴ The Governor sought relief from President Madison, appealing to the theory of states’ rights Madison articulated in the Virginia Resolutions, but was rebuffed.⁹⁵ The state ultimately backed down and complied with the Supreme Court’s order without violence.⁹⁶

States also declined to enforce federal laws with which they disagreed. In the years leading up to the War of 1812, Congress enacted a series of embargoes that prohibited American vessels from trading with foreign countries.⁹⁷ The Embargo Acts culminated with a provision prohibiting any vessel bearing cargo from departing a U.S. port for any other U.S. port adjacent to a foreign territory without the President’s “special permission.”⁹⁸ These laws crippled commerce in New England and triggered widespread resistance.⁹⁹

Because the embargoes were flouted, Congress passed the Enforcement Act of 1809 to allow the President to use the army and militia to enforce them.¹⁰⁰ The Massachusetts House of Representatives enacted a resolution declaring the Enforcement Act to be “unconsti-

90 *Id.* at 136.

91 *Id.* at 139, 141.

92 *Id.* at 141.

93 MCDONALD, *supra* note 86, at 65.

94 Hunter, *supra* note 20, at 672.

95 *Id.*

96 MCDONALD, *supra* note 86, at 65; *see also* Hunter, *supra* note 20, at 672 (describing how the State of Pennsylvania’s “retreat in its position” prevented “actual armed conflict between the state and federal government”).

97 *See* Act of Apr. 25, 1808, 10 Cong. Ch. 66, 2 Stat. 499; Act of Mar. 12, 1808, 10 Cong. Ch. 33, 2 Stat. 473; Act of Jan. 9, 1808, 10 Cong. Ch. 8, 2 Stat. 453; Act of Dec. 22, 1807, 10 Cong. Ch. 5, 2 Stat. 451.

98 Act of Apr. 25, 1808, 10 Cong. Ch. 66, 2 Stat. at 500.

99 Bradley D. Hays, *A Place for Interposition? What John Taylor of Caroline and the Embargo Crisis Have to Offer Regarding Resistance to the Bush Constitution*, 67 MD. L. REV. 200, 211–12 (2007).

100 Act of January 9, 1809, 10 Cong. Ch. 5, 2 Stat. 506.

tutional, and not legally binding on the citizens of this State.”¹⁰¹ Likewise, the Rhode Island legislature declared that it had a “duty . . . to interpose” to protect its citizens “from the ruinous inflictions of usurped and unconstitutional power.”¹⁰² The Connecticut legislature instructed all state officers, including militia officers, to refuse to enforce the embargoes pursuant to the Enforcement Act.¹⁰³ President Jefferson—who only years before had proclaimed states’ ability to interpret the Constitution for themselves—attempted to enforce the embargoes over the states’ constitutional objections. Congress responded to this public outcry, however, by repealing the embargoes less than two months after passing the Enforcement Act.¹⁰⁴

During the War of 1812, several states went even further. The governors of Massachusetts, Connecticut, Rhode Island, New Hampshire, and Vermont refused to muster their militias at President Madison’s order to invade Canada.¹⁰⁵

In the early 1830s, the State of Georgia managed to ignore two U.S. Supreme Court orders—a goal at which both Virginia¹⁰⁶ and Pennsylvania¹⁰⁷ had earlier failed. Georgia enacted a statute providing that state law applied to all persons within Cherokee Indian territory.¹⁰⁸ Pursuant to that statute, the state tried a Cherokee citizen, George “Corn” Tassels, for a murder he allegedly committed on

101 Michael Bahar, *The Presidential Intervention Principle: The Domestic Use of the Military and the Power of the Several States*, 5 HARV. NAT’L SEC. J. 537, 586–87 (2014) (quoting LEG. OF MASS., THE PATRIOTIC PROCEEDINGS OF THE LEGISLATURES, 69, Sess. from Jan. 26 to Mar. 4, 1809).

102 Powell, *supra* note 49, at 934–935 (quoting Report and Resolutions of Rhode Island on the Embargo (1809), reprinted in STATE DOCUMENTS ON FEDERAL RELATIONS: THE STATES AND THE UNITED STATES 42, 43–44 (Herman V. Ames ed., 1906) [hereinafter STATE DOCUMENTS ON FEDERAL RELATIONS]).

103 Hays, *supra* note 99, at 214; see also Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–29*, 116 YALE L.J. 1636, 1666 (2007) (describing the Connecticut legislature’s response to what it deemed an unconstitutional exercise of federal power).

104 Act of Mar. 1, 1809, 10 Cong. Ch. 24, 2 Stat. 528, 533.

105 H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 CHI.-KENT L. REV. 403, 523 (2000).

106 *Hunter v. Fairfax’s Devisee*, 15 Va. (1 Munf.) 218, 229–30 (1810), *rev’d sub nom.* *Fairfax’s Devisee v. Hunter’s Lessee*, 11 U.S. (7 Cranch) 603 (1813), *on remand sub nom.* *Hunter v. Martin*, 18 Va. (1 Munf.) 1 (1814), *rev’d sub nom.* *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816); see also *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (holding that the Supreme Court has the power to review state supreme court decisions concerning constitutional issues in criminal cases).

107 *United States v. Peters*, 9 U.S. (5 Cranch) 115 (1809) (holding that legislatures may not nullify or ignore federal courts’ judgments).

108 Act of Dec. 20, 1828, 1828 Ga. Acts 88, 88–89.

Cherokee land.¹⁰⁹ The Georgia Supreme Court upheld his conviction, holding that the state had “legitimate powers over the Cherokee territory.”¹¹⁰ Tassels, represented by former U.S. Attorney General William C. Wirt, obtained a writ of error from Chief Justice John Marshall, ordering the State to appear before the U.S. Supreme Court in an appeal of the conviction.¹¹¹ Georgia ignored the order on the grounds that the Court lacked jurisdiction over the matter, and hung Tassels less than two weeks later, before the Court could consider the case on the merits.¹¹²

Another Georgia statute required white people living on Cherokee land to obtain a license and take a loyalty oath to the state.¹¹³ Two missionaries were convicted and imprisoned for failing to obtain a license and appealed their convictions to the U.S. Supreme Court.¹¹⁴ “Because Georgia refused to recognize the Court’s authority,” it boycotted oral argument.¹¹⁵ Unsurprisingly, the Court held the Georgia statute unconstitutional.¹¹⁶

The Georgia legislature immediately enacted a law providing that anyone who attempted to enforce the Supreme Court’s ruling would be hanged.¹¹⁷ President Andrew Jackson refused to intervene to enforce the judgment, stating, “The decision of the [S]upreme [C]ourt has fell still born . . . and they find that it cannot coerce Georgia to yield to its mandate.”¹¹⁸ Legal tradition contends that Jackson instead proclaimed, “John Marshall has made his order, now let him enforce it!”¹¹⁹ Georgia held the missionaries in prison for approximately ten more months, until the Governor pardoned them to avoid embroiling the state in the Nullification Crisis of 1832.

109 E. Nathaniel Gates, *Justice Stillborn: Lies, Lacunae, Incommensurability, and the Judicial Role*, 19 CARDOZO L. REV. 971, 1004–05 (1997).

110 *State v. Tassels*, 1 Dud. (Ga.) 229, 236 (1830).

111 Gates, *supra* note 109, at 1007.

112 *Id.*

113 Matthew L. Sundquist, *Worcester v. Georgia: A Breakdown in the Separation of Powers*, 35 AM. INDIAN L. REV. 239, 240 (2010/2011); see also Edwin A. Miles, *After John Marshall’s Decision: Worcester v. Georgia and the Nullification Crisis*, 39 J. S. LEGAL HIST. 519 (1973) (describing the sentencing of two white Congregationalist missionaries for residing within Cherokee territory without a license).

114 Miles, *supra* note 113, at 519.

115 Sundquist, *supra* note 113, at 243.

116 *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 540 (1832).

117 Sundquist, *supra* note 113, at 246.

118 Hunter, *supra* note 20, at 674 (alterations in original) (quoting Letter from Andrew Jackson to John Coffee (Apr. 7, 1832), reprinted in 4 CORRESPONDENCE OF ANDREW JACKSON 429, 430 (John Spencer Bassett ed., 1929)).

119 *Id.*

As its name suggests, the Nullification Crisis is one of the most notable incidents in which a state claimed the authority to ignore federal law. In 1828¹²⁰ and 1832,¹²¹ Congress imposed tariffs on foreign textiles. The new taxes greatly reduced American demand for British products which, in turn, depressed Britain's demand for cotton from southern states. Southerners referred to the measures as the "Tariff of Abominations."¹²²

Vice President John C. Calhoun drafted an Exposition and Protest against the tariffs for the South Carolina legislature, declaring them "unconstitutional, unequal, and oppressive."¹²³ The Exposition further asserted that states had the "right of deciding on the infractions of [the federal government's] powers, and the proper remedy to be applied for their correction."¹²⁴ The constitution "clearly implies" that states have "a veto or control . . . on the action of the General Government, on contested points of authority . . . to prevent the encroachments of the General Government on the reserved right of the States."¹²⁵

The South Carolina legislature held a state Nullification Convention on November 24, 1832, which enacted an Ordinance of Nullification. The ordinance declared that the tariffs were "unauthorized by the Constitution," and "null, void, and no law, nor binding upon this State, its officers or citizens."¹²⁶ The ordinance further purported to make it illegal for any state or federal authority "to enforce the payment of duties" under the tariff acts within the state.¹²⁷ It also prohibited any appeals to the U.S. Supreme Court regarding its legality. The ordinance specified that a convention of states would be convened to ratify it; if other states did not support it, South Carolina would have to either repeal the ordinance or secede from the Union.

120 An Act in Alteration of the Several Acts Imposing Duties on Imports, 20 Cong. Ch. 55, 4 Stat. 270 (May 19, 1828).

121 An Act to Alter and Amend the Several Acts Imposing Duties on Imports, 22 Cong. Ch. 227, 4 Stat. 583 (July 14, 1832). The "substantive provisions" of the 1832 Act never entered into effect due to widespread public opposition. Bryan T. Camp, *A History of Tax Regulation Prior to the Administrative Procedure Act*, 63 DUKE L.J. 1673, 1687 n.79 (2014).

122 Powell, *supra* note 49, at 945.

123 John C. Calhoun, *The South Carolina Exposition and Protest* (Dec. 19, 1828), *reprinted in* 10 THE PAPERS OF JOHN C. CALHOUN 445, 449 (Clyde N. Wilson & W. Edwin Hemphill eds., 1977).

124 *Id.*

125 *Id.*

126 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 (Nov. 24, 1832), *reprinted in* STATE DOCUMENTS ON FEDERAL RELATIONS, *supra* note 102, at 169, 170-71.

127 *Id.* at 171.

“South Carolina raised over twenty-five thousand volunteer militiamen to prepare for federal resistance.”¹²⁸

No other states joined in South Carolina’s efforts. To the contrary, several states expressly repudiated them.¹²⁹ Virginia went so far as to enact a resolution stating that the Ordinance was inconsistent with its own nullification resolution of 1798.¹³⁰ Likewise, James Madison publicly declared that states lacked the power to nullify federal law.¹³¹ President Jackson proclaimed that nullification was “contradicted expressly by the letter of the Constitution,” and that South Carolina’s acts were treasonous.¹³²

To resolve the conflict without sacrificing federal supremacy, Congress enacted a Force Act, authorizing the use of military force to collect the tariff,¹³³ simultaneously with a companion measure substantially reducing the amount of the tariff.¹³⁴ In response, the South Carolina legislature repealed its Nullification Ordinance,¹³⁵ but saved face by also issuing a new ordinance purporting to nullify the Force Act.¹³⁶ The state nevertheless complied with the tariff, eliminating any direct conflict with the federal government.¹³⁷

While the theories underlying nullification ultimately led to secession and helped precipitate the Civil War,¹³⁸ Northern States also relied on nullification to attempt to avoid enforcing the Fugitive Slave

128 Kight, *supra* note 20, at 530; *see also* MCDONALD, *supra* note 86, at 109 (noting that South Carolina’s newly installed governor “advised the people of his state to arm themselves for resistance”).

129 STATE DOCUMENTS ON FEDERAL RELATIONS, *supra* note 102, at 158–63 (discussing various states’ resolutions opposing the Ordinance of Nullification).

130 Resolves of Virginia (Jan. 26, 1833), *reprinted in* STATE DOCUMENTS ON FEDERAL RELATIONS, *supra* note 102, at 185, 187.

131 James Madison, *Notes on Nullification*, *reprinted in* 9 THE WRITINGS OF JAMES MADISON 573, 573–74, 576–77, 588–93 (Gaillard Hunt ed., 1910).

132 President Andrew Jackson, Proclamation (Dec. 10, 1832), *reprinted in* 2 PAPERS OF THE PRESIDENTS, *supra* note 50, at 640, 643.

133 An Act Further to Provide for the Collection of Duties on Imports, 22 Cong. Ch. 57, 4 Stat. 632 (Mar. 2, 1833).

134 Act of March 2, 1833, 22 Cong. Ch. 55, 4 Stat. 629.

135 South Carolina’s Final Action (Mar. 18, 1833), *reprinted in* STATE DOCUMENTS ON FEDERAL RELATIONS, *supra* note 102, at 188, 188.

136 An Ordinance to Nullify an Act of the Congress of the United States, entitled “An Act Further to Provide for the Collection of Duties on Imports,” commonly called the Force Bill (Mar. 18, 1833), *reprinted in* STATE DOCUMENTS ON FEDERAL RELATIONS, *supra* note 102, at 188, 188–89.

137 Hunter, *supra* note 21, at 679.

138 *See* WILLIAM CALEB LORING, NULLIFICATION, SECESSION WEBSTER’S ARGUMENT AND THE KENTUCKY AND VIRGINIA RESOLUTIONS: CONSIDERED IN REFERENCE TO THE CONSTITUTION AND HISTORICALLY 27 (1893); Mark R. Killenbeck, *Bad Company?*, 67 Ark. L. Rev. 1, 1 (2014) (“Nullification was secession’s evil precursor.”).

Act,¹³⁹ which implemented the Constitution's Fugitive Slave Clause.¹⁴⁰ At the same time as the U.S. Supreme Court was reaffirming the supremacy of federal law over contrary state statutes,¹⁴¹ Northern States were enacting personal liberty laws attempting to block or interfere with slaveholders' right of recaption under federal law.¹⁴² In *Prigg v. Pennsylvania*, Justice Joseph Story wrote for a unanimous Court that Pennsylvania's personal liberty law was unconstitutional because the Constitution granted Congress exclusive authority to implement the Fugitive Slave Clause.¹⁴³

As part of the Compromise of 1850, Congress enacted the Fugitive Slave Act of 1850¹⁴⁴ which strengthened the original statute and expanded slaveowners' ability to recover slaves who escaped to the North.¹⁴⁵ Northern states, in response, continued enacting and enforcing personal liberty laws to preclude its enforcement. Indeed, Southern States cited the North's repeated attempts to nullify federal law as part of their justification for seceding.¹⁴⁶

"Wisconsin presented the most notorious example of state interposition, for the state's executive, legislative, and judicial branches joined its citizens in strenuous efforts to nullify federal law."¹⁴⁷ In perhaps the most extreme example of Wisconsin's nullification, federal authorities had enforced the Fugitive Slave Act of 1850 by arresting an abolitionist, Sherman M. Booth, who helped a runaway slave escape his former owner.¹⁴⁸ A Wisconsin state court, in a ruling af-

139 Act of Feb. 12, 1793, 2 Cong. Ch. 7, 1 Stat. 302.

140 U.S. CONST. art. IV, § 2, cl. 3.

141 See *supra* notes 73–79 and accompanying text.

142 THOMAS D. MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH 1780–1861*, at 27–29 (1974).

143 41 U.S. (16 Pet.) 539, 625 (1842) (holding that state law "can never be permitted to interfere with or to obstruct the just rights of the owner to reclaim his slave, derived from the Constitution of the United States; or with the remedies prescribed by Congress to aid and enforce the same"); see also MORRIS, *supra* note 142, at 102 (noting that the *Prigg* Court held "that states lacked the power to establish procedures for the adjudication of claims to runaways"); Paul Finkelman, *Sorting Out Prigg v. Pennsylvania*, 24 RUTGERS L.J. 605, 630 (1993) (analyzing *Prigg*).

144 Fugitive Slave Act of 1850, 31 Cong. Ch. 60, 9 Stat. 462 (Sept. 18, 1850).

145 MORRIS, *supra* note 142, at 146.

146 Stephen C. Neff, *Secession and Breach of Compact: The Law of Nature Meets the United States Constitution*, 45 AKRON L. REV. 405, 426–27 (2012).

147 Robert J. Kaczorowski, *The Tragic Irony of American Federalism: National Sovereignty Versus State Sovereignty in Slavery and in Freedom*, 45 KAN. L. REV. 1015, 1039 (1997); see also Robert J. Kaczorowski, *The Supreme Court and Congress's Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 FORDHAM L. REV. 153, 202 (2004) [hereinafter, Kaczorowski, *Moral Anomaly*] (same).

148 Kaczorowski, *Moral Anomaly*, *supra* note 147, at 202–03; Earl M. Maltz, *Slavery, Federalism, and the Constitution: Ableman v. Booth and the Struggle Over Fugitive Slaves*, 56 CLEV. ST. L.

firmed by the state supreme court, issued a writ of habeas corpus directing those federal officials to free Booth.¹⁴⁹ It held that the 1850 Act was unconstitutional because, among other things, it denied alleged slaves the right to trial by jury before being returned to the South.¹⁵⁰

The U.S. Marshal released Booth, but re-arrested him again shortly thereafter, and Booth was convicted in federal court.¹⁵¹ The Wisconsin Supreme Court issued another writ ordering his release, reiterating its earlier holding that the Fugitive Slave Act of 1850 was unconstitutional.¹⁵² In language that recalled both the Virginia and Kentucky Resolutions and the South Carolina legislature's arguments during the Nullification Crisis, the state's highest court held that a state has the "solemn duty to interpose [its] authority" when the federal government seeks to imprison a citizen unconstitutionally.¹⁵³

The court elaborated that the Tenth Amendment's recognition of states' implied powers would be pointless if it did not grant them authority to defend their constitutional prerogatives against federal encroachment.¹⁵⁴ If the federal government had "sole power" to determine the constitutionality of its own acts and "enforce its decision upon the states," the Tenth Amendment would be "a mere empty sounding announcement, placing the governments of original, inherent and reserved powers at the mere forbearance of the federal government."¹⁵⁵

The federal government released Booth, but appealed to the U.S. Supreme Court.¹⁵⁶ The Wisconsin Supreme Court refused to certify the case records to the U.S. Supreme Court on the grounds that the Court lacked appellate jurisdiction to review its judgment.¹⁵⁷ "By refusing to honor the writ of error, the Wisconsin court essentially asserted the authority to nullify section 25 of the Judiciary Act of 1793,

REV. 83, 83 (2008) ("Widely-discussed at the time, the case involved not only a successful effort by a segment of the Northern populace to prevent the rendition of an escaped slave, but also the outright defiance of the federal government by the judiciary of the state of Wisconsin."); see also A. J. Beitzinger, *Federal Law Enforcement and the Booth Cases*, 41 MARQ. L. REV. 7, 10–11 (1957).

149 *In re Booth*, 3 Wis. 1, 66 (1854).

150 *Id.*

151 Kaczorowski, *Moral Anomaly*, *supra* note 147, at 203 (citing *United States v. Rycraft*, 27 F. Cas. 918 (D. Wis. 1824)).

152 *In re Booth and Rycraft*, 3 Wis. 157, 189 (1854).

153 *Id.* at 194.

154 *Id.* at 198.

155 *Id.*

156 Maltz, *supra* note 148, at 98, 100.

157 Kaczorowski, *Moral Anomaly*, *supra* note 147, at 203; Beitzinger, *supra* note 148, at 18.

which provided for appeals by writ of error.”¹⁵⁸ The U.S. Supreme Court ordered the state supreme court’s clerk to produce the record,¹⁵⁹ but he refused to do so.¹⁶⁰ The U.S. Supreme Court nevertheless considered the case and unanimously overturned the lower court’s ruling.¹⁶¹

The Court began by reaffirming its jurisdiction to entertain appeals from state supreme courts.¹⁶² It went on to rule that state courts lack power to determine the validity of federal officials’ custody of their prisoners,¹⁶³ and that in any event the 1850 Act was constitutional.¹⁶⁴ On remand, a divided Wisconsin Supreme Court refused to accept the U.S. Supreme Court’s mandate,¹⁶⁵ but the U.S. Marshal nevertheless re-arrested Booth several months later and incarcerated him.¹⁶⁶ The conflict finally abated when President James Buchanan pardoned Booth on the last day of his term as President.¹⁶⁷

Most nullification episodes following the Civil War involved southern states’ “massive resistance” to integration and civil rights for African Americans.¹⁶⁸ Following the Supreme Court’s ruling in *Brown v. Board of Education*,¹⁶⁹ and particularly the Court’s follow-up mandate

158 Maltz, *supra* note 148, at 101.

159 *United States v. Booth*, 59 U.S. (18 How.) 476, 478–79 (1855).

160 *Albeman v. Booth*, 62 U.S. (21 How.) 506, 512 (1859) (noting that “no return ha[d] been made” in response to the Supreme Court’s order).

161 *Id.* at 526.

162 The Court explained:

[N]o power is more clearly conferred by the Constitution and laws of the United States, than the power of this court to decide, ultimately and finally, all cases arising under such Constitution and laws; and for that purpose to bring here for revision, by writ of error, the judgment of a State court, where such questions have arisen, and the right claimed under them denied by the highest judicial tribunal in the State.

Id. at 525.

163 *Id.* at 524 (“No State judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them.”).

164 *Id.* at 526 (“[T]he act of Congress commonly called the fugitive slave law is, in all of its provisions, fully authorized by the Constitution of the United States.”).

165 *Ableman v. Booth*, 11 Wis. 498, 499, 521 (1859); *see also* Maltz, *supra* note 148, at 107.

166 Maltz, *supra* note 148, at 108–09. A group of armed men rescued Booth on August 1, 1860, and he resumed his anti-slavery advocacy. The U.S. Marshal recaptured him that October. *Id.*

167 *Id.*

168 Judith A. Hagley, *Massive Resistance: The Rhetoric and Reality*, 27 N.M. L. REV. 167, 167 (1997) (describing “massive resistance” as a “campaign of terror directed against black citizens in the South” characterized by “murders, bombings, riots, and racist rhetoric”); *see generally* NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950S* (1969) (discussing the politics of southern resistance to desegregation efforts).

169 *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

in *Brown II* that states desegregate their public schools “with all deliberate speed,”¹⁷⁰ several southern states enacted “Interposition and Nullification Resolutions” declaring that *Brown* was unconstitutional and unenforceable within their respective borders.¹⁷¹ Arkansas went so far as to enact a state constitutional amendment requiring the legislature to oppose “in every Constitutional manner the Un-Constitutional desegregation decisions of May 17, 1954 and May 31, 1955 of the United States Supreme Court.”¹⁷²

Notwithstanding that amendment, the Little Rock School Board admitted in federal court that its segregated school district was unconstitutional,¹⁷³ and adopted a phased desegregation plan, commencing with the 1957 school year, that would take six years to fully implement.¹⁷⁴ A group of white parents obtained an injunction from state court preventing the school district from implementing that desegregation plan by admitting black students to Central High School.¹⁷⁵ The federal district court, however, stayed the state court proceedings and prohibited the parents from enforcing their state court order.¹⁷⁶

On September 2, 1957, ostensibly seeking to prevent violence, Arkansas Governor Orval Faubus called out the Arkansas National Guard to prevent integration of the Little Rock School District as the federal court had ordered by barring nine African-American students from entering Central High School.¹⁷⁷ The federal district court enjoined Governor Faubus and the Arkansas National Guard from interfering with its previous desegregation order and required them to allow the black students to attend Central High School.¹⁷⁸ When a local mob continued to hinder desegregation efforts, President Dwight

170 *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

171 Hunter, *supra* note 20, at 687 & nn.223–24.

172 ARK. CONST. amend. 44 (repealed 1990).

173 *Aaron v. Cooper*, 143 F. Supp. 855, 857–58 (E.D. Ark. 1956), *aff'd* 243 F.2d 261 (8th Cir. 1957).

174 *Id.* at 861.

175 Keith E. Whittington, *The Court as the Final Arbiter of the Constitution: Cooper v. Aaron* (1958), *reprinted in* CREATING CONSTITUTIONAL CHANGE 9, 12–13 (Gregg Ivers & Kevin T. McGuire eds., 2004).

176 *See Thomason v. Cooper*, 254 F.2d 808, 808 (8th Cir. 1958) (discussing unreported district court order of August 30, 1957, enjoining white parents from using a state court order “as a means for preventing the Little Rock School Board from opening on September 3, 1957, the partially integrated high school in the Little Rock School District in accordance with the Board’s plan of integration”).

177 Whittington, *supra* note 175, at 12–13.

178 *Aaron v. Cooper*, 156 F. Supp. 220, 222 (E.D. Ark. 1957), *aff'd sub nom.* *Faubus v. United States*, 254 F.2d 797 (8th Cir. 1958).

D. Eisenhower mobilized the 101st Airborne Division and federalized the Arkansas National Guard to enforce the federal court's order.¹⁷⁹

In light of the overwhelming local hostility to integration,¹⁸⁰ the Little Rock School District successfully petitioned the federal district court for permission to stay its desegregation order for three years. The district court pointed out that “[d]uring the entire [1957–58] school year the grounds and interior of Central High School were patrolled first by regular army troops and later by federalized national guardsmen.”¹⁸¹ The year had been “marked by repeated incidents of more or less serious violence directed against the Negro students and their property, by numerous bomb threats directed at the school, by a number of nuisance fires started inside the school, by desecration of school property, and by the circulation of cards, leaflets and circulars designed to intensify opposition to integration.”¹⁸² Those events, the court concluded, “have had a serious and adverse impact upon the students themselves, upon the class-room teachers, upon the administrative personnel of the school, and upon the overall school program.”¹⁸³ The court concluded that the district had made a good-faith effort to start desegregating,¹⁸⁴ but the serious widespread difficulties in enforcing the order and resulting interference with the educational process warranted a “tactical delay” in implementation as a matter of equitable discretion.¹⁸⁵

The Eighth Circuit reversed, stating:

Appalling as the evidence is—the fires, destruction of private and public property, physical abuse, bomb threats, intimidation of school officials, open defiance of the police department of the City of Little Rock by mobs—and the naturally resulting additional expense to the District, disruption of normal educational procedures, and tension, even nervous collapse of the school personnel, we cannot accept the legal conclusions drawn by the District Court from these circumstances.¹⁸⁶

It concluded that “the time has not yet come in these United States when an order of a Federal Court must be whittled away, watered

179 See Exec. Order No. 10,730, 22 Fed. Reg. 7,628 (Sept. 25, 1957).

180 *Aaron v. Cooper*, 163 F. Supp. 13, 14 (E.D. Ark. 1958), *rev'd* 257 F.2d 33 (8th Cir. 1958), *aff'd sub nom. Cooper v. Aaron*, 358 U.S. 1 (1958).

181 *Id.* at 17.

182 *Id.* at 20.

183 *Id.* at 22.

184 *Id.* at 26.

185 *Id.* at 28.

186 *Aaron v. Cooper*, 257 F.2d 33, 39 (8th Cir. 1958), *aff'd sub nom. Cooper v. Aaron*, 358 U.S. 1 (1958).

down, or shamefully withdrawn in the face of violent and unlawful acts of individual citizens in opposition thereto.”¹⁸⁷

In *Cooper v. Aaron*—which has come to be regarded as one of the strongest assertions of the federal judiciary’s supremacy over the states with regard to constitutional interpretation¹⁸⁸—the Supreme Court affirmed the Eighth Circuit’s ruling.¹⁸⁹ It held that, while the local school board may have been attempting to comply with *Brown* in good faith, most of the implementation problems stemmed from the refusal of state officials, including the governor and state legislature, to cooperate with the district’s integration efforts.¹⁹⁰ Black children’s constitutional rights, the Court declared, “are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature.”¹⁹¹

The Court went on to respond to earlier public assertions by the governor and legislature that *Brown* did not bind them. One of the “permanent and indispensable feature[s] of our constitutional system,” the Court declared, is that “the federal judiciary is supreme in the exposition of the law of the Constitution.”¹⁹² The Supreme Court’s interpretation of the Constitution in *Brown* therefore is “the supreme law of the land, and [the Supremacy Clause] makes it of binding effect on the States”¹⁹³ A Governor therefore lacks “power to nullify a federal court order.”¹⁹⁴

Apart from desegregation, there have been relatively few attempts at nullification in the modern era. Officials at both the state and federal levels have repeatedly criticized the Supreme Court’s ruling in *Roe v. Wade*,¹⁹⁵ and many states have passed laws limiting the ability of women to obtain abortions.¹⁹⁶ Scholars have argued that *Roe* played a

187 *Id.* at 40 (emphasis omitted).

188 Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1468 n.45 (1997) (emphasis omitted).

189 *Cooper v. Aaron*, 358 U.S. 1 (1958).

190 *Id.* at 15–16.

191 *Id.* at 16.

192 *Id.* at 18.

193 *Id.*

194 *Id.* at 18–19.

195 *Roe v. Wade*, 410 U.S. 113 (1973).

196 *See, e.g., Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006) (holding that exceptions to New Hampshire’s parental notification law were insufficiently broad to protect a minor’s access to an immediate abortion when necessary to protect her health); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (invalidating partial-birth abortion ban); *Voinovich v. Women’s Med. Prof’l Corp.*, 523 U.S. 1036 (1998) (Thomas, J., dissenting from denial of certiorari) (discussing lower court’s holding that a state law permitting post-viability abortions only when necessary to prevent “a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman” was too nar-

major role in galvanizing abortion opponents and generated a legislative backlash of abortion restrictions.¹⁹⁷

This opposition to *Roe*, despite its often heated rhetoric, generally does not amount to nullification. While some states and officials insist that *Roe* was wrongly decided and support the appointment of Justices who would overturn it or a constitutional amendment to do so, they seldom dispute the Supreme Court's jurisdiction to hear the case, its power to make its pronouncement, or their concomitant duty to follow that pronouncement. For example, Texas did not continue enforcing its abortion statute after *Roe* invalidated it; indeed, the Court was so confident that the state would implement its opinion that it did not direct the district court to issue an injunction ordering the state to comply.¹⁹⁸

row to adequately protect the health of the mother (quoting OHIO REV. CODE ANN. § 2919.17)); *Ada v. Guam Soc'y of Obstetricians & Gynecologists*, 506 U.S. 1011 (1992) (Scalia, J., dissenting from denial of certiorari) (discussing lower court's ruling that Guam's abortion law, which prohibited "all abortions except in cases of medical emergency," was facially unconstitutional); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895–98 (1992) (invalidating spousal notification law); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (invalidating informed consent requirements, recordkeeping requirements that could have resulted in public disclosure of a woman's decision to have an abortion, and a requirement that a second physician be present during abortions of viable fetuses), *overruled in part by Casey*, 505 U.S. at 881–87; *Planned Parenthood Ass'n of Kan. City, Mo. v. Ashcroft*, 462 U.S. 476, 481–82 (1983) (invalidating law requiring second-trimester abortions to be performed in a hospital); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983) (invalidating hospitalization requirements for patients seeking abortions, a parental consent ordinance that lacked judicial bypass provisions, disclosure requirements, and a 24-hour waiting period), *overruled in part by Casey*, 505 U.S. at 881–87; *Bellotti v. Baird*, 443 U.S. 622 (1979) (invalidating parental consent law that lacked exceptions); *Colautti v. Franklin*, 439 U.S. 379 (1979) (invalidating statute requiring a physician aborting a fetus that "may be viable" to use the method most likely to result in the fetus being born alive); *see also Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67–75 (1976) (invalidating law requiring married women to obtain spousal consent for abortions, and minors to obtain parental consent to abortions, during the first trimester).

197 *See, e.g.*, William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 *YALE L.J.* 1279, 1312 (2005) ("Not only did *Roe* energize the pro-life movement and accelerate the infusion of sectarian religion into American politics, but it also radicalized many traditionalists."); Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 *CAL. L. REV.* 751, 766 (1991) ("[T]he decision may well have created the Moral Majority, helped defeat the equal rights amendment, and undermined the women's movement by spurring opposition and demobilizing potential adherents."). *But see* Neal Devins, *How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars*, 118 *YALE L.J.* 1318, 1323 (2009) (contending that *Casey* "stabilized abortion politics" because, "with the notable exception of partial-birth abortion," legislatures "have typically looked to provisions of the Pennsylvania statute upheld in *Casey* as a template for their own legislative enactments").

198 *Roe*, 410 U.S. at 166 ("We find it unnecessary to decide whether the District Court erred in withholding injunctive relief, for we assume the Texas prosecutorial authorities will

Rather than ignoring *Roe* and its progeny or unilaterally declaring the Court's holdings to be null and void, conservative states enact anti-abortion laws to the maximum extent the Constitution permits. They attempt to find the precise contours of the right to an abortion and legislate up to that boundary. They can achieve this goal only through the trial-and-error process of obtaining court rulings on different types of statutory provisions and variations on statutory language.¹⁹⁹ This legislative probing gives rise to a constitutional dialogue between different branches and levels of government;²⁰⁰ it is not an attempt to nullify or undermine the Court's rulings. Such an approach can be burdensome to the women living in those jurisdictions and impose substantial transaction costs, but that is largely a function of our precedent-based system of adjudication and Article III's case-or-controversy requirement, which prohibits federal courts from issuing advance opinions on hypothetical or potential future pieces of legislation.²⁰¹

Commentators have debated whether the refusal of many states to implement the REAL ID Act²⁰² amounts to nullification.²⁰³ Many states also have vigorously opposed the Patient Protection and Affordable Care Act ("ACA"),²⁰⁴ but very few of these efforts qualify as nullification, either. North Dakota passed a law declaring that the ACA "likely [is] not authorized by the United States Constitution and

give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional.").

199 See *supra* note 196.

200 Cf. Stephen L. Carter, *The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819, 824 (1986).

201 See *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 971 n.3 (1984) ("[F]ederal courts have no roving commission to survey the statute books and pass judgments on laws prematurely, and . . . [m]usings regarding the constitutionality of hypothetical statutes . . . are neither wise nor permissible in the courtroom." (internal quotation marks omitted)).

202 Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, 119 Stat. 321 (2005).

203 Compare John Dinan, *Contemporary Assertions of State Sovereignty and the Safeguards of American Federalism*, 74 ALB. L. REV. 1637, 1639-40 (2010/2011) (contending that states' opposition to the REAL ID Act "fall[s] short of invoking the clearly discredited doctrine of nullification"), and Hunter, *supra* note 20, at 692 (contending that states' efforts at undermining the Real ID Act "are neither nullification nor true interposition, lacking any declaration of the Act as unconstitutional"), with Kight, *supra* note 20, at 534 (discussing state opposition to the Real ID Act as part of the "modern nullification movement"), and Card, *supra* note 20, at 1823-24 (stating that "these attempts to nullify Real ID are unconstitutional and without legal foundation").

204 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

may violate its true meaning and intent as given by the founders and ratifiers.”²⁰⁵ The statute goes on to specify that no provision of the ACA “may interfere with an individual’s choice of a medical or insurance provider except as otherwise provided by the laws of this state”²⁰⁶—a direct, and apparently ineffectual, attempt at nullification.

The citizens of Ohio went even further, amending the Ohio Constitution’s Bill of Rights through a ballot initiative to proclaim that “[n]o federal, state, or local law” shall: “compel a person or physician to “participate in a health care system,” “prohibit the purchase or sale of health care or health insurance,” or “impose a penalty or fine for the sale or purchase of health care or health insurance.”²⁰⁷ The provision specifies that it does not affect any laws in effect as of March 19, 2010—prior to ACA’s enactment.²⁰⁸

The marijuana laws of many states also may be considered to be at least an implicit form of nullification. Federal law prohibits the possession and sale of any amount of marijuana for any reason,²⁰⁹ including medicinal use,²¹⁰ except as part of pre-approved FDA research studies. In *Gonzales v. Raich*, the Supreme Court held that the Commerce Clause permits the Government to apply this prohibition even to the purely intrastate possession, sale, and use of marijuana.²¹¹ Numerous states have nevertheless enacted medical marijuana laws which purport to affirmatively permit or license individuals to dispense and use marijuana pursuant to a physician’s order.²¹²

Colorado and Washington upped the ante still further by permitting the recreational use of marijuana and establishing a permitting system for dispensaries.²¹³ While these permits do not purport to exempt users or dealers from federal law, it is nevertheless anomalous for a state to officially authorize conduct that federal law prohibits. The Obama Administration’s announcement that it will not enforce federal drug laws against people acting in compliance with such state laws further complicates the analysis.²¹⁴ Call it “dual nullification”:

²⁰⁵ N.D. CENT. CODE § 54-03-31(1) (2011).

²⁰⁶ *Id.* § 54-03-31(3).

²⁰⁷ OHIO CONST. art. I, § 21(A)–(C).

²⁰⁸ *Id.* art. I, § 21(D).

²⁰⁹ 21 U.S.C. §§ 812(b)(1), (c), 841(a)(1), 844(a); *see also* *Gonzales v. Raich*, 545 U.S. 1, 13–14 (2005).

²¹⁰ *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 491 (2001).

²¹¹ *Raich*, 545 U.S. at 22 (citing *Wickard v. Filburn*, 317 U.S. 111 (1942)).

²¹² *See* David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States*, 35 CARDOZO L. REV. 567, 575–76 nn.19–24 (2013) (citing statutes).

²¹³ COLO. CONST. art. XVIII, § 16; WASH. REV. CODE § 69.50.4013 (2013).

²¹⁴ Memorandum from Deputy Attorney General James M. Cole to All United States Attorneys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), *available at*

the Executive undermines a federal law by refusing to enforce it, and states undermine it still further by affirmatively allowing the ostensibly prohibited conduct.

Among the most blatant modern examples of clear nullification are the “Firearms Freedom Acts” that nine states have enacted, which proclaim that federal law does not apply to firearms and ammunition that are produced and used exclusively within the state.²¹⁵ Attorney General Eric Holder wrote a letter to Governor Sam Brownback of Kansas, one of the states that enacted such a statute, declaring it “unconstitutional” under the Supremacy Clause.²¹⁶ He informed the Governor that federal law enforcement agencies “will continue to execute their duties to enforce all federal firearms laws and regulations.”²¹⁷ And the Ninth Circuit has invalidated Montana’s law.²¹⁸

Reverse nullification is easily distinguishable from the patently unconstitutional “traditional” nullification that states have attempted to implement throughout American history. Nullification is an attempt to ignore federal law by declaring it unconstitutional. When states enact provisions that mirror federal law, they are attempting to assist in its enforcement, to prevent it from being undermined, effectively amended, or temporarily nullified by the Executive.

II. THE SUPREMACY CLAUSE AND REVERSE NULLIFICATION

The Supremacy Clause provides: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the

<http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> (limiting enforcement of federal marijuana laws in states that have legalized its use); *cf.* Memorandum to the United States Attorneys and Assistant Attorney General for the Criminal Division from Attorney General Eric H. Holder, Jr., Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013), *available at* <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf> (restricting inclusion of drug quantities in indictments to avoid triggering statutory minimum penalties).

²¹⁵ Kight, *supra* note 20, at 551; *see also* Barak Y. Orbach, et. al., *Arming States’ Rights: Federalism, Private Lawmakers, and the Battering Ram Strategy*, 52 ARIZ. L. REV. 1161, 1164 (2010) (“document[ing] the organization of the Firearms Freedom Act movement”).

²¹⁶ Letter from Attorney General Eric H. Holder, Jr., to Governor Sam Brownback (Apr. 26, 2013), *available at* <http://www.propublica.org/documents/item/695506-attorney-general-holder-letter-to-kans-gov>.

²¹⁷ *Id.*

²¹⁸ *Montana Shooting Sports Ass’n v. Holder*, 727 F.3d 975, 982–83 (9th Cir. 2013) (holding that, because the Montana Firearms Freedom Act “purports to dictate” that Congress lacks power to regulate purely intrastate possession of firearms, “it is necessarily preempted and invalid”).

United States, shall be the supreme Law of the Land”²¹⁹ This provision underlies the Supreme Court’s repeated holdings that states must follow federal law and may neither ignore nor nullify it.²²⁰ The Supremacy Clause is the constitutional basis for preemption doctrines, which specify the circumstances under which federal law precludes states from legislating in areas that otherwise fall within their authority. To understand why reverse nullification is constitutionally permissible, it is helpful to first review the Supremacy Clause’s development.

The earliest draft of the Supremacy Clause, included in the Virginia Plan that Edmund Randolph presented at the Constitutional Convention, would have granted Congress power “to negative” any state laws that it believed to be unconstitutional.²²¹ At Benjamin Franklin’s suggestion, the clause was expanded to allow Congress to “negative” any state laws that, in its opinion, “contraven[ed]” either the Constitution or any U.S. treaties.²²² The Convention unanimously agreed to the provision as amended.²²³

About a week later, Charles Pinckney moved to revise that provision to allow Congress to “negative all Laws which they shd. [sic] Judge to be improper.”²²⁴ He explained that such a “universal” veto “was in fact the corner stone of an efficient national Govt [sic]” to keep the States “in due subordination to the nation.”²²⁵ Madison concurred, contending that states would have a “constant tendency” to infringe on Congress’s prerogatives.²²⁶ Allowing Congress to nullify state laws was preferable to using force to ensure state compliance

219 U.S. CONST. art. VI, § 2.

220 See *Cooper v. Aaron*, 358 U.S. 1 (1958) (holding the federal Constitution overrules any contrary state law); *Ableman v. Booth*, 62 U.S. (21 How.) 506, 517–18 (1858) (“[I]n the sphere of action assigned to it, [the federal government] should be supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a State or from State authorities.”); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 381 (1821) (“The general government, though limited as to its objects, is supreme with respect to those objects . . . [N]one can deny its authority.”); see also *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 571–72 (1832) (M’Lean, J., concurring) (declaring that federal law is supreme); *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 341 (1816) (same).

221 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., rev. ed. 1966) [hereinafter FARRAND’S RECORDS].

222 *Id.* at 54 (Madison’s Journal) (May 31, 1787).

223 *Id.*

224 *Id.* at 164 (Madison’s Journal) (June 8, 1787) (internal quotation marks omitted).

225 *Id.* (Madison’s Journal) (statement of Pinckney); accord *id.* at 169 (Yates’ Journal) (statement of Pinckney).

226 1 FARRAND’S RECORDS, *supra* note 221, at 164 (Madison’s Journal) (statement of Madison).

with its will.²²⁷ And granting Congress broad discretion to decide for itself when to nullify state law would prevent disputes over whether a particular state statute actually was unconstitutional or violated a treaty.²²⁸ Picking up on that thread, Wilson elaborated that “[a] definition of the cases in which the Negative should be exercised, is impracticable.”²²⁹ Since discretion had to be “left on one side or the other,” it would be “most safely lodged on the side of the Natl. Govt [sic].”²³⁰ Another delegate concurred that it was “impossible to draw a line between the cases proper & improper for the exercise of the negative,” and there was a greater chance of states enacting harmful legislation than of Congress abusing its authority to set aside state law.²³¹

Other delegates, such as Elbridge Gerry, were concerned that such a broad power would be abused, and believed the proposed “negative” should be limited only to certain types of state laws, such as those authorizing paper money.²³² It was feared that large states, which would control Congress, would use this power to “crush the small ones.”²³³ Pinckney’s motion to expand Congress’s discretion to “negative” state laws failed by a vote of three to seven, with one state divided.²³⁴ Thus, the Virginia Plan would have given Congress power “to negative all laws passed by the several States contravening in the opinion of the National Legislature the articles of Union, or any treaties subsisting under the authority of the Union.”²³⁵

After Randolph finished presenting the Virginia Plan, William Paterson offered the New Jersey Plan, which provided greater protection for smaller states. Whereas the Virginia Plan allowed Congress to override state laws, the New Jersey Plan’s version of the Supremacy Clause more closely resembled the one that was ultimately adopted. It provided that all acts of Congress made in pursuance of its consti-

227 *Id.* at 164–65 (Madison’s Journal) (statement of Madison); *accord id.* at 169 (Yates’ Journal) (statement of Madison).

228 *Id.* at 165 (Madison’s Journal) (statement of Madison).

229 *Id.* at 166 (Madison’s Journal) (statement of Wilson).

230 *Id.*

231 1 FARRAND’S RECORDS, *supra* note 221, at 167 (Madison’s Journal) (statement of Dickinson).

232 *Id.* (statement of Gerry); *see also id.* at 165–66 (Madison’s Journal) (statement of Sherman) (agreeing that “the cases in which the negative ought to be exercised, might be defined”); *id.* at 169 (Yates’ Journal) (statement of Williamson) (“The national legislature ought to possess the power of negating such laws only as will encroach on the national government.”).

233 *Id.* at 167 (Madison’s Journal) (statement of Bedford).

234 *Id.* at 168 (Madison’s Journal).

235 *Id.* at 236 (June 13, 1787) (Madison’s Journal).

tutional powers, as well as all treaties, “shall be the supreme law of the respective States so far as those Acts or Treaties shall relate to the said States or their Citizens,” and that state judges “shall be bound thereby in their decisions, any thing in the respective laws of the Individual States to the contrary notwithstanding”²³⁶ His proposal further specified that if “any State, or any body of men in any State shall oppose or prevent ye. [sic] carrying into execution such acts or treaties,” the Executive could use military force “to enforce and compel an obedience.”²³⁷ While the Virginia Plan would have allowed Congress to excuse “a negative on the law of the States,”²³⁸ Paterson’s New Jersey Plan empowered the Executive to forcibly compel states’ obedience to federal law.²³⁹

Madison “declare[d] himself unfriendly to both plans,”²⁴⁰ and proposed his own alternative.²⁴¹ His compromise provided:

All laws of the particular States contrary to the Constitution or laws of the United States to be utterly void; and the better to prevent such laws being passed, the Governour or president of each state shall be appointed by the General Government and shall have a negative upon the laws about to be passed in the State of which he is Governour or President.²⁴²

Madison explained that Paterson’s plan would leave states at liberty “to execute their unrighteous projects agst. [sic] each other” because it did not grant Congress a negative over state laws.²⁴³ The Convention voted to proceed with Randolph’s plan rather than Paterson’s plan.²⁴⁴ Luther Martin cautioned, however, that small states “would never allow a negative to be exercised over their laws.”²⁴⁵

Approximately one week later, the Convention reviewed each component of Randolph’s plan. Upon returning to the Supremacy Clause, Gouverneur Morris argued that allowing Congress to negative state laws was unnecessary and “likely to be terrible to the States.”²⁴⁶ Congress did not need such a power, he argued, because “[a] law that

²³⁶ *Id.* at 245 (Madison’s Journal) (June 15, 1787) (proposal of Paterson).

²³⁷ 1 FARRAND’S RECORDS, *supra* note 221, at 245.

²³⁸ *Id.* at 252 (Madison’s Journal) (June 16, 1787) (statement of Wilson).

²³⁹ *Id.* at 252; *accord id.* at 260 (Yates’ Journal) (June 16, 1787) (statement of Wilson).

²⁴⁰ *Id.* at 283 (Madison’s Journal) (June 18, 1787) (statement of Madison).

²⁴¹ *Id.* at 291 (Madison’s Journal) (June 18, 1787) (statement of Madison).

²⁴² *Id.* at 293 (Madison’s Journal) (June 18, 1787) (proposal of Madison).

²⁴³ 1 FARRAND’S RECORDS, *supra* note 221, at 318 (Madison’s Journal) (June 18, 1787) (statement of Madison).

²⁴⁴ *Id.* at 313 (Convention Journal) (June 19, 1787); *accord id.* at 322 (Madison’s Journal) (June 19, 1787).

²⁴⁵ *Id.* at 438 (Madison’s Journal) (June 27, 1787) (statement of L. Martin).

²⁴⁶ 2 FARRAND’S RECORDS, *supra* note 221, at 27 (Madison’s Journal) (July 17, 1787) (statement of Morris).

ought to be negated will be set aside in the Judiciary department. [sic] and if that security should fail; may be repealed by a National. [sic] law.”²⁴⁷ Roger Sherman agreed, claiming that “the Courts of the States would not consider as valid any law contravening the Authority of the Union.”²⁴⁸ Madison insisted that a negative was necessary to check the states’ “propensity” to “pursue their particular interests in opposition to the general interests,”²⁴⁹ but was overruled. The convention voted three to seven to eliminate Congress’ power to “negative” state laws.²⁵⁰

The Convention then approved Luther Martin’s motion to replace that clause with a modified version of Paterson’s proposal:

[T]he Legislative acts of the U.S. made by virtue & in pursuance of the articles of Union, and all treaties made & ratified under the authority of the U.S. shall be the supreme law of the respective States, as far as those acts or treaties shall relate to the said States, or their Citizens and inhabitants — & that the Judiciaries of the several States shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding.²⁵¹

This language was submitted to the Committee on Detail in late July.²⁵² The Committee made some stylistic tweaks,²⁵³ and the Convention as a whole further modified the provision to specify that the Constitution itself, as well as federal laws and treaties, constitutes part of the supreme law of the land.²⁵⁴ The proposal was then submitted to the Committee on Style, which reported the final version of the Clause:

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, un-

247 *Id.* at 28 (Madison’s Journal) (July 17, 1787) (statement of Morris).

248 *Id.* at 27 (Madison’s Journal) (July 17, 1787) (statement of Sherman); *see also id.* (statement of L. Martin).

249 *Id.* (statement of Madison).

250 *Id.* at 28 (Madison’s Journal) (July 17, 1787).

251 *Id.* at 28–29 (Madison’s Journal) (July 17, 1787) (proposal of L. Martin).

252 2 FARRAND’S RECORDS, *supra* note 221, at 132.

253 On August 6, the Committee on Detail reported the following version of the clause:

The Acts of the Legislature of the United States made in pursuance of this Constitution, and all Treaties made under the authority of the United States shall be the supreme law of the several States, and of their citizens and inhabitants; and the judges in the several States shall be bound thereby in their decisions anything in the Constitutions or laws of the several States to the contrary notwithstanding.

Id. at 183 (Aug. 6, 1781) (Madison’s Journal).

254 As modified, the language in the first half of the clause read: “This Constitution & the Laws of the [United States] made in pursuance thereof, and all Treaties made under the authority of the [United States]. . . .” *Id.* at 389. Madison successfully moved to have the reference to treaties expanded to read, “all Treaties made or which shall be made.” *Id.* at 409 (Madison’s Journal) (Aug. 25, 1787); *see also id.* at 572 (reprinting the proposal containing these provisions, as submitted to the Committee on Style).

der the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.²⁵⁵

In late August, Pinckney moved to supplement the Supremacy Clause by granting Congress broad authority, by a two-thirds vote of each house, to “negative” any state laws that “interfer[ed] in the opinion of the Legislature with the General interests and harmony of the Union.”²⁵⁶ Wilson concurred that it would be better to let Congress nullify objectionable state laws before they went into effect, rather than relying on judges to void them afterwards.²⁵⁷

Sherman objected that the proposal was “unnecessary” because the Supremacy Clause rendered “the laws of the General Government . . . Supreme & paramount to the State laws”²⁵⁸ Another delegate objected that no state would “ever agree to be bound hand & foot in this manner.”²⁵⁹ The convention narrowly defeated the proposal by a vote of five to six.²⁶⁰

The history of the Supremacy Clause reveals an important fact to consider in determining both the legitimacy of the Court’s current preemption doctrine as well as the constitutionality of reverse nullification. The Clause, as adopted, declares that state laws which violate the Constitution, federal law, or treaties are void and unenforceable.²⁶¹ Charles Pinckney moved on two different occasions to grant the government even wider preemptive powers, allowing Congress to “negative” any state laws it “judge[s] to be improper,”²⁶² or that would “interfer[e] . . . with the General interests and harmony of the Union.”²⁶³ The Convention rejected both proposals.²⁶⁴ This history counsels against a broad interpretation of the Supremacy Clause that would allow state laws to be nullified on the grounds they are inconsistent with broad national interests or objectives. Rather, the Framers carefully tailored the Supremacy Clause to allow state laws to be voided only if they actually conflict with federal law itself. Nothing in the legislative history suggests that state laws may be set aside to promote an executive policy of under- or non-enforcement of federal

²⁵⁵ *Id.* at 603.

²⁵⁶ *Id.* at 390 (Madison’s Journal) (Aug. 23, 1787) (statement of Pinckney).

²⁵⁷ *Id.* at 391 (statement of Wilson).

²⁵⁸ 2 FARRAND’S RECORDS, *supra* note 221, at 390 (statement of Sherman).

²⁵⁹ *Id.* at 391 (statement of Rutledge).

²⁶⁰ *Id.*

²⁶¹ U.S. CONST. art. VI, § 2.

²⁶² 1 FARRAND’S RECORDS, *supra* note 221, at 164 (Madison’s Journal) (June 8, 1787).

²⁶³ 2 *id.* at 390 (Madison’s Journal) (Aug. 23, 1787) (statement of Pinckney).

²⁶⁴ 1 *id.* at 168 (Madison’s Journal) (June 8, 1787); 2 *id.* at 390 (Madison’s Journal) (Aug. 23, 1787).

law. Reverse nullification is consistent with the Supremacy Clause's plain text, legislative history, and underlying purposes.

III. PREEMPTION AND REVERSE NULLIFICATION

The Supreme Court recognizes four main types of preemption: express preemption, conflict preemption, obstacle preemption, and field preemption.²⁶⁵ Express preemption, which occurs when Congress explicitly prohibits states from legislating within a particular “domain,” precludes reverse nullification.²⁶⁶ Congress should tailor express preemption clauses in statutes to allow states to enact and enforce their own parallel restrictions that mirror those set forth in federal law.²⁶⁷ Allowing for such reverse nullification would help ameliorate the effects of executive under- and non-enforcement of federal law.

Conflict preemption, by definition, does not arise when states engage in reverse nullification. With reverse nullification, states enact provisions that mirror, rather than conflict with, federal requirements. Obstacle and field preemption, in contrast, are direct impediments to reverse nullification; the Court should either abandon those doctrines, to conform its preemption jurisprudence more closely to the original intent underlying the Supremacy Clause,²⁶⁸ or modify them to permit reverse nullification.

A. *Express Preemption*

Express preemption occurs when Congress includes a provision in a federal law that prohibits states from enacting certain types of statutes. For example, the Federal Aviation Administration Authoriza-

²⁶⁵ Congress also may preempt state law under the Elections Clause. U.S. CONST. art. I, § 4, cl. 1. That provision permits state legislatures to regulate the time, place, and manner of federal elections, but specifies that “Congress may at any time by Law make or alter such Regulations.” *Id.* The Supreme Court has recognized that this provision grants Congress authority to displace state law independent of the Supremacy Clause. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2256–57 (2013); *see also Ex parte Siebold*, 100 U.S. 371, 384 (1879) (holding that “the power of Congress” over federal elections “is paramount,” and that federal election laws “necessarily supersede[]” contrary state laws). The Court explained that, when Congress exercises its power under the Elections Clause, a presumption against preemption does not apply (as it would under the Supremacy Clause), because the exercise of Elections Clause authority “necessarily displaces some element of a pre-existing legal regime erected by the States.” *Inter Tribal Council*, 133 S. Ct. at 2257 (emphasis omitted).

²⁶⁶ *Cipollone v. Liggett Grp.*, 505 U.S. 504, 517 (1992).

²⁶⁷ *See infra* notes 274–77 and accompanying text.

²⁶⁸ *See supra* notes 261–64 and accompanying text.

tion Act provides, “[A] State [or local government] may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.”²⁶⁹ Likewise, the United States Warehouse Act stated, “[T]he power, jurisdiction, and authority conferred upon the Secretary of Agriculture under this Act” with regard to warehouses and warehousemen “shall be exclusive with respect to all persons securing a license hereunder so long as said license remains in effect.”²⁷⁰ Such an exclusive grant of authority necessarily excluded states from regulating warehouses.

If Congress chooses to bar states from legislating in a particular area, then reverse nullification is impermissible. As a policy matter, for the reasons discussed throughout this Part, Congress generally should craft express preemption provisions to allow for reverse nullification. Rather than specifying that all state laws concerning particular matters are preempted, statutes should specify instead that any laws other than those which simply restate federal requirements or prohibitions are preempted. For example, the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) provides that a state “shall not impose or continue in effect any requirements for labeling or packaging” of “any federally registered pesticide or device” that is “in addition to or different from those required under this subchapter.”²⁷¹ The Supreme Court held that “a state-law labeling requirement is not pre-empted by [this language] if it is equivalent to, and fully consistent with, FIFRA’s misbranding provisions.”²⁷² Thus, FIFRA allows states to impose and enforce standards mirroring those set forth in federal law, thereby authorizing an alternate enforcement mechanism for them.

Likewise, the Federal Food, Drug, and Cosmetic Act of 1938 provides that no state or political subdivision may “establish or continue in effect . . . any requirement which is different from, or in addition

²⁶⁹ 49 U.S.C. § 14501(c)(1) (2012) (quoted in *Am. Trucking Ass’n v. City of Los Angeles*, 133 S. Ct. 2906, 2100–02 (2013) (holding that § 14501(c)(1) expressly preempts contrary state laws and other state-imposed restrictions with the force of law)); *see also* 15 U.S.C. § 1334(b) (2012) (“No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.”) (quoted in *Cipollone*, 505 U.S. at 515, 521–22 (holding that § 1334(b) expressly preempts state common law claims based on cigarette advertisements)).

²⁷⁰ Act of Mar. 2, 1931, 71 Cong. Ch. 366, § 29, 46 Stat. 1463, 1465 (internal quotation marks omitted) (quoted in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 224 (1947)).

²⁷¹ Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136v(a)–(b) (2012).

²⁷² *Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431, 447 (2005).

to, any requirement applicable under this chapter” for a “device intended for human use . . . which relates to [its] safety or effectiveness.”²⁷³ The Court held that this provision allows states to maintain their own manufacturing and labeling requirements for pacemakers so long as they mirror FDA regulations.²⁷⁴

Such reasonably limited express preemption provisions allow states to engage in reverse nullification by crafting and enforcing mandates that parallel those set forth in federal law, to help ameliorate the impact of under- or non-enforcement by the federal Executive. Robert Schapiro’s work on interactive federalism points out that states can act as a “fail-safe mechanism”—an “additional source of protection” for the interests a federal statute is enacted to promote—if the federal government “fails to enforce regulations that facially apply.”²⁷⁵ Allowing state officials to enforce parallel legal restrictions can help offset the ubiquitous resource constraints to which nearly all government agencies are subject.²⁷⁶

Amanda M. Rose emphasizes that supplemental state enforcement can be especially useful when under-enforcement occurs because an agency responsible for enforcing a federal law has been “captured” by the very interests or group the statute was enacted to regulate.²⁷⁷ She explains:

Because they are accountable to a different set of constituencies, it may prove harder for regulated parties to capture state enforcers than a federal enforcer. Capture will also be harder—or at least more expensive—simply because in a concurrent enforcement regime there are more enforcers that must be captured to ensure the desired level of under-enforcement.²⁷⁸

At the very least, if a law is worth enacting, Congress should indulge a strong presumption in favor of embedding a backstop to protect against the possibility that future administrations will decline, or be unable, to adequately enforce it.

²⁷³ 21 U.S.C. § 360k(a) (2012).

²⁷⁴ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495 (1996).

²⁷⁵ Schapiro, *supra* note 21, at 243, 290; *see also* Lemos, *supra* note 21, at 748–49 (“Enforcement authority creates a state-level check against underenforcement by federal agencies States can increase enforcement, thereby reducing the risk of discriminatory nonenforcement and underdeterrence.”).

²⁷⁶ Lemos, *supra* note 21, at 702–03; Rose, *supra* note 21, at 1345.

²⁷⁷ Rose, *supra* note 21, at 1345, 1357; *see also* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 56–57 (2010).

²⁷⁸ Rose, *supra* note 21, at 1357.

B. Conflict Preemption

Conflict preemption occurs when “it is impossible for a private party to comply with both state and federal requirements.”²⁷⁹ In one recent case, for example, the Court held that state law was preempted because it was impossible for the manufacturer of a generic pharmaceutical “to comply with both its federal-law duty to not alter [the drug’s] label and its state law duty to . . . strengthen the warnings on [the drug’s] label.”²⁸⁰ Reverse nullification does not raise concerns about conflict preemption because, by definition, it involves a state attempt to enforce the same requirements as those set forth in federal law.

C. Obstacle Preemption

Obstacle preemption is one of the biggest impediments to reverse nullification. As its name suggests, obstacle preemption arises when a state law would “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” in enacting the federal law.²⁸¹ Some aspects of obstacle preemption may better be classified as “conflict” preemption. For example, the Court has held that obstacle preemption applies where federal law affirmatively authorizes or permits conduct under certain circumstances (i.e., the law goes beyond merely refraining from prohibiting the conduct), yet state law purports to either prohibit it or impose additional requirements.²⁸² In such a case, the state law conflicts with the federal stat-

279 *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

280 *Mut. Pharm. Co., Inc. v. Bartlett*, 133 S. Ct. 2466, 2469 (2013).

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

282 *See, e.g., Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 31 (1996) (“[T]he Federal Statute authorizes national banks to engage in activities that the State Statute expressly forbids. Thus, the State’s prohibition of those activities would seem to stand as an obstacle to the accomplishment of one of the Federal Statute’s purposes.” (internal quotation marks omitted)); *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987) (holding that the Clean Water Act preempts state common law suits for pollution because such suits “would compel the [point] source [of the pollution] to adopt different control standards and a different compliance schedule from those approved by the EPA”); *Franklin Nat’l Bank of Franklin Square v. New York*, 347 U.S. 373, 375–79 (1954) (holding that a New York law prohibiting banks from using the word “saving” or “savings” was invalid because it conflicted with federal law authorizing national banks to receive savings deposits); *see also Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 380 (2000) (invalidating state laws that prohibited a wider range of trade with Burma than did federal sanctions, because “[s]anctions are drawn not only to bar what they prohibit but to allow what they permit, and the inconsistency of sanctions here undermines the congressional calibration of force”).

ute,²⁸³ even though it is not impossible to comply with both provisions.²⁸⁴

Obstacle preemption also goes further, however, barring state laws that may frustrate Congress's purpose in enacting a statute or the goals it sought to achieve.²⁸⁵ The Supremacy Clause provides that the Constitution, federal laws, and treaties are the "supreme Law of the Land, . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."²⁸⁶ Federal statutes themselves indisputably may preempt state laws, but the Supremacy Clause does not provide much of a basis for contending that the purposes or goals underlying those laws should be accorded similar preemptive effect. As Caleb Nelson explained in his seminal article on this topic, "[u]nder the Supremacy Clause, preemption occurs if and only if state law contradicts a valid rule established by federal law, and the mere fact that federal law serves certain purposes does not automatically mean that it contradicts everything that might get in the way of those purposes."²⁸⁷

By way of comparison, the Constitution specifies the purposes for which it was enacted, including "establish[ing] justice" and "promot[ing] the general welfare."²⁸⁸ Even though the Framers expressly agreed upon these objectives, they do not license federal courts to invalidate any state laws that purportedly conflict with those broad goals. Indeed, it does not appear that any court has ever relied on the Constitution's Preamble or other expressions of the Framers' objectives as a basis for preempting state law. And the Framers twice rejected Charles Pinckney's proposals to grant Congress broad authority to invalidate state laws that Congress believed frustrated national goals.²⁸⁹ The Supremacy Clause does not afford courts greater authority to preempt state laws to promote the goals underlying federal statutes than to further the objectives underlying the Constitution itself.

283 See *Wyeth v. Levine*, 555 U.S. 555, 590 (2009) (Thomas, J., concurring) (holding that a state law is preempted when it prohibits, restricts, or burdens conduct in which federal law "gives an actor a right to engage").

284 See *Florida Lime & Avocado Growers, Inc.*, 373 U.S. at 142–43 ("A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility.").

285 *Hines*, 312 U.S. at 67; see also *Hillman v. Maretta*, 133 S. Ct. 1943, 1950 (2013) (determining "whether a state law conflicts with Congress' purposes and objectives").

286 U.S. CONST. art. VI, § 2.

287 Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 231–32 (2000).

288 U.S. CONST. pmbl.

289 See *supra* notes 263–64 and accompanying text.

A court would maintain that, as a formal matter, it is the federal statute that preempts state law, rather than Congress's unenacted purposes or objectives. Such an argument is untenable with regard to obstacle preemption because a court must retreat to that doctrine only if express and conflict preemption (broadly understood, as explained above) have failed. Even if obstacle preemption reflects Congress's actual or hypothesized preferences, it is a stretch to deem such preemption either an interpretation or implementation of the statute itself.²⁹⁰ Obstacle preemption thus stands in tension with the Supremacy Clause.²⁹¹ It likewise stands in contrast with the Article I, § 7 legislative process, which affords legal effect only to provisions that have been enacted by both chambers of Congress and presented to the President.²⁹²

The Court's ruling in *Arizona v. United States* demonstrates the extraordinary breadth of obstacle preemption. The Immigration Reform and Control Act of 1986 ("IRCA") makes it a crime "for employers to knowingly hire, recruit, refer, or continue to employ unauthorized workers,"²⁹³ but only a civil offense for undocumented aliens to "seek or engage in unauthorized work."²⁹⁴ Section 5(C) of Arizona's S.B. 1070 made it a misdemeanor for undocumented aliens to knowingly work or seek work in the state.²⁹⁵ The Court held that enforcement of this statute would pose an "obstacle" to IRCA's goals, since Congress had opted against imposing criminal sanctions on undocumented employees.²⁹⁶

Since IRCA prohibits undocumented aliens from attempting to work in the United States, and even imposes civil penalties on those

290 *But see* John David Ohlendorf, *Textualism and Obstacle Preemption*, 47 GA. L. REV. 369, 442 (arguing that "obstacle preemption is justifiable as a form of negative inference from the statutory text").

291 *See* *Wyeth v. Levine*, 555 U.S. 555, 585–90 (2009) (Thomas, J., concurring) (arguing that the Court's obstacle preemption doctrine is a misinterpretation of the Supremacy Clause); *see also* *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1142 (2011) (Thomas, J., concurring) (concluding that obstacle preemption is "wholly illegitimate"); *Haywood v. Drown*, 556 U.S. 729, 767 (2009) (Thomas, J., dissenting) (contending that 42 U.S.C. § 1983 does not preempt a state law governing procedure in state courts that burdens plaintiffs' ability to pursue § 1983 claims).

292 U.S. CONST. art. I, § 7; *see* *INS v. Chadha*, 462 U.S. 919, 951 (1983) ("[T]he prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.").

293 *Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012) (citing 8 U.S.C. § 1324a(a)(1)(A), (a)(2)).

294 *Id.* (citing 8 U.S.C. §§ 1227(a)(1)(C)(i), 1255(c)(2)).

295 *Id.* at 2503 (quoting ARIZ. REV. STAT. ANN. § 13-2928(C) (West Supp. 2011)).

296 *Id.* at 2504.

who did so, it is difficult to understand how Arizona's parallel enactment undermined federal law. The Court explained that federal law "reflects a considered judgment that making criminals out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives."²⁹⁷ This reasoning conflates *federal law*—which is the supreme law of the land—with the motives of some (or perhaps even most) of the members of Congress who voted for IRCA.

IRCA refrains from imposing criminal penalties on undocumented aliens who work illegally. The *Arizona* Court, however, treated IRCA as if it affirmatively provided that such individuals may not be subject to criminal penalties at the federal, state, or local levels. Congress' refusal to impose federal criminal penalties does not constitute a statutory policy against the imposition of such penalties by other authorities. The fact that the possibility of criminal penalties was considered and rejected during one of the many steps in the legislative process²⁹⁸ does not mean that Congress affirmatively adopted a policy of protecting "aliens who seek or engage in unauthorized employment" from being subject to such consequences.²⁹⁹ Congress's decision to omit criminal penalties for undocumented aliens who work illegally means only that Congress declined to impose such penalties, not that Congress acted, or even intended, to prohibit them.

Indeed, Congress's decision to exclude such penalties from IRCA does not even suggest that a majority of members in each House opposed the idea. William Eskridge cogently explains:

[F]ederal legislation can be blocked not only by majorities in either the House or the Senate, but also by individual committee chairs in either chamber, by the Rules Committee in the House, by filibustering minorities in the Senate, by House-Senate conference committees, by negative votes of either chamber for the conference substitute, and of course by the President.³⁰⁰

Furthermore, had a member suggested a provision to expressly protect undocumented workers from criminal prosecution at the state level (as the Court's ruling in *Arizona* does), there is a substantial likelihood it would not have gotten through the legislative pro-

297 *Id.*

298 *Arizona*, 132 S. Ct. at 2504 ("Proposals to make unauthorized work a criminal offense were debated and discussed during the long process of drafting IRCA. But Congress rejected them." (internal citations omitted)).

299 *Id.*

300 William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1448 (2008).

cess, either. While the Court claims it is simply enforcing a legislative compromise,³⁰¹ in reality it has granted a windfall to one side.³⁰² Thus, should the Court choose to retain its doctrine of obstacle preemption, it should at least recognize an exception for reverse nullification.³⁰³

It might be objected that a state law can pose an obstacle to the goals underlying an analogous federal statute because state officials may interpret it differently or pursue different enforcement priorities than their federal counterparts.³⁰⁴ Requiring regulated entities to deal with two or more different sets of regulators, even if they are enforcing identically worded provisions, also can be costly and inconvenient and unduly interfere with their operations.³⁰⁵ Moreover, many regulated entities may find it prudent to comply with a state's expectations or interpretations, even if they are more stringent than those of the federal government, thereby undermining the legislative balance embodied in the federal statute.³⁰⁶

The weight of these objections will vary dramatically with the nature and specificity of the federal statute at issue. In *Arizona*, for example, there was no serious argument that federal and state officials were interpreting the applicable statutes differently, in the sense that they disagreed about whether certain conduct was illegal. If the text of other federal statutes gives insufficiently determinate guidance as to the legality of particular acts, Congress could authorize agencies to

301 *Arizona*, 132 S. Ct. at 2504. The Court recognized that federal law gives federal officials discretion over whether to arrest removable aliens. *Id.* at 2505–06. The Court held that allowing state officers to arrest removable aliens interferes with the Executive's discretion to refrain from removing them. *Id.* at 2506 (expressing concern about “unnecessary harassment of some aliens . . . whom federal officials determine should not be removed,” even though they have broken the law and are in the country illegally). Thus, it concluded that “§ 6 creates an obstacle to the full purposes and objectives of Congress.” *Id.* at 2507.

302 The Court also invalidated § 6 of S.B. 1070, which permitted state officers to arrest people whom they had probable cause to believe had “committed any public offense that makes [them] removable from the United States.” *Arizona*, 132 S. Ct. at 2505 (quoting ARIZ. REV. STAT. § 13-3883(A)(5) (West Supp. 2011) (internal quotation marks omitted)).

303 Schapiro, *supra* note 21, at 1295 (arguing that courts should be less willing to apply obstacle preemption to state laws that parallel federal restrictions, due to the benefits of concurrent state enforcement of those restrictions); Bulman-Pozen & Gerken, *supra* note 20, at 1303 (“[U]ncooperative federalism underscores the value of state statutes and regulations that occupy the same terrain as federal law.”).

304 Lemos, *supra* note 21, at 701; Rose, *supra* note 21, at 1353.

305 Rose, *supra* note 21, at 1352.

306 Lemos, *supra* note 21, at 753.

enact preemptive legislative regulations, which would be binding on states, to implement and definitively construe those laws.³⁰⁷

Agencies concerned with states' interpretations of federal statutory standards should be required to clarify them through congressionally authorized legislative regulations, rather than being permitted to rely on obstacle preemption. Such regulations would bear the legitimacy of statutory authorization, and generally would be promulgated subject to the procedural protections of the formal notice-and-comment rulemaking process.³⁰⁸ When first issued, they also would be subject to legislative invalidation under the Congressional Review Act.³⁰⁹

Perhaps most importantly, such a regulation must be consistent with, and a reasonable interpretation of, the text of the statute it is purportedly implementing or interpreting.³¹⁰ Administrative under- and non-enforcement policies, in contrast, do not enjoy congressional sanction and typically are inconsistent with the plain text of the statute (since, by definition, the Executive refrains from applying a statute to situations to which it admittedly extends). Thus, requiring states with statutes that parallel federal laws to act consistently with congressionally authorized federal regulations implementing or construing those laws leaves room for those states to supplement insufficient federal enforcement efforts. And even in the absence of such implementing regulations, state enforcement efforts still will be "necessarily cabin[ed]" by the language of the federal law the state mirrored.³¹¹

Allowing states to become involved in enforcing federal restrictions also may sometimes be seen as undesirable because state officials act primarily to promote the interests of constituencies within their respective states, while federal officials presumably are con-

307 See *Wyeth v. Levine*, 555 U.S. 555, 576 (2009) ("[A]n agency regulation with the force of law can pre-empt conflicting state requirements."); see, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (holding that the Federal Motor Vehicle Safety Standard preempted plaintiff's tort law claim).

308 See 5 U.S.C. § 553.

309 See *id.* §§ 801–08. Congress has successfully nullified federal regulations under the Act, however, on only one occasion: ergonomic regulations from the Occupational Health and Safety Administration that would have protected workers from repetitive strain disorders. Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1717 (2012) (citing Joint Resolution of Mar. 20, 2001, Pub. L. No. 107-5, 115 Stat. 7).

310 See *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

311 Lemos, *supra* note 21, at 757.

cerned with broader national interests.³¹² State officials also have a substantial incentive to focus their enforcement efforts on out-of-state targets.³¹³ Such practical concerns are not a basis for preempting a state law, however, since they do not give rise to conflicts between federal and state law. Even as a policy matter, these concerns are not persuasive reasons for Congress or courts to bar states from engaging in reverse nullification. State officials' willingness and incentive to enforce legal restrictions against entities other than those whom federal officials would target is one of the primary justifications for reverse nullification. State enforcement supplements federal enforcement, filling gaps that federal officials leave as a matter of policy, cost-benefit analysis, or resource constraints.

Finally, it may be objected that modifying obstacle preemption doctrine to facilitate reverse nullification would interfere with the President's Article II power to execute the law.³¹⁴ The Court has held, however, that Article II does not prohibit "voluntary state participation" in the administration or enforcement of federal law.³¹⁵ States regularly enact laws that mirror federal law,³¹⁶ and are sometimes even empowered to directly enforce federal laws themselves.³¹⁷ Modifying preemption doctrine to facilitate states' reverse nullification of federal law therefore would not raise colorable Article II concerns.

D. Field Preemption

The final type of preemption the Supreme Court recognizes is field preemption. A federal statute precludes state laws in an area due to field preemption "when the scope of [the federal] statute indicates that Congress intended federal law to occupy a field exclusively."³¹⁸ Field preemption will be inferred when Congress enacts a "scheme of federal regulation . . . so pervasive as to make reasonable

312 *Id.* at 753.

313 *Id.* at 753; Rose, *supra* note 21, at 1361.

314 See U.S. CONST. art. II, § 1, cl. 1 (Vesting Clause); *id.* art. II, § 3.

315 *Printz v. United States*, 521 U.S. 898, 923 n.12 (1997).

316 See *supra* notes 13, 21 and accompanying text; Cox, *supra* note 23, at 31; Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863, 870–73 (2006); see, e.g., *supra* notes 271–74 and accompanying text.

317 Amy Widman & Prentiss Cox, *State Attorneys General's Use of Concurrent Public Enforcement Authority in Federal Consumer Protection Laws*, 33 CARDOZO L. REV. 53, 55 (2011) (noting that approximately two dozen federal laws authorize direct enforcement by states).

318 *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (quoted in *Altria Group, Inc. v. Good*, 555 U.S. 70, 76–77 (2008)); see, e.g., *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605, 611 (1926) (holding that the Locomotive Inspection Act, 49 U.S.C. § 20701 *et seq.*, "manifest[s] the intention to occupy the entire field of regulating locomotive equipment").

the inference that Congress left no room for the States to supplement it.”³¹⁹ For example, the Court has held that “the pervasive nature of the scheme of federal regulation of aircraft noise . . . leads us to conclude that there is pre-emption.”³²⁰

Textualist Justices on the Supreme Court have come to recognize field preemption as “suspect . . . in the absence of a congressional command that a particular field be pre-empted.”³²¹ A strong argument can be made that field preemption is an unnecessary doctrine that the Court should abandon. If Congress wishes to preempt state laws in a particular area, it may do so expressly.³²² In recent years, the Court has moved toward requiring express “clear statements” from Congress for various purposes, including creating a private right of action,³²³ overcoming the presumption against extraterritoriality,³²⁴ and waiving state sovereign immunity.³²⁵ The same concerns about federalism and state sovereignty that motivated the Court to require a clear statement from Congress in order to waive a state’s sovereign immunity³²⁶ also weigh in favor of imposing a similar “clear statement” rule for preempting state legislation in areas otherwise within states’ power to regulate.³²⁷

319 *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *accord* *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

320 *City of Burbank v. Lockheed Air Terminal, Inc.* 411 U.S. 624, 633 (1973); *see also* *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300–01 (1988) (holding that the Natural Gas Act occupies the field of natural gas regulation because it is a “comprehensive scheme of federal regulation of ‘all wholesales of natural gas in interstate commerce’” and “confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale”) (quoting *N. Natural Gas Co. v. State Corp. Comm’n of Kan.*, 372 U.S. 84, 91 (1963)).

321 *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 616–617 (1996) (Thomas, J., dissenting); *cf.* *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994) (declining to adopt a “court-made rule” of preemption “to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law”).

322 *See supra* notes 269–71; *cf.* *Wyeth v. Levine*, 555 U.S. 555, 574 (2009) (“If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point during the FDCA’s 70-year history.”).

323 *Alexander v. Sandoval*, 532 U.S. 275, 288–89 (2001).

324 *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

325 *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003); *see also* *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) (concluding that “Congress intended to abrogate sovereign immunity only if its intention is ‘unmistakably clear in the language of the statute’” (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985))).

326 *See Atascadero*, 473 U.S. at 242 (holding that Congress must “unequivocally express its intention to abrogate the Eleventh Amendment bar”).

327 *Cf. Eskridge, supra* note 300, at 1471–72 (explaining that the presumption against preemption arises from “constitutional federalism principle[s]”).

Moreover, when Congress purportedly has the implicit intention to preempt an entire field, courts must attempt to intuit the breadth of the resulting preemption. For example, the Court has held that Congress has preempted the field concerning “the radiological safety aspects involved in the construction and operation of a nuclear plant,”³²⁸ while also cautioning that “not every state law that in some remote way may affect the nuclear safety decisions made by those who build and run nuclear facilities can be said to fall within the preempted field.”³²⁹ Eliminating field preemption in favor of express preemption would alleviate the need for courts to draw such difficult lines, or at least guarantee them a more direct textual basis for their rulings.

Daniel Meltzer has argued that courts cannot avoid uncertainty by insisting on express preemption rather than attempting to infer whether Congress intended field preemption.³³⁰ He points out that “it is often difficult to ascertain from the text alone just what the ‘domain’ is that is subject to preemption.”³³¹ Nevertheless, requiring Congress to use explicit language in order to preempt state law avoids the need for judicial inferences as to Congress’s intent, and provides a helpful data point about the scope of such preemption.

At the very least, the Court should recognize an exception to field preemption for reverse nullification, to promote states’ efforts to check executive under-enforcement of federal law. In *Arizona v. United States*, in contrast, the Supreme Court permitted field preemption to be used as a mechanism for protecting such underenforcement. The Court invalidated § 3 of S.B. 1070, an Arizona immigration measure that made it a misdemeanor for an alien to willfully fail to “complete or carry an alien registration document” in violation of 8 U.S.C. § 1304(e) or § 1306(a).³³² As the Court noted, § 3 “adds a state-law penalty for conduct proscribed by federal law.”³³³ The Court

328 *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 205 (1983).

329 *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

330 Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 28 (2013).

331 *Id.* Meltzer also contends that express preemption is insufficient because “participants in the drafting process, even if strongly motivated, lack the foresight, or sometimes the consensus, that would permit resolution of the range of preemption questions that will eventually arise under federal statutory schemes of any complexity.” *Id.* at 40–41.

332 *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (quoting ARIZ. REV. STAT. ANN. § 1509(A) (West Supp. 2011)).

333 *Id.*

held that § 3 was preempted because “the Federal Government has occupied the field of alien registration.”³³⁴

Critically, the Court emphasized that states had to be prevented from enacting alien registration laws that mirror federal requirements to preserve the Executive’s ability to refuse to enforce federal law. It explained: “Were § 3 to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies.”³³⁵ Earlier in the opinion, the Court celebrated executive under-enforcement of immigration law, declaring, “Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission.”³³⁶ The Executive’s “enforcement policies,” the Court held, must be “consistent with this Nation’s foreign policy,” “embrace[] immediate human concerns,” and weigh “[t]he equities of [each] individual case.”³³⁷

The *Arizona* Court seems to be defending what may be called “dual preemption”: the Court barred states from establishing standards that mirror federal law, in order to preserve the Executive’s discretion to refrain from enforcing that very law. Thus, a federal statute serves as the basis for nullifying state law, even as executive discretion serves as the basis for effectively nullifying that federal statute, either in general or in certain categories of cases (categories that Congress has not seen fit to exempt from the statute). The Supremacy Clause protects the status of federal statutes as the “Law of the Land.”³³⁸ The Court should not interpret or apply the Supremacy Clause so as to facilitate statutes’ desuetude.

When states enact and enforce provisions that mirror federal law in a field in which they possess constitutional authority to legislate, their actions are, by definition, consistent with underlying federal statute and should not be invalidated.³³⁹ Indeed, states routinely ex-

³³⁴ *Id.* at 2502.

³³⁵ *Id.* at 2503. The Court also was concerned that aliens convicted of violating § 3 would not be who violated federal law would be eligible for parole and presidential pardons. *Id.*

³³⁶ *Id.* at 2499.

³³⁷ *Id.*; see also *United States v. South Carolina*, 720 F.3d 518, 532–33 (4th Cir. 2013) (“[A]llowing the state to prosecute individuals for violations of a state law that is highly similar to a federal law strips federal officials of [their] discretion.”).

³³⁸ U.S. CONST. art. VI, § 2.

³³⁹ *Cf. Cox*, *supra* note 23, at 43 (“[R]edundant enforcement presents the clearest case against preemption one can imagine, because there is no conceptual space between state and federal law.”).

ercise concurrent enforcement authority with the federal government over numerous areas in the absence of express congressional authorization.³⁴⁰ The State of New York, for example, has been aggressively pursuing high-end investment firms for which the FEC traditionally assumed primarily responsibility.³⁴¹ And approximately two dozen federal laws affirmatively authorize direct enforcement by state officials.³⁴²

The executive branch's mere policy preference to refrain from enforcing a statute under certain circumstances does not constitute part of the "supreme law of the land" that the Supremacy Clause allows to supersede state law. At most, allowing states to enforce restrictions that parallel federal law increases the likelihood that a person will be investigated for engaging in the prohibited conduct, thereby raising the effective price of engaging in such conduct or the sanction for doing so.³⁴³ As Adam Cox points out, the Supreme Court generally rejects this Holmesian approach to the law, envisioning law "as a set of obligations rather than prices."³⁴⁴ Moreover, under this conception of law, "[o]nce the federal government adopt[s] a particular legal prohibition . . . anything a state [does] to enforce that prohibition would change the expected sanction," and therefore be preempted.³⁴⁵ Applying this approach transsubstantively would dramatically upset the balance of power in our federal system by reducing the scope of permissible state regulation to the few (if any) remaining arenas the federal government has chosen not to regulate.

Thus, the Supreme Court should not consider the Executive's possible desire to refrain from fully enforcing a statute as a basis for concluding that states must be excluded from the field. If Congress wishes to reinforce the Executive's ability to effectively amend or nullify its enactments by selectively enforcing them, it may do so through express preemption of parallel state-law provisions. The federal judiciary should not tip the scales further in favor of the Executive³⁴⁶ where Congress itself has not expressly chosen to do so.

340 *Id.* at 31.

341 Ahdieh, *supra* note 316, at 872–73.

342 Widman & Cox, *supra* note 317, at 55.

343 *Cf.* Cox, *supra* note 23, at 43–44, 53.

344 *Id.* at 44, 53.

345 *Id.* at 44.

346 *See generally* POSNER & VERMEULE, *supra* note 12 (explaining that the Executive possesses extremely broad discretion that is virtually unfettered by legal constraints).

IV. EXECUTIVE UNDERENFORCEMENT OF FEDERAL LAW AND REVERSE NULLIFICATION

Reverse nullification is a constitutionally permissible form of self-help states can implement to secure the benefits of federal statutes that the Executive declines to adequately enforce as written.³⁴⁷ Courts should not invoke the doctrines of field or obstacle preemption to prohibit states from enacting prohibitions, standards, or requirements that mirror those set forth in federal law.

Admittedly, executive underenforcement may serve valuable social goals. Statutes may be overbroad or poorly drafted, sweeping in wide ranges of innocuous conduct. Executive discretion can act as a practical “fix” when legislative language is unnecessarily or unintentionally overbroad, or experience with implementing the law shows that its enforcement under certain circumstances is undesirable.³⁴⁸ Relatedly, cost-benefit analysis may counsel “rational underenforcement,” on the grounds that the social benefits of enforcing the law in certain cases is not worth the attendant costs (however they may be measured).³⁴⁹ Or social norms, technology, or other circumstances may substantially change in the years or decades following a law’s enactment, rendering its enforcement under some or all circumstances much more objectionable than when the law first entered into effect. For these reasons, the Executive often may contend that refraining from fully enforcing the law promotes the public interest. It might further argue that underenforcement can be more faithful to the preferences of current democratic majorities because the numerous vetogates strewn throughout the complex bicameral legislative process³⁵⁰ prevent the amendment or repeal of laws that have lost public support.³⁵¹

Resource constraints also inevitably contribute to underenforcement.³⁵² Few law enforcement or administrative agencies possess the funding, personnel, and other resources necessary to fully enforce all of the laws for which they are responsible against all

347 See Pozen, *supra* note 3, at 87–88 (describing the growing efforts of states to enforce laws that federal officials do not adequately enforce).

348 Delahunty & Yoo, *supra* note 3, at 792; Lemos, *supra* note 21, at 754; Sant’Ambrogio, *supra* note 8, at 383.

349 Jonathan M. Barnett, *The Rational Underenforcement of Vice Laws*, 54 RUTGERS L. REV. 423, 426, 431 (2002) (arguing that “underenforcement is the most effective strategy for deterring consensual conduct that violates a widely shared moral norm”).

350 Eskridge, *supra* note 300, at 1444–48.

351 Delahunty & Yoo, *supra* note 3, at 792–93; Sant’Ambrogio, *supra* note 8, at 377–78, 380.

352 Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1216–17 (2014).

possible transgressors. Tradeoffs almost always must be made in terms of investigative and prosecutorial resources. By deliberately declining to attempt to enforce statutes under certain circumstances, government agencies can focus their resources to the most serious violations, or allocate them based on the President's substantive policy preferences.³⁵³

It is questionable whether these types of policy and fairness concerns allow the Executive to unilaterally decline to "[t]ake Care that the Laws be faithfully executed" against certain people or under certain circumstances.³⁵⁴ Persistent underenforcement of the law also may give rise to fairness concerns for those against whom it is enforced; when nearly everyone on a highway is traveling five miles over the speed limit, but only one person is ticketed for doing so, she surely has at least some valid cause for complaint.³⁵⁵ And underenforcement easily can be used to turn enforcement of the law into a political tool, rewarding favored constituencies and punishing disfavored ones.

Regardless, even if underenforcement is constitutionally permissible,³⁵⁶ and, at least sometimes, socially valuable,³⁵⁷ state law should not be preempted to bar states from supplementing the Executive's enforcement efforts. When Congress enacts a statute, it likely recognizes that, due to resource constraints and other practical considerations, full enforcement is unlikely to occur. This generally does not

³⁵³ Andrias, *supra* note 7, at 1039; Sant'Ambrogio, *supra* note 8, at 384.

³⁵⁴ U.S. CONST. art. II, § 3. Zachary S. Price contends that "the constitutional principle of congressional primacy in lawmaking requires executive officials to focus on effectuating statutory policies rather than undermining them through nonenforcement." Price, *supra* note 3, at 677. Kate Andrias, in contrast, argues that the President's "enforcement power" includes the authority to decline to enforce certain laws under some circumstances in order to focus law enforcement resources on situations that more directly promote his political agenda. Andrias, *supra* note 7, at 1039.

³⁵⁵ It appears that the Supreme Court disagrees. See *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 604 (2008) ("[A]llowing an equal protection claim on the ground that a ticket was given to one person and not others, even if for no discernible or articulable reason, would be incompatible with the discretion inherent in the challenged action."). Cf. Cristian Farias, *The Chief Justice Has Never Been Pulled Over in His Life*, SLATE (Feb. 11, 2015, 9:36 AM), available at <http://tinyurl.com/m55uvxp> (arguing that a majority of Supreme Court Justices do not understand a motorist's experience during a traffic stop because they have never experienced one).

³⁵⁶ See *supra* notes 2, 11 (discussing the constitutionality of underenforcement by the executive).

³⁵⁷ See Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715, 1720 (2006) ("[D]istinguishing 'good' underenforcement from 'bad' poses an analytic challenge."); see also Barnett, *supra* note 349, at 431 (finding a benefit to underenforcement). Cf. Lemos, *supra* note 21, at 702–03 (recognizing that state enforcement of federal laws may sometimes be beneficial to ameliorate underenforcement).

constitute an affirmative grant of discretion to the Executive to exempt certain offenders from the law, or remove certain types of offenses from the scope of the statute. That is, even if the President has discretion to refrain from enforcing a statute under certain circumstances, the Supremacy Clause does not include such decisions as part of the “law of the land” which may displace state law.³⁵⁸

Both the Court and commentators have addressed the circumstances under which federal executive or administrative agencies should be permitted to preempt state law.³⁵⁹ The Court gives agencies’ preemption decisions the most deference when they promulgate a “regulation bearing the force of law.”³⁶⁰ Non-enforcement decisions and policies do not rise to that level. To the contrary, underenforcement general is at the very least in tension with the text of the underlying statute.³⁶¹ Beyond that, the ultimate source of the preemption authority remains the underlying statute itself; an agency may not bootstrap itself into preempting state law without statutory authorization.³⁶² Thus, federal administrative or prosecutorial discretion does not constitute an independent basis for preventing concurrent state enforcement of standards set forth in federal statutes.

Periodically throughout our Nation’s history, states have attempted to combat federal statutes they believed to be unconstitutional through nullification. Today, it is the federal Executive that, for a

358 Cf. Cox, *supra* note 23, at 54 (“[T]he practical consequence of the Court’s approach in *Arizona* is to elevate prosecutorial decisions by executive branch officials to the status of law for purposes of preemption analysis.”).

359 See, e.g., Brian Galle, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933 (2008) (arguing for a more nuanced set of rules that would permit agencies in many instances to preempt or regulate without the need for express congressional approval); Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 695–699 (2008) (arguing for a presumption against agency preemption); Richard J. Pierce, Jr., *Regulation, Deregulation, Federalism, and Administrative Law: Agency Power to Preempt State Regulation*, 46 U. PITT. L. REV. 607 (1985) (arguing that federal agencies can play a valuable role in checking state regulation that is harmful to national interests); Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869 (2008) (describing the problems with preemption based on regulations, orders, or other agency activity).

360 *Wyeth v. Levine*, 555 U.S. 555, 580 (2009).

361 Underenforcement differs from a situation where an agency exercises its discretion under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), to define certain terms narrowly, or adopt narrow implementing regulations as a policy matter, to minimize the amount of conduct a statute prohibits. If an agency goes too far in attempting to underenforce a statute by regulation in this manner, it generally is subject to challenge under the Administrative Procedures Act. See, e.g., *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2008) (invalidating FEC regulations that did not adequately implement the Bipartisan Campaign Reform Act).

362 *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884–85 (2000).

mix of practical, ideological, and occasionally constitutional reasons, effectively amends or even nullifies federal statutes by declining to enforce them, either in general or particular cases. The Court should modify obstacle and field preemption doctrines to allow states to engage in reverse nullification of federal law by enforcing state laws that mirror federal prohibitions or requirement unless Congress has expressly preempted state laws on the issue or affirmatively authorized or licensed certain conduct. This reform would be based on a more accurate interpretation of the Supremacy Clause and allow states to provide an alternative mechanism for enforcing the “law of the land.”