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## ARTICLES

# LEGISLATIVE ARROGANCE AND CONSTITUTIONAL ACCOUNTABILITY\*

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“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 [C]onstitution itself becomes a solemn mockery . . . .”<sup>1</sup>

### ABSTRACT

*A movement is quietly gaining traction—state legislatures are enacting social policy through laws specially designed to evade constitutional review by the courts. These laws give individuals a private right of action to seek massive damages against those who engage in constitutionally protected but controversial conduct. The coercive nature of potential, massive civil liability has the same effect as an outright ban on constitutionally protected acts. But federal appellate courts have found legal challenges to these laws barred by the doctrines of Article III standing and state sovereign immunity. The resulting legislative arrogation of power is a dangerous trend, forewarned of by the Framers of the*

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1. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (quoting *United States v. Peters*, 9 U.S. (5 Cranch) 115, 136 (1809) (Marshall, C.J.)).

*Constitution. It contravenes federal supremacy and upsets the balance of power among coordinate branches of government. This Article argues that the courts can address this new phenomenon based on time-honored constitutional principles and a long-overdue reevaluation of the doctrine of Ex parte Young.*

## I. INTRODUCTION

Denouncing the judiciary is in vogue among elected officials.<sup>2</sup> Legislators across the political spectrum have proposed tactics to divest a supposedly runaway, activist judiciary of its independence and its capacity to check legislative actions. These strategies have been widely discussed and include measures such as “court-stripping” provisions<sup>3</sup> or directives that limit how courts can rule on particular issues.<sup>4</sup> Such legislative tactics, however, are themselves subject to immediate constitutional scrutiny by federal courts.<sup>5</sup> The constitutional structure is thus designed to rein in the

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2. The criticisms are also prevalent within the legal academy and the media. *See generally, e.g.*, LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (law professor arguing that the Constitution was enacted to reflect the popular ideals of the people); MARK R. LEVIN, *MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA* (2005) (conservative talk show host arguing that the Constitution is under siege by judicial activists); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (law professor arguing for a populist view of constitutional interpretation rather than strict judicial supremacy). And the criticisms are not new. *See, e.g.*, *Enwonwu v. Chertoff*, 376 F. Supp. 2d 42, 78–79 (D. Mass. 2005) (discussing contemporary attacks on judicial review and observing that “[v]erbal and political attacks on an independent federal judiciary are as old as the republic”).

3. *See, e.g.*, Pledge Protection Act of 2005, H.R. 2389, 109th Cong. § 2 (2005) (divesting federal courts of jurisdiction to determine the constitutionality of the Pledge of Allegiance); Constitution Restoration Act of 2005, S. 520, 109th Cong. §§ 101–02 (2005) (eliminating federal court jurisdiction over cases brought against governments or government agents based on their “acknowledgement of God as the sovereign source of law, liberty, or government”); Marriage Protection Act of 2005, H.R. 1100, 109th Cong. § 2 (2005) (divesting federal courts of jurisdiction to determine the constitutionality of the Defense of Marriage Act).

4. *See, e.g.*, S. 520 § 201 (prohibiting federal courts from relying on international law in interpreting the Constitution). This bill was introduced by Senators Shelby, Brownback, and Burr three days after the Supreme Court invoked international law in support of a decision to declare unconstitutional the application of the death penalty to juvenile offenders. *See id.*; *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005). State legislatures have imposed similar limitations on state courts’ independence through constitutional amendments. *See infra* notes 314–317 and accompanying text (discussing *Romer v. Evans*, 517 U.S. 620 (1996)).

5. *See, e.g.*, Ira Mickenberg, *Abusing the Exceptions and Regulations Clause: Legislative Attempts to Divest the Supreme Court of Appellate Jurisdiction*, 32 AM. U. L. REV. 497 (1983) (arguing that congressional court-stripping bills are unconstitutional). Although Congress can, of course, propose federal constitutional amendments, the difficult amendment process offers its own check on legislative overreaching.

most aggressive examples of legislative overreaching.<sup>6</sup>

Recently, however, a potent and more insidious form of legislative defiance has emerged—one that is specifically designed to escape judicial review. In this new iteration, state legislatures have burdened or suppressed constitutionally protected conduct, not by banning the targeted conduct outright, but by creating the risk of massive civil liability for engaging in it. These laws eliminate any official enforcement role for the state, so that those subject to liability have no one to sue to prevent the laws' enforcement. By making it sufficiently costly to engage in the targeted conduct, these statutes effectively suppress the conduct before the constitutional issues can be addressed by the courts.

These laws pose a dangerous affront to two basic constitutional principles: the proper division of authority between federal and state government, and the proper distribution of power between the judicial and legislative branches. They invoke the prospect of a “hydra in government”—forewarned of in the *Federalist Papers*<sup>7</sup>—in which the “authority of the whole society” is “subordinate to the authority of the parts.”<sup>8</sup> I refer to state legislative defiance of the federal judiciary as “legislative arrogance.”<sup>9</sup> In this new, insidious incarnation, states flout the Court's pronouncements about what the Constitution means and simultaneously design their enactments to escape judicial review. State legislatures thus arrogate authority by removing constitutionally questionable legislative actions from judicial scrutiny altogether. These laws purport to empower the public by creating a private cause of action to redress a perceived harm. In fact, they are power grabs by state legislatures frustrated with constitutional constraints imposed by an independent judiciary. Because the absence of state enforcement precludes pre-enforcement court challenges, state legislatures can use this paradigm to

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6. See, e.g., *infra* notes 194, 314–317 and accompanying text (discussing *Romer v. Evans*, 517 U.S. 620 (1996)).

7. E.g., THE FEDERALIST NO. 80, at 403 (Alexander Hamilton) (Buccaneer Books 1992).

8. THE FEDERALIST NO. 44 (James Madison), *supra* note 7, at 231 (referring to the “monster” of state authority superseding federal power).

9. “Arrogance” is the act of “unduly appropriating authority or importance,” and stems from the Latin word *arrogare* (to claim for oneself). See NEW SHORTER OXFORD ENGLISH DICTIONARY 119 (Oxford Univ. Press 1992). Legislative arrogance can be limited to the state level, where state legislatures defy unpopular decisions by a state's high court. Similarly, it can exist purely at the federal level, through congressional defiance of Supreme Court rulings. This Article focuses on *state* legislative defiance of the *federal* judiciary. This particular kind of legislative arrogance is especially significant because it implicates not only the proper distribution of power among the constitutional actors in our system of government, but also the issue of federal supremacy.

enact extreme social policy without being held constitutionally accountable.

So far, the tactic has been largely confined to the abortion context; however, its potential reach is far broader. At least two states have circumvented the Supreme Court's reaffirmations of a woman's right to abortion by passing laws that create private rights of action, with strict liability and massive potential damages, against abortion providers.<sup>10</sup> Pre-enforcement challenges have been unavailing: the Fifth and Tenth Circuits each claimed to be powerless when confronted with challenges to the laws. Because the states play no official role in the legislative schemes beyond having enacted the statutes, both courts found the suits barred by the doctrine of Article III standing.<sup>11</sup> Half of the Fifth Circuit, which ruled en banc, also found that sovereign immunity protected Louisiana from suit.<sup>12</sup>

State legislative arrogance raises unique concerns which courts should address head-on. State enactments that directly defy Supreme Court rulings and evade federal court review invite a breakdown of a uniform system of federal rights. An anarchy results in which each state—directed by popular will that may be overtly hostile to the rights of minorities—determines for itself what the “supreme law of the land” says. To permit defiant state legislatures to circumvent the judicial process through shrewd legislative drafting is to contemplate an entirely different form of government: one that posits that state government is equal or superior in authority to the federal government, and one in which the legislative branch is virtually unchecked by the judicial branch. The prospect of such a “hydra in government”<sup>13</sup> should trouble even those who favor a sharply curtailed role

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10. Louisiana has imposed essentially unlimited tort liability on abortion providers generally. *See* LA. REV. STAT. ANN. § 9:2800.12 (Supp. 2006); discussion *infra* Part III.A. Oklahoma's measure is more narrowly aimed at those who provide abortions to minors by creating a cause of action against those who fail to require parental consent. *See* OKLA. STAT ANN. tit. 63, § 1-740 (West 2004). In May 2005, Oklahoma's measure was revised to limit its application to unemancipated minors and to offer a constitutionally required judicial bypass option. *See id.* §§ 1-740.1 to -740.3 (West Supp. 2006). Oklahoma additionally criminalized conducting such abortions as a misdemeanor. *Id.* § 1-740.4; discussion *infra* Part III.B.

11. *See* *Nova Health Sys. v. Gandy*, 388 F.3d 744, 755 (10th Cir. 2004); *Okpalobi v. Foster*, 244 F.3d 405, 425–27 (5th Cir. 2001) (en banc).

12. *Okpalobi*, 244 F.3d at 408, 409, 411–16. A Louisiana appellate court later ordered a state court challenge to be dismissed on the grounds that no justiciable controversy existed between the plaintiffs and the State of Louisiana. *Women's Health Clinic v. State*, 825 So. 2d 1208, 1210–12 (La. Ct. App. 2002).

13. THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 7, at 403.

for the federal courts and increased state power.<sup>14</sup> Moreover, the problem should worry both political parties, because there is no limit to the nature of the social policies that legislative arrogance could be used to advance.<sup>15</sup> In the face of the decisions by the Fifth and Tenth Circuits dismissing challenges to these laws, state legislatures are likely to attempt even bolder acts of defiance.

This Article argues for a reinstatement of constitutional accountability<sup>16</sup> in the context of self-enforcing state legislation that infringes on constitutional rights. Holding state legislatures constitutionally accountable in these instances requires no more than a straightforward application of Article III case or controversy principles and a logical extension of the doctrine of *Ex parte Young*.<sup>17</sup> Part II of the Article sketches out the basic problem in greater detail, discussing the characteristics of and concerns raised by laws that implement constitutionally questionable social policy through private enforcement schemes. Part III describes the two recent cases in which federal appellate courts have reviewed challenges to such laws and rejected them on Article III standing or sovereign immunity grounds. Part III then critiques the legal reasoning employed by those courts, concluding that the doctrines of standing and sovereign immunity do not preclude pre-enforcement review of these statutes. Finally, Part IV steps back and considers the broader constitutional principles implicated by state acts of legislative arrogance. It argues that pre-enforcement challenges to these laws are supported by a proper regard for federal supremacy and the appropriate balance of power

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14. This Article does not grapple with how fundamental rights are properly determined. It does presume that once the Supreme Court has recognized a constitutional right, state legislatures are bound by that determination.

15. The Louisiana and Oklahoma statutes echo a tort liability scheme intended to prevent pornography that was proposed in Massachusetts in 1992. See H.R. 5194, 1992 Legis. Sess. (Mass. 1992). The Massachusetts bill, which was never passed, implicated the free speech rights of publishers, booksellers, and others. It would have given a private cause of action against these parties to women harmed by pornography. See *id.* § 2. See also *infra* notes 22–24 and accompanying text (discussing the Massachusetts bill). For further examples of potential legislative policymaking, see *infra* notes 31–35 and accompanying text.

16. By “constitutional accountability” I mean fidelity to core constitutional principles and the acceptance by a constitutional actor of its own place, and that of others, within the constitutional structure. Guido Calabresi has used the term in discussing the propensity of legislatures to shirk constitutional responsibility in other contexts. See Guido Calabresi, *Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 104 (1991) (referring to these instances as “failures of ‘constitutional accountability’”). See also Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003) (discussing how legislatures avoid constitutional accountability through privatization).

17. See U.S. CONST. art. III, § 2; *Ex parte Young*, 209 U.S. 123 (1908) (establishing an exception to state sovereign immunity).

between the legislative and judicial branches. Part IV also examines the Supreme Court's recent treatment of these constitutional principles and hypothesizes that the Court would likely uphold federal courts' authority to consider challenges to state legislative arrogance.

## II. DUCKING THE CHALLENGE: THE USE OF TORT LAW TO INSULATE CONSTITUTIONALLY SUSPECT SOCIAL POLICY FROM JUDICIAL REVIEW

Proposals for privately enforced laws that directly contradict well-established constitutional precedents are not new, although their deliberate use as a means of evading judicial review appears to be a nascent development. In the mid-1980s, Catherine MacKinnon and Andrea Dworkin proposed a novel way to address the harms they believed pornography inflicted on women.<sup>18</sup> Their idea was to hold all persons involved in the production and distribution of pornographic material civilly liable to those who claimed to be harmed by the pornography. This contrasted with the traditional course of making government the sole enforcer of pornography restrictions. MacKinnon and Dworkin's proposal hit a roadblock, however, when the Seventh Circuit Court of Appeals invalidated one such ordinance enacted in Indianapolis. In *American Booksellers Ass'n v. Hudnut*, the Seventh Circuit held that the ordinance unconstitutionally restrained free speech.<sup>19</sup> The ordinance gave some enforcement role to the local government: complaints were to be filed with the city, which was charged with investigating the complaints, resolving disputes through informal and formal proceedings, and enforcing determinations of the proceedings. City officials could also seek judicial enforcement of their decision.<sup>20</sup> When several trade associations and other plaintiffs<sup>21</sup> sued individual Indianapolis officials responsible for implementing the ordinance, no judge questioned the existence of a case or controversy with these defendants.

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18. MINNEAPOLIS, MINN., ORDINANCE NOS. 1983-OR-139, 141 (1983), *available in* IN HARM'S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS 426-32 (Catherine A. MacKinnon & Andrea Dworkin eds., 1997) [hereinafter IN HARM'S WAY].

19. *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 327-32 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

20. *See Am. Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316, 1321-25 (S.D. Ind. 1984).

21. The plaintiffs included trade associations for booksellers, publishers, periodical distributors, and college stores; businesses engaged in distributing and selling books, periodicals, videos, and television programming; an individual reader; and the Freedom to Read Foundation (a nonprofit organization). *Id.* at 1319.

In 1992, the Massachusetts House of Representatives took up a second-generation proposal, which eliminated any enforcement role for the government. Instead, the bill permitted “[a]ny woman . . . acting against the subordination of women,” as well as “[a]ny man, child, or transsexual who alleges injury by pornography in the way women are injured by it,” to “complain directly to a court of competent jurisdiction for relief,” including an injunction and nominal, compensatory, or punitive damages.<sup>22</sup> The Massachusetts House held a hearing on the bill, which was entitled “An Act to Protect the Civil Rights of Women and Children.”<sup>23</sup> The fervent debate included the testimony of opponents who worried about the proposed law’s chilling effect on free speech and on the sale of books, movies, and videos.<sup>24</sup>

Had the Massachusetts bill been enacted, the same kinds of individuals and entities who sued to enjoin the Indianapolis ordinance in *Hudnut* surely would have challenged the constitutionality of the Massachusetts bill. Rather than wait to be sued for potentially catastrophic damages (or desist entirely from conduct they believed to be constitutionally protected), these content producers would have wanted to bring a preemptive action to have the law declared unconstitutional and enjoin its enforcement. But whom would they have sued? The only actual “enforcers” of this law would have been individual private citizens. How could the challengers possibly predict who would sue them in order to enjoin any such suit? But, without a pre-enforcement challenge, would the legislation not achieve its goal by chilling the speech of those who did not dare risk liability?

Massachusetts failed to enact MacKinnon and Dworkin’s statute, so potential challengers to the law never faced these questions. But, abortion providers in Louisiana and Oklahoma have recently confronted these precise questions in seeking to challenge privately enforced liability schemes.<sup>25</sup> And the Fifth and Tenth Circuits have essentially answered that

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22. See H.R. 5194 §§ 2, 4, 1992 Legis. Sess. (Mass. 1992). In describing differences between the Massachusetts bill and the Indianapolis ordinance during a committee hearing in the Massachusetts House of Representatives, William Hudnut, former mayor of Indianapolis, confirmed “that the Indianapolis ordinance required people to go with their complaint to our Equal Employment Office and then, if that office wanted to take it to a court, they could,” whereas under the Massachusetts bill “they are given the right to take it directly to court.” *IN HARM’S WAY*, *supra* note 18, at 365.

23. See *An Act to Protect the Civil Rights of Women and Children: Hearing on H.R. 5194 Before the Committee of the Commonwealth of Massachusetts*, 1992 Legis. Sess. (Mass. 1992), transcript available in *IN HARM’S WAY*, *supra* note 18, at 361–416.

24. See *IN HARM’S WAY*, *supra* note 18, at 395, 399, 404.

25. See *supra* note 10 (discussing the Louisiana and Oklahoma statutes, respectively).

the providers are without a remedy. Subjected to laws that appear almost certainly unconstitutional,<sup>26</sup> the providers nevertheless have not heard their claims addressed because courts have found no case or controversy between them and the defendants named in the lawsuits.<sup>27</sup> Half of the judges on the Fifth Circuit also concluded that the doctrine of sovereign immunity shielded the state of Louisiana from suit.<sup>28</sup>

That this legislative vehicle has thus far been employed mainly in the context of abortion is of little consequence. The Louisiana and Oklahoma statutes are notable because they are manifestations of a paradigmatic self-enforcing law that states could adopt to avoid pre-enforcement constitutional challenges in a wide array of contexts. The paradigm comprises the following features: (1) it regulates a hot-button social issue; (2) it addresses the issue in a way the state has reason to think may be (or knows is) unconstitutional; and (3) it creates a private cause of action with two elements that make it highly risky not to comply, open-ended or potentially catastrophic damages and strict liability (or an easy threshold for such damages). Through this kind of statute, a state lets the prospect of private lawsuits stand in for the threat of criminal or other state enforcement. In Louisiana, this key feature made possible what the state tried unsuccessfully for years to achieve, a law that imposes unconstitutional burdens on the provision of abortion services and that has remained in effect because no one has been granted standing to challenge it.<sup>29</sup> A similar Oklahoma law caused abortion providers to implement changes in their policies that the state could never have imposed directly.<sup>30</sup>

This paradigm could be employed to achieve any number of other state goals across the political spectrum. The antipornography proposals of MacKinnon and Dworkin only offer one illustration. As another example, many state legislatures have recently proposed bills that would institute special grievance procedures for students who believe their professors are teaching in a biased manner.<sup>31</sup> These bills could be retooled slightly to

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26. See *Nova Health Sys. v. Gandy*, 388 F.3d 744, 750, 755 (10th Cir. 2004) (finding that abortion providers suffered an injury in fact but had no standing in federal court); *Okpalobi v. Foster*, 244 F.3d 405, 425–27 (5th Cir. 2001) (en banc) (noting that abortion providers suffered a “coercive effect” but did not have standing in federal court).

27. See *Nova Health Sys.*, 388 F.3d at 755; *Okpalobi*, 244 F.3d at 425–27.

28. *Okpalobi*, 244 F.3d at 411–16.

29. See LA. REV. STAT. ANN. § 9:2800.12 (Supp. 2006); *infra* Part III.A.

30. See OKLA. STAT. ANN. tit. 63, § 1-740 (West 2004); *infra* Part III.B.

31. See, e.g., S. 1988, 84th Leg. Sess. (Minn. 2005–06); S. 24, 126th Gen. Assemb. (Ohio 2005); S. 5, 2003–05 Leg. Sess. (Cal. 2004). See also Sara Hebel, *Patrolling Professors’ Politics*, CHRON. OF HIGHER EDUC., Feb. 13, 2004 (describing proposals); Michael Janofsky, *Professors’ Politics Draw Lawmakers into the Fray*, N.Y. TIMES, Dec. 25, 2005, §1, at 22 (same).

allow the students to sue professors in court.<sup>32</sup> Similarly, states could impose freestanding, “abstinence-only” requirements on sexuality education in schools<sup>33</sup> or libraries by giving a private cause of action to any parent whose child received information about contraception or other objectionable topics from such an entity. A creationism or “intelligent design” requirement offers a variation on this example. Likewise, legislatures could inhibit the sale of guns by imposing huge damage awards against gun manufacturers, distributors, and retailers for any harm caused by a gun.<sup>34</sup> Or a state could pass a law allowing defamation liability that clearly violates *New York Times Co. v. Sullivan*,<sup>35</sup> by imposing strict liability for making a false statement, and even for the mere sale or distribution of material containing such a statement. One can transform unconstitutional statutes into self-enforcing, but apparently unchallengeable, laws simply by substituting massive tort liability for criminal penalties or fines in statutes found to violate constitutional rights.

In each of these examples, the only way for those targeted by the legislation to challenge its constitutionality would be to wait until they themselves were sued under the law’s provisions. Those unwilling to continue their activities under a cloud of potential catastrophic financial and other consequences would simply cease to engage in the conduct, despite their belief that the restriction violated their constitutional rights.

Abortion restrictions provide a helpful context in which to consider the likely effects of such a law in greater detail. Assume a state has five medical facilities that provide abortions.<sup>36</sup> The state passes a law that imposes strict tort liability for performing abortions. Two facilities immediately stop providing abortions due to the economic risk. Two others

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32. Presumably, under the current proposals, professors could challenge such laws by suing the universities, who are responsible for implementing the grievance procedures. *See, e.g.*, S. 24, 126th Gen. Assemb. (Ohio 2005); S. 5, 2003–05 Leg. Sess. (Cal. 2004).

33. Abstinence-only education requirements are currently imposed as conditions placed upon certain federal funding streams. *See, e.g.*, Adolescent Family Life Act, 42 U.S.C. §§ 300z to 300z-10 (2000).

34. Such a law might be argued to be unconstitutional under a dormant commerce clause theory, claiming that the state unconstitutionally interfered with interstate commerce. *Cf. Nat’l Rifle Ass’n of Am. v. Magaw*, 132 F.3d 272, 278, 290–91 (6th Cir. 1997) (describing pre-enforcement claims brought against gun control provisions of the federal Violent Crime Control and Law Enforcement Act of 1994, and the justiciability of challenging the Act on Commerce Clause grounds).

35. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that the First Amendment requires proof of “actual malice” in order to recover damages in claims of defamation).

36. The United States is experiencing a widespread scarcity of abortion providers. *See* Caitlin Borgmann & Catherine Weiss, *Beyond Apocalypse & Apology: A Moral Defense of Abortion*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 40, 40 & n.3 (2003) (citing study showing that 87% of all counties in the nation lack abortion providers and listing factors contributing to the scarcity).

quietly continue providing abortions, hoping they will not be sued. The final provider openly defies the law and vows to fight it. An antichoice group finds a plaintiff, who brings a private lawsuit under the act. The group chooses the defendants opportunistically—suing the two tentative providers, but not the defiant one, who would mount an aggressive defense to challenge the statute’s constitutionality. The defendant providers immediately cut their losses by agreeing to stop providing abortions. Antichoice legislatures and advocates have now succeeded in eliminating eighty percent of the abortion providers in the state, without a court ever addressing the statute’s constitutional infirmities.

The problem with these laws, then, is that they may well succeed in getting many, if not most, in a targeted group to stop engaging in protected conduct merely because most individuals are risk averse. From a financial perspective, many organizations are either unwilling or unable to risk losing a constitutional challenge and incurring massive liability, however remote the risk. Even if those who are risk neutral continue to engage in the conduct, it will take years before a lawsuit settles the constitutional issues. In the meantime, the constitutionally protected acts of others are chilled.<sup>37</sup>

Should states be permitted to duck constitutional challenges to legislatively enacted policies simply by tinkering with penalties to shift the enforcement role from the state to private parties? Should they be allowed to use the shield of Article III standing requirements and sovereign immunity as a sword to enact punitive and unconstitutional policies that would never withstand pre-enforcement constitutional challenges? The Fifth and Tenth Circuits have effectively answered “yes.”

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37. This is precisely what happened in Oklahoma. *See infra* note 102 and accompanying text (discussing the chilling effect Oklahoma’s statute had on the availability of abortions in the state). It is possible that, because liability under these kinds of laws is purely monetary, market incentives will produce protection in the form of insurance. In Louisiana, the abortion law was specifically written to undermine this possibility, as it eliminated the applicability of the state’s malpractice cap and statute of limitations. *Compare* LA. REV. STAT. ANN. § 40:1299.42(B) (2001) (limiting medical malpractice claims), *with* LA. REV. STAT. ANN. § 9:2800.12 (Supp. 2006) (abrogating those limitations for abortion providers). *See also* Emily Townsend Black Grey, Comment, *The Medical Malpractice Damages Cap: What Is Included?*, 60 LA. L. REV. 547, 548–49 (2000) (“The legislature’s purpose in enacting [Louisiana’s] Medical Malpractice Act . . . was to provide for affordable health care by preventing tremendous liability and excessive insurance premiums.”). But even if liability insurance became available to cover risks imposed by unconstitutional, self-enforcing tort laws, those subject to the laws would have to absorb the costs of these insurance premiums. The protection of constitutional rights should not be surrendered to the vagaries of these potentially erratic market solutions.

## III. COURT DECISIONS

A. THE FIFTH CIRCUIT: *OKPALOBI V. FOSTER*

Banning abortion has long been an official goal of the Louisiana legislature, which has historically resisted the federal Constitution's protection of that right.<sup>38</sup> From the nineteenth century until *Roe v. Wade* was decided, Louisiana had banned abortions throughout pregnancy.<sup>39</sup> Louisiana reenacted an amended version of the same law in 1991, banning abortion at all stages of pregnancy except when necessary to save the pregnant woman's life or in limited cases of rape or incest.<sup>40</sup> This law was declared unconstitutional.<sup>41</sup> Anticipating a day when abortion is no longer protected under the Constitution, Louisiana has also passed a legislative declaration that a fetus is a "legal person . . . entitled to the right to life" from the moment of conception.<sup>42</sup>

In 1997, the legislature tried a new approach. It enacted a law entitled "Liability for Termination of a Pregnancy" (the "Act").<sup>43</sup> The Act provides:

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38. See *Okpalobi v. Foster*, 244 F.3d 405, 442 & n.1 (5th Cir. 2001) (Parker, J., dissenting) ("This appeal is the latest episode in a long effort by Louisiana to exercise its police power over a practice to which the courts have given considerable protection.") (quoting *Margaret S. v. Edwards*, 794 F.2d 994, 996 (5th Cir. 1986)).

39. Louisiana criminalized abortions at least as early as 1870. See LA. REV. STAT. OF 1870 § 807. This prohibition was amended in 1888 and included a mandatory sentence of one to ten years at hard labor for abortion providers. See 1888 La. Acts, No. 24, § 1 (codified as LA. REV. STAT. OF 1870 § 807 (1897)). In 1942, Louisiana revised its criminal code, but retained the criminalization of abortion in the new title. See 1942 La. Acts, No. 43, § 1, Art. 87 (codified as LA. REV. STAT. OF 1942 § 14:87 (1942)). Minor revisions were subsequently enacted. See 1964 La. Acts, No. 167 (substituting "intent" for "purpose" in the provision's first sentence).

40. 1991 La. Acts, No. 26, § 2 (codified as LA. REV. STAT. ANN. § 14:87 (2004)). The law imposed imprisonment "at hard labor for not less than one nor more than ten years" on a person who performed a prohibited abortion. LA. REV. STAT. ANN. § 14:87(E)(1) (2004).

41. *Sojourner T. v. Roemer*, 772 F. Supp. 930, 932 (E.D. La. 1991), *aff'd sub nom.* *Sojourner T. v. Edwards*, 974 F.2d 27, 31 (5th Cir. 1992).

42. H.R. Con. Res. No. 10, 1989 Second Extraordinary Sess. (La. 1989) (enacted in LA. REV. STAT. ANN. § 40:1299.35.0 (2001)). In addition to attempting to ban abortion outright, Louisiana has passed numerous severe restrictions on abortion, many of which have been invalidated while others remain on the books. See NARAL PRO-CHOICE AMERICA, WHO DECIDES? THE STATUS OF WOMEN'S REPRODUCTIVE RIGHTS IN THE UNITED STATES 48 (15th ed. 2006) (listing Louisiana's abortion restrictions).

43. 1997 La. Acts, No. 825, § 1 (codified as LA. REV. STAT. ANN. § 9:2800.12 (Supp. 2006)). For a discussion of the Act and the federal and state court decisions addressing it, see Jennifer L. Achilles, Comment, *Using Tort Law to Circumvent Roe v. Wade and Other Pesky Due Process Decisions: An Examination of Louisiana's Act 825*, 78 TUL. L. REV. 853 (2004).

Any person who performs an abortion is liable to the mother of the unborn child for any damage occasioned or precipitated by the abortion, which action survives for a period of three years from the date of discovery of the damage with a preemptive period of ten years from the date of the abortion.<sup>44</sup>

According to the Act, “‘Damage’ includes all special and general damages which are recoverable in an intentional tort, negligence, survival, or wrongful death action for injuries suffered or damages occasioned by the unborn child or mother.”<sup>45</sup> Moreover, the woman’s consent to the abortion is no defense, “but rather reduces the recovery of damages to the extent that the content of the consent form informed the mother of the risk of the type of injuries or loss for which she is seeking to recover.”<sup>46</sup> Finally, laws governing and limiting malpractice liability are expressly made inapplicable to the Act.<sup>47</sup>

When abortion providers challenged the Act’s constitutionality in *Okpalobi v. Foster*, not one of the fifteen judges who heard the case at the district or appellate level questioned the Act’s intent to ban or severely limit abortions.<sup>48</sup> Essentially, the Act subjects an abortion provider to strict liability for performing abortions. It appears to invite, for example, the following scenario: A woman obtains a safe and legal abortion in Louisiana. Nine years later, she has a religious conversion and now believes that abortion is murder. She files a lawsuit claiming that, at the time of the abortion, she did not know that she was “killing a child,” but that, since then, she has come to know that the fetus was indeed a child. Moreover, while she signed a consent form acknowledging her awareness of certain medical facts about the procedure and its consequences, she was never offered and never signed a consent form informing her that the

44. LA. REV. STAT. ANN. § 9:2800.12(A) (Supp. 2006).

45. *Id.* § 9:2800.12(B)(2) (emphasis added).

46. *Id.* § 9:2800.12(C)(1).

47. *Id.* § 9:2800.12(C)(2).

48. *See Okpalobi v. Foster*, 244 F.3d 405, 427 (5th Cir. 1999) (en banc) (noting the statute’s coercive impact); *id.* at 429–32 (Higginbotham, J.) (not questioning the Act’s coercive intent or effect); *id.* at 435 (Benavides, J., concurring in part and dissenting in part) (noting that the Act’s mere existence “coerces the plaintiffs to abandon the exercise of their legal rights”); *id.* at 442–43 (Parker, J., dissenting) (noting that the Act was “not designed to help a woman’s choice, but to eliminate that choice by effectively shutting down abortion providers”); *Okpalobi v. Foster*, 190 F.3d 337, 356–57 (5th Cir. 1999) (Wiener, J.) (finding that “the State’s proffered legislative purpose simply is not credible” and that “there is significant evidence that the legislature intended the law” to have its actual coercive effect); *id.* at 361 (Jolly, J., dissenting) (noting that the “statute [is] plainly aimed at making medical practice more difficult for abortion doctors”); *Okpalobi v. Foster*, 981 F. Supp. 977, 983, 986 (E.D. La. 1998) (holding that the statute’s unlimited, strict liability was designed to “chill[] the exercise of constitutionally protected rights”).

abortion would entail the killing of a child. She therefore sues the abortion provider for damages on her own behalf and that of the fetus. The doctor is subject to potentially catastrophic damages and is unprotected by Louisiana's malpractice law.

Of course, in this scenario, the doctor continuing to provide abortions in Louisiana could defend against the woman's lawsuit by claiming that it is unconstitutional. It is equally plausible, however, that the Act would deter Louisiana abortion providers from performing abortions altogether, and that legal abortions would cease to be available in the state. Indeed, several of the judges who heard *Okpalobi* concluded that the Act imposed, or was substantially likely to impose, an undue burden on abortion rights by making it so risky to provide abortions that doctors would stop doing so, leaving women without access to safe and legal abortions in Louisiana.<sup>49</sup>

Typically, when unconstitutional abortion restrictions are proposed, abortion providers bring pre-enforcement challenges to enjoin the government from enforcing the laws.<sup>50</sup> In these circumstances, courts customarily issue temporary restraining orders and preliminary injunctions to protect providers while the lawsuit is pending. The providers thus need not risk criminal or civil penalties in order to have the constitutional question settled.<sup>51</sup> When the Louisiana Act became effective, Louisiana providers followed the now-familiar routine of filing a lawsuit for declaratory and injunctive relief against the governor and the state attorney general in federal court.

In the trial court, neither defendant raised Article III standing principles or the doctrine of sovereign immunity as a bar to the lawsuit. Instead, they defended the law on its merits, arguing that the law imposed appropriate standard-of-care and informed-consent requirements upon abortion providers.<sup>52</sup> The district judge rejected these arguments and granted a preliminary injunction, concluding that the plaintiffs had

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49. See, e.g., *Okpalobi*, 190 F.3d at 360 (holding that Louisiana's strict liability regime "chills the inclination of physicians to provide abortions and thus inflicts an undue burden" on women). See also *supra* note 48.

50. It is virtually impossible for pregnant women who need abortions to be plaintiffs in a lawsuit without eventually being mooted out. Moreover, privacy concerns often deter women from filing challenges to abortion restrictions. The Supreme Court accordingly has long permitted abortion providers to challenge abortion restrictions on behalf of their patients, whose constitutional rights the laws infringe. See *Singleton v. Wulff*, 428 U.S. 106, 118 (1976).

51. This is precisely what the doctrine in *Ex parte Young* was meant to ensure. See *Ex parte Young*, 209 U.S. 123, 145–49 (1908); *infra* notes 214–218 and accompanying text (discussing *Ex parte Young*).

52. *Okpalobi*, 981 F. Supp. at 982.

established a substantial likelihood of success in proving the law unconstitutional.<sup>53</sup> The defendants appealed.

A divided panel of the United States Court of Appeals for the Fifth Circuit affirmed. Before reaching the merits, however, the majority addressed *sua sponte* the issues of Article III standing and Eleventh Amendment immunity.<sup>54</sup> The court concluded that neither doctrine posed a bar to the plaintiffs' lawsuit.

Considering the Eleventh Amendment question, the Fifth Circuit panel first discussed the doctrine of *Ex parte Young*, pursuant to which state officers may be sued to enjoin the enforcement of unconstitutional acts.<sup>55</sup> In particular, the court focused on the requirement that plaintiffs establish a "connection" between the state official sued and enforcement of the act. The court found no authority to establish that "the general duty of a governor to enforce state laws . . . [is] sufficient to make him a proper party defendant in a civil rights action attacking the constitutionality of a state statute concerning . . . private civil actions."<sup>56</sup>

Instead, relying on a 1979 decision from the Southern District of Ohio, the court applied a two-part test for determining whether a sufficient connection exists between the state official and statutory enforcement. First, the court looked at the defendants' power to enforce the law in question. Second, the court examined "the nature of the law and its place on the continuum between public regulation and private action."<sup>57</sup> The court found that the governor and attorney general had general powers and duties of enforcement under Louisiana law, if not expressly under the statute at issue, sufficient to meet the first prong of the test.<sup>58</sup> Moreover, the court concluded that the Louisiana law was "a thinly-veiled attempt to regulate and interfere with a right protected by the United States [C]onstitution."<sup>59</sup> The court thus found that the law, although creating a private cause of action, was "designed to implement and serve the *public* interest of the state."<sup>60</sup>

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53. *Id.* at 987–88.

54. *Okpalobi*, 190 F.3d at 343–49.

55. *Id.* at 343–47.

56. *Id.* at 345 (quoting *Gras v. Stevens*, 415 F. Supp. 1148, 1152 (S.D.N.Y. 1976)).

57. *Id.* at 346.

58. *Id.*

59. *Id.* at 347.

60. *Id.* (quoting *Allied Artists Pictures Corp. v. Rhodes*, 473 F. Supp. 560, 569 (S.D. Ohio 1979), *aff'd*, 679 F.2d 656 (6th Cir. 1982)).

The Fifth Circuit panel next considered whether there was a justiciable case or controversy between the plaintiffs and the defendants pursuant to Article III, Section 2 of the Constitution. The court found that “the claim for declaratory relief can stand on its own for purposes of the case or controversy jurisdictional requirement.”<sup>61</sup> The court admitted that it was “[l]ess obvious” whether the named defendants were the “proper defendants in plaintiffs’ claims for injunctive relief,” but concluded that the private enforcement mechanism in the statute did not make the suit against the state defendants improper.<sup>62</sup> The court also found that the existence of an actual controversy did not hinge on the defendant state officers enforcing or threatening to enforce the law. It maintained that the coercively self-enforcing nature of the statute rendered it unnecessary for plaintiffs to plead or prove such threats of enforcement.<sup>63</sup>

The appellate panel then affirmed the district court’s order permanently enjoining the “operation and effect” of the statute.<sup>64</sup> The court found that the statute was impermissible both in its purpose (to deter the provision of abortions in Louisiana) and in its likely effect (significantly reducing the number of abortion providers in the state).<sup>65</sup> The statute was thus unconstitutional under *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which prohibits laws that have the purpose or effect of placing “a substantial obstacle in the path of a woman seeking an abortion.”<sup>66</sup> The court also found the statute unconstitutionally vague.<sup>67</sup>

The defendants sought and were granted a rehearing en banc.<sup>68</sup> The en banc court reversed the panel’s decision.<sup>69</sup> Judge Jolly, who had dissented below, wrote the majority opinion, in which the court held that the plaintiffs lacked standing under Article III.<sup>70</sup> While he acknowledged that the court’s consideration of the merits of plaintiffs’ claims “may have strong appeal to some,” Judge Jolly concluded that “we are powerless to act

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61. *Id.*

62. *Id.* at 348.

63. *Id.* at 349.

64. *Id.* at 361. The district court had originally issued a preliminary injunction, which was later converted to a permanent injunction upon the parties’ agreement. *See id.* at 341.

65. *Id.* at 357.

66. *See* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992).

67. *Okpalobi*, 190 F.3d at 359.

68. *Okpalobi v. Foster*, 201 F.3d 353, 353 (5th Cir. 2000).

69. *Okpalobi v. Foster*, 244 F.3d 405, 409 (5th Cir. 2001) (en banc).

70. *See id.* at 409.

except to say that we cannot act: these plaintiffs have no case or controversy with these defendants.”<sup>71</sup>

Before addressing the Article III question, however, Judge Jolly contended that the state officials were immune from suit under the Eleventh Amendment.<sup>72</sup> Only half of the court joined this section of the opinion.<sup>73</sup> Nevertheless, Judge Jolly devoted more than twelve pages of his opinion to making his case.<sup>74</sup> He acknowledged that, under the doctrine articulated by the Supreme Court in *Ex parte Young*, state officials can be sued “for the purpose of enjoining the enforcement of an unconstitutional state statute.”<sup>75</sup> But Judge Jolly read the *Ex parte Young* doctrine as requiring that officials be closely connected to the enforcement of the challenged law before they may be sued.<sup>76</sup> He asserted that the *Ex parte Young* doctrine hinges on both a “particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty.”<sup>77</sup> Because the Act provided only for private lawsuits and gave no enforcement role to the state, Judge Jolly concluded that the governor and attorney general lacked the necessary connection to enforcement of the Act.<sup>78</sup>

Judge Jolly also found “seriously erroneous” the panel’s two-part test, in which it situated the law on a continuum between public regulation and private action.<sup>79</sup> As to the first prong, Judge Jolly rejected the notion that the requisite enforcement connection could be established by an “undefined, inchoate, general duty to see that all of the laws of the state are enforced.”<sup>80</sup> He rejected the second prong entirely, questioning courts’ ability to determine where different laws belong on a spectrum of public-to-private regulation.<sup>81</sup>

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71. *Id.*

72. *Id.* at 424.

73. *Id.* at 408. In concurrence, Judge Higginbotham argued that the Article III question was dispositive and that the court should not have reached the Eleventh Amendment issue at all. *See id.* at 429–30 (Higginbotham, J., concurring).

74. *See id.* at 411–24.

75. *Id.* at 411.

76. *Id.* at 415 (“*Young* requires both a close connection between the official and the act and the threatening or commencement of enforcement proceedings by the official.”). Elsewhere, he described *Young* as requiring simply “*some connection*” between defendant state officials and enforcement of the act. *See id.* at 416.

77. *Id.*

78. *See id.* at 416–17, 423.

79. *Id.* at 417.

80. *Id.* at 418.

81. *See id.* at 421.

Judge Jolly, now writing for the majority, then turned to the question of Article III standing, summarizing the three criteria necessary to establish a case or controversy under Article III: (1) injury in fact, (2) a causal connection between the injury and the conduct complained of, and (3) redressibility.<sup>82</sup> The court did not dispute that the plaintiffs had suffered an injury, implying that injury in fact could result from a coercively self-enforcing statute.<sup>83</sup> The court found, however, that the plaintiffs had not proven causation or redressability: “[T]he panel confuses the *statute’s* immediate coercive effect on the plaintiffs with any coercive effect that might be applied by the *defendants*—that is, the Governor and the Attorney General.”<sup>84</sup> Moreover, Judge Jolly reasoned that an injunction against the defendants would be “utterly meaningless” because they had neither the power to enforce the statute nor the power to prevent a private plaintiff from filing suit under the law.<sup>85</sup>

The court also rejected the plaintiffs’ concern that, by refusing to consider the merits of the case, the court would allow an unconstitutional statute to remain law.<sup>86</sup> The court rejoined that “anyone exposed to actual liability under this statute has immediate redress—that is to say, a defendant sued by a private plaintiff under Act 825 can immediately and forthwith challenge the constitutionality of the statute.”<sup>87</sup>

#### B. THE TENTH CIRCUIT: *NOVA HEALTH SYSTEMS V. GANDY*

Soon after the Fifth Circuit’s decision, the Oklahoma legislature enacted a strikingly similar law.<sup>88</sup> Rather than threatening the provision of all abortions, however, Oklahoma’s enactment effectively imposed an unconstitutional parental consent requirement on teenagers seeking abortions.<sup>89</sup> The statute imposed upon “[a]ny person who performs an abortion on a minor without parental consent or knowledge” civil liability “for the cost of any subsequent medical treatment such minor might require

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82. *See id.* at 425.

83. *See id.* at 426.

84. *Id.* at 426–27.

85. *Id.*

86. *See id.* at 429 n.40.

87. *Id.* The statute was later challenged in state court, but this lawsuit was also dismissed for lack of a justiciable controversy. *See supra* note 12.

88. 2001 Okla. Sess. Laws, c. 379, § 2 (codified at OKLA. STAT. ANN. tit. 63, § 1-740 (West 2004)).

89. *See* OKLA. STAT. ANN. tit. 63, § 1-740 (West 2004) (requiring parental consent for minors as a prerequisite to receiving an abortion, but without allowing for any form of judicial bypass, as required by *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 899 (1992)).

because of the abortion.”<sup>90</sup> Like the Louisiana statute, the law imposed strict liability and assigned the state no direct enforcement role.<sup>91</sup> Instead, the threat of private lawsuits forced providers to choose between refusing to provide abortions to minors without parental consent or risking potentially major civil liability regardless of fault or malpractice. Also like the Louisiana statute, Oklahoma’s initial version of the law would undoubtedly have been struck as unconstitutional had the appellate court reached the merits of the case: parental notification or consent laws for abortion must include exceptions for teenagers whose health is at risk and must provide some judicial mechanism for teenagers to bypass the parental involvement requirement.<sup>92</sup>

The statute was challenged by Nova Health Systems, which operates a medical clinic offering reproductive health services, including abortions.<sup>93</sup> Because the statute did not limit lawsuits to parents or other private individuals, Nova named as defendants government officials who oversaw health facilities that might provide postabortion medical care to teenagers and who might sue Nova to recover the costs of such care.<sup>94</sup> The defendants countered that they were entitled to Eleventh Amendment immunity.<sup>95</sup> They argued that, as in *Okpalobi*, the state could not be sued because it lacked any enforcement role.<sup>96</sup> Moreover, the defendants argued that they had not enforced or threatened to enforce the law. They asserted that any claim that they might enforce the law by seeking to recover medical costs from Nova Health Systems was speculative and therefore not ripe for review.<sup>97</sup>

The Federal District Court for the Northern District of Oklahoma addressed justiciability issues in two separate rulings at various procedural

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90. *Id.*

91. *See id.*

92. *See Ayotte v. Planned Parenthood of N. New Eng.*, 126 S. Ct. 961, 966–67 (2006); *Casey*, 505 U.S. at 899 (1992). The “judicial bypass” mechanism that has become standard in such legislation allows a teenager to be granted access to an abortion without her parents’ involvement if she proves to a judge that she is either mature enough to choose the abortion on her own or that an abortion would be in her best interests. *See, e.g., Bellotti v. Baird*, 443 U.S. 622, 643–44, 651 (1979). Oklahoma revised its statute in 2005 to include a judicial bypass option and a medical emergency exception. *See OKLA. STAT. ANN. tit. 63, §§ 1-740.1 to -740.3* (West Supp. 2006). Oklahoma also made conducting such abortions a misdemeanor. *Id.* § 1-740.4 (Supp. 2006).

93. *See Nova Health Sys. v. Fogarty*, No. 01-CV-0419-EA, 2002 WL 32595281, at \*1 (N.D. Okla. June 14, 2002). Nova sued on behalf of itself and its minor abortion patients.

94. *See Nova Health Sys.*, 2002 WL 32595281, at \*1–2.

95. *Id.*

96. *See id.* at \*3.

97. *See id.* at \*2–3.

points in the case.<sup>98</sup> In each opinion, the court held that the Eleventh Amendment did not bar Nova's claims against several defendants.<sup>99</sup> The court held that an imminent threat of enforcement was not required, finding that the statute's chilling effect would otherwise "virtually immunize the statute . . . from pre-enforcement challenge."<sup>100</sup> In its first ruling, the court found that several state defendants did have authority to "enforce the challenged statute if they provided the requisite 'subsequent medical treatment'" and allowed the lawsuit to proceed against those defendants.<sup>101</sup> In its second ruling, the court concluded that the statute's chilling effect resolved the ripeness question. The court declared, "[I]f this case is not ripe now, it never will be," as Nova had already begun to refuse abortions to minors who lacked "written, in-person consent from a parent."<sup>102</sup>

The court also found that the plaintiffs met Article III standing requirements.<sup>103</sup> First, the court held that the statute imposed a risk of financial loss upon Nova, thereby satisfying the "injury-in-fact" requirement.<sup>104</sup> Second, the court held that this injury was "'fairly traceable'" to the defendants' ability to sue Nova for recovery of medical costs.<sup>105</sup> Third, the court held that redressability was met because declaratory relief would redress Nova's injury by deterring potential litigants and helping Nova defend itself against suits, while injunctive relief would prevent the named defendants from suing.<sup>106</sup> Turning to the merits, the district court held the statute unconstitutional, finding that it imposed an undue burden on minors seeking an abortion because it would force Nova to require parental consent without providing for either a judicial bypass option or an exception for the health of the minor.<sup>107</sup> The court also concluded that the statute was unconstitutionally vague.<sup>108</sup>

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98. See *id.* at \*1–5, \*14; *Nova Health Sys. v. Fogarty*, No. 01-CV-419-K(E), slip op. at 5–6 (N.D. Okla. Oct. 15, 2001).

99. See *Nova Health Sys.*, No. 01-CV-419-K(E), slip op. at 5–11; *Nova Health Sys.*, 2002 WL 32595281, at \*2 (rejecting the defendants' renewed assertions that the Eleventh Amendment barred the plaintiffs' claims).

100. *Nova Health Sys.*, No. 01-CV-419-K(E), slip op. at 5–6.

101. *Id.* at 8.

102. See *Nova Health Sys.*, 2002 WL 32595281, at \*3.

103. *Id.* at \*5.

104. *Id.* at \*4.

105. *Id.* at \*5 (quoting *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 261 (1977)).

106. *Id.*

107. *Id.* at \*13. Oklahoma later revised its statute to address these infirmities. See *supra* note 92.

108. *Id.* at \*12–13.

The Tenth Circuit reversed the district court's decision on the grounds that there was no genuine case or controversy between the parties.<sup>109</sup> The court agreed that Nova sufficiently demonstrated "that it faced a concrete and imminent injury in fact," namely the loss of potential abortion patients under Nova's new policy requiring in-person parental consent for minors.<sup>110</sup> However, the court found that Nova had failed to establish a causal connection between this injury and the named defendants.<sup>111</sup> The court acknowledged that the enactment of the tort statute had "coerced [Nova] into requiring at least some sort of parental involvement prior to performing an abortion on a minor."<sup>112</sup> But the court distinguished the statute's coercive effect from any action that the defendants might take, finding the latter to be purely speculative.<sup>113</sup> "A party may not attack a tort statute in federal court simply by naming as a defendant anyone who might someday have a cause of action under the challenged law."<sup>114</sup>

For similar reasons, the court found that an injunction against the named defendants would not redress the plaintiff's injury, because "there would still be a multitude of other prospective litigants who could potentially sue Nova under that act."<sup>115</sup> The court also rejected as overly speculative the notion that a declaratory judgment would redress Nova's injury by deterring potential litigants.<sup>116</sup> Moreover, the court stated that redressability must be measured by the effect of the court's judgment on a defendant, not on those who are not parties to the action.<sup>117</sup> Finally, the Tenth Circuit panel noted the lack of "concrete adverseness"<sup>118</sup> between the parties and concluded that the named defendants—hospital directors and university administrators—did not have a particularly strong incentive "to defend a politically divisive abortion statute."<sup>119</sup>

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109. *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1153 (10th Cir. 2005).

110. *Id.* at 1155.

111. *Id.* at 1156.

112. *Id.*

113. *Id.* at 1157.

114. *Id.* at 1153.

115. *Id.* at 1158–59.

116. *Id.* at 1159–60.

117. *Id.* at 1159.

118. *Id.* at 1160 (quoting *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72 (1978)).

119. *Id.*

C. A CRITIQUE OF THE FIFTH AND TENTH CIRCUITS' REASONING IN  
*OKPALOBI* AND *NOVA*

1. Article III Case or Controversy

The Fifth Circuit justifiably rejected the plaintiffs' claims for injunctive relief against the governor and attorney general in *Okpalobi* on the grounds that an injunction against these defendants would not redress the plaintiffs' injuries.<sup>120</sup> Private citizens, not the state of Louisiana, are the ones empowered to sue under the statute. An injunction against the named state officials would effectively be meaningless—the officials had no enforcement power to enjoin and an injunction would not bar private suits.<sup>121</sup> Judge Benavides, who dissented in part in *Okpalobi*, agreed.<sup>122</sup> As Judge Benavides concluded, however, the Fifth Circuit should have granted the plaintiffs standing on their claim for declaratory judgment—the *Okpalobi* plaintiffs *did* satisfy the constitutional standing requirements for a declaratory judgment that the statute was unconstitutional.<sup>123</sup>

The Declaratory Judgment Act permits a federal court, in a “case of actual controversy,” to “declare the rights and other legal relations of any interested party seeking such declaration.”<sup>124</sup> The Act “manifestly has regard to . . . [Article III] and is operative only in respect to controversies which are such in the constitutional sense.”<sup>125</sup> Nevertheless, the Supreme Court has employed somewhat different language in describing standing requirements under the Act from the three-part test used to determine standing generally under Article III. In *Aetna Life Insurance Co. v. Haworth*, the Court explained that a “justiciable controversy” under the Declaratory Judgment Act must be “a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.”<sup>126</sup> In a later decision, the Court stated that, to

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120. See *Okpalobi v. Foster*, 244 F.3d 405, 427 (5th Cir. 2001) (en banc).

121. Arguably, the court could have enjoined the attorney general from intervening in any private lawsuit to defend the constitutionality of the statute. But had the court granted declaratory relief, res judicata would bar the attorney general from intervening in private lawsuits brought under the statute, rendering any such injunction superfluous.

122. See *Okpalobi*, 244 F.3d at 433, 436 (Benavides, J., concurring in part and dissenting in part).

123. *Id.* at 433–36.

124. 28 U.S.C. § 2201(a) (2000). A declaratory judgment is an independent source of relief; plaintiffs need not pair their request for such a judgment with a claim for an injunction. See *Steffel v. Thompson*, 415 U.S. 452, 462–63 (1974).

125. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239–40 (1937).

126. *Id.* at 240–41.

determine whether plaintiffs have standing under the Act, a court must consider “whether the facts alleged, *under all the circumstances*, show that there is a substantial controversy, between parties having adverse legal interests, of *sufficient immediacy and reality* to warrant the issuance of a declaratory judgment.”<sup>127</sup>

Where plaintiffs, in response to an unconstitutional, strict liability scheme, stop engaging in conduct rather than risk catastrophic damages, the controversy could scarcely be more immediate and real. Unlike a case in which injury is speculative and contingent upon unforeseeable events, a plaintiff’s injury in such a case has already occurred and will continue until the statute is declared unconstitutional. Even the majority in *Okpalobi* acknowledged “the statute’s immediate coercive effect on the plaintiffs.”<sup>128</sup>

Moreover, adverseness between the parties is clearly present when a state must defend the constitutionality of a self-enforcing law that implements controversial social policy, even where the state retains no formal enforcement role.<sup>129</sup> In both *Okpalobi* and *Nova*, such an adverseness was evident. The court in *Nova* noted that the named defendants (state-owned health care providers) had no particular incentive to defend the controversial statute’s constitutionality.<sup>130</sup> Yet the policymakers who enacted the statute were clearly motivated to do so, filing an amicus brief urging the court to uphold the statute.<sup>131</sup> Likewise, in *Okpalobi*, both the governor and attorney general initially mounted a vigorous defense of the statute’s merits until the Fifth Circuit panel sua sponte addressed the issues of Article III standing and sovereign immunity.<sup>132</sup> Although the states’ eagerness to defend the statute’s merits may not *itself* generate standing, it “creates the odor of a ‘case or controversy’—precisely what [the state] claims is absent.”<sup>133</sup> Thus,

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127. See *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941) (emphasis added). This implies a distinct Article III standing test under the Declaratory Judgment Act. Some courts, however, have considered traditional Article III standing to be a predicate for standing under the Declaratory Judgment Act. See, e.g., *Lawson v. Callahan*, 111 F.3d 403, 405 (5th Cir. 1997) (holding that the Declaratory Judgment Act does not independently convey federal subject matter jurisdiction and that the “actual controversy” requirement under the Act is “identical to the meaning of ‘case or controversy’ for the purposes of Article III”).

128. See *Okpalobi*, 244 F.3d at 426 (emphasis omitted).

129. See *id.* at 443 (Parker, J., dissenting) (considering that “privatizing the enforcement of unlimited monetary damages . . . is undoubtedly a state-sanctioned penalty”).

130. See *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1160 (10th Cir. 2005).

131. See *id.* at 1149.

132. See *Okpalobi*, 244 F.3d at 410 n.5; *Okpalobi v. Foster*, 981 F. Supp. 977, 982–83 (E.D. La. 1998).

133. See *Mobil Oil Corp. v. Attorney Gen.*, 940 F.2d 73, 77 (4th Cir. 1991).

plaintiffs seeking declaratory judgments that invalidate statutes like those challenged in *Okpalobi* and *Nova* readily meet the standing test employed pursuant to the Declaratory Judgment Act.

Indeed, such plaintiffs even meet the traditional test for standing under Article III. Article III of the Constitution limits federal courts to deciding “cases” or “controversies.”<sup>134</sup> In order to establish a case or controversy, plaintiffs must meet three requirements: they must allege (1) a personal injury that is (2) fairly traceable to the defendant’s allegedly unlawful conduct and (3) likely to be redressed by the requested relief.<sup>135</sup>

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134. U.S. CONST. art. III, § 2.

135. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

### a. Injury-in-Fact Requirement

Plaintiffs meet the injury-in-fact requirement when a statute forces them to change their conduct in order to avoid liability or prosecution. For example, in *Virginia v. American Booksellers Ass'n*, the Supreme Court addressed the constitutionality of a statute that restricted the commercial display of certain “visual or written material that ‘depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles.’”<sup>136</sup> The Court noted, “[T]he alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution.”<sup>137</sup> Statutes like those enacted by Louisiana and Oklahoma use the fear of tort liability to compel individuals or entities to stop engaging in conduct they believe is constitutionally protected.

In both *Okpalobi* and *Nova*, the defendants asserted that there was no injury in fact because neither they nor anyone else had actually threatened to enforce the statute. Although the doctrine of ripeness requires that the “injury in fact be certainly impending,”<sup>138</sup> courts have not always required an actual threat of enforcement to establish ripeness, particularly when an allegedly unconstitutional statute chills conduct.<sup>139</sup> Rather, courts have traditionally found the injury element met if plaintiffs would otherwise be “put to the Hobson’s choice of giving up an intended course of conduct which . . . [they believe they are] entitled to undertake or facing possible severe civil or criminal consequences.”<sup>140</sup> Courts have even entertained

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136. *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 386 (1988) (quoting VA. CODE ANN. § 18.2-391(a) (Supp. 1987)).

137. *Id.* at 393. See also *Mobil Oil Corp.*, 940 F.2d at 76 (finding that a plaintiff meets the injury-in-fact requirement for standing when that plaintiff self-censors by complying with the statute in order to avoid enforcement).

138. See *Nat'l Treasury Employees Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996).

139. See *Am. Booksellers*, 484 U.S. at 393 (“We are not troubled by the pre-enforcement nature of this suit. . . . [P]laintiffs have alleged an actual and well-founded *fear* that the law will be enforced against them.” (emphasis added)).

140. See *Tex. Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491, 507 n.22 (5th Cir. 1988) (en banc). See also *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 282–83 (6th Cir. 1997) (stating that the plaintiffs, who abandoned a line of business in response to passage of gun control legislation, “have alleged an immediate, concrete injury-in-fact”). In *Younger v. Harris*, the Supreme Court seemed to view skeptically the propriety of federal courts issuing pre-enforcement injunctions based on a statute’s facial unconstitutionality. *Younger v. Harris*, 401 U.S. 37, 42, 50 (1971) (holding that merely feeling “inhibited” from engaging in constitutionally protected speech was insufficient for a plaintiff to establish jurisdiction for a federal court to enjoin the prosecution of another under a state statute). But in later cases, the Court has made clear that *Younger* is “expressly limited to situations where state prosecutions were pending when the federal action commenced.” *Steffel v. Thompson*, 415 U.S. 452, 457 (1974). Thus, in *Younger*, the constitutionality of the statute would theoretically be addressed by the defendant in the pending state action, making other actions potentially moot. This is not the case

lawsuits where the state's attorney general not only failed to threaten enforcement, but also declined to defend a statute, agreeing that it was unconstitutional.<sup>141</sup> Plaintiffs challenging the constitutionality of self-enforcing tort statutes thus easily satisfy the injury requirement under Article III. Indeed, neither the Fifth nor the Tenth Circuit questioned the existence of an injury in fact in *Okpalobi* and *Nova*.

b. Causation Requirement

The requirement of causation raises a harder question. Both the Fifth and Tenth Circuits concluded that the plaintiffs' injuries in each case were not caused by the named state officials.<sup>142</sup> In *Okpalobi*, the state lacked any specific enforcement role whatsoever.<sup>143</sup> In *Nova*, the named state officials were just a few of the many parties who arguably could have sued to recover the costs of medical treatment; there was no official role for the state in the Oklahoma statute.<sup>144</sup>

In refusing to find causation in each case, the courts in *Okpalobi* and *Nova* focused on whether the individual defendants had themselves caused the plaintiffs' injuries.<sup>145</sup> But this is the wrong approach to causation in these cases. The injury to plaintiffs in self-executing statutory liability schemes has by definition occurred before any individual state official's involvement in enforcing the law. As both courts recognized, the injury lies in an unconstitutional statute coercing the cessation of protected

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with self-executing, private enforcement schemes. If the statute chills the targeted conduct, no state action will ever commence, foreclosing even this avenue for asserting the constitutional arguments.

141. See, e.g., *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 131 (3d Cir. 2000). When the attorney general, the New Jersey Board of Medical Examiners, and the commissioner of the state's Department of Health and Senior Services all declined to defend New Jersey's "partial-birth abortion" ban, the state legislature appointed private counsel to intervene. See *id.*

142. See *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1156 (10th Cir. 2005); *Okpalobi v. Foster*, 244 F.3d 405, 426–27 (5th Cir. 2001) (en banc). In *Nova*, the Tenth Circuit declared that a "but for" causal connection between plaintiff's injury and defendant is required. *Nova Health Sys. v. Gandy*, 388 F.3d 744, 750–51 (10th Cir. 2004). This conclusion is inconsistent with Supreme Court precedents on Article III standing, however. See, e.g., *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 75 n.20, 77 (1978) (stating that iron-clad proof of "but for" causation is not required to establish causation or redressability). As the dissent in *Nova* pointed out, the standard is not "but for" causation, but whether injury is "fairly traceable" to defendants' conduct, a lower standard. *Nova Health Sys.*, 388 F.3d at 756 & n.1 (Briscoe, J., concurring in part and dissenting in part). See also *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180 (2000) (requiring only that an injury be "fairly traceable to the challenged action of the defendant"); *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (same); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (same).

143. See *Okpalobi*, 244 F.3d at 426–27.

144. See *Nova Health Sys. v. Fogarty*, No. 01-CV-0419-EA, 2002 WL 32595281, at \*1–2 (N.D. Okla. June 14, 2002).

145. See *Nova Health Sys.*, 416 F.3d at 1156; *Okpalobi*, 244 F.3d at 426–27.

conduct.<sup>146</sup> The plaintiffs in *Okpalobi* did not sue the state officials because of anything they did as individuals.<sup>147</sup> Rather, they sued them as representatives of the state itself.<sup>148</sup> The *state*, not any private individual or even any individual state official, caused their injuries by enacting a statute designed to produce this kind of chilling effect.<sup>149</sup> The majority in *Okpalobi* missed the mark when it claimed that “it is the private plaintiff, bringing a private lawsuit under Act 825, who causes the injury of which the plaintiffs complain.”<sup>150</sup>

Dissenting judges in both *Okpalobi* and *Nova* recognized this. In *Okpalobi*, Judge Benavides pointed out that plaintiffs’ injury—giving up an intended course of conduct rather than risking substantial civil liability—was “directly traceable to *the promulgation of [the] Act.*”<sup>151</sup> Likewise, Judge Briscoe, dissenting in *Nova*, recognized that state officials are sued in such cases not because the particular official “is himself a source of injury, but because the official represents the state whose statute is being challenged as the source of injury.”<sup>152</sup> Other courts, addressing state-enforced prohibitions, have likewise recognized that Article III injury can be caused by the very enactment of coercively self-enforcing statutes.<sup>153</sup>

Of course, the specific state bodies that caused the injury in *Okpalobi* and *Nova* are the state legislatures and governors that enacted the self-

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146. See *Nova Health Sys.*, 416 F.3d at 1155; *Okpalobi*, 244 F.3d at 426.

147. See *supra* notes 50–51 and accompanying text (discussing why the plaintiffs sued the particular named defendants in *Okpalobi*). The *Ex parte Young* fiction posits that government officials sued in challenges to unconstitutional laws are “stripped of [their] official or representative character,” thus permitting them to be sued despite a state’s Eleventh Amendment sovereign immunity. See *Ex parte Young*, 209 U.S. 123, 160 (1908). But federal courts, including the Supreme Court, have acknowledged the limits of this fiction. See *infra* notes 227–232 and accompanying text (discussing same).

148. See *Okpalobi v. Foster*, 981 F. Supp. 977, 977–78 (E.D. La. 1998). Cf. *Mobil Oil Corp. v. Attorney Gen.*, 940 F.2d 73, 76 n.2 (4th Cir. 1991) (noting that “[t]he Attorney General tries to distance herself from the state, but we think a dispute with a state suffices to create a dispute with the state’s enforcement officer sued in a representative capacity,” and that “a controversy exists not because the state official is himself a source of injury but because the official represents the state whose statute is being challenged as the source of injury.” (quoting *Wilson v. Stocker*, 819 F.2d 943, 947 (10th Cir. 1987))).

149. See *Okpalobi*, 244 F.3d at 443 (Parker, J., dissenting) (“By privatizing the enforcement of unlimited monetary damages, which is undoubtedly a state-sanctioned penalty, the State is . . . effecting a coercive impact so drastic that abortion providers have no choice but to cease operations.”).

150. See *id.* at 428 (en banc) (emphasis omitted).

151. *Okpalobi*, 244 F.3d at 435 (Benavides, J., concurring in part and dissenting in part) (emphasis added). See also *Nova Health Sys.*, 416 F.3d at 1162 (Briscoe, J., concurring in part and dissenting in part) (stating that “the statute’s mere existence presents an ‘appreciable threat of injury’” by causing plaintiffs to cease providing abortions to minors without in-person parental consent).

152. See *Nova Health Sys.*, 416 F.3d at 1161–62 (internal quotation marks omitted).

153. See, e.g., *Nat’l Rifle Ass’n of Am. v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997).

executing liability scheme. In addition, the state courts stand in as a kind of shadow enforcer, because they are implicitly charged with hearing the private lawsuits authorized by the statute. Absent state court adjudication of these claims, the private lawsuits would carry no threat.<sup>154</sup> The legislators and judges are immune from suit.<sup>155</sup> The governors, however, were also instrumental because they signed the bills into law, ensuring that the policies would take effect.<sup>156</sup> The chill of the plaintiffs' constitutionally protected conduct in each case is thus "directly traceable" to the governor's actions, making the governor an appropriate defendant.<sup>157</sup>

Moreover, once the statute becomes law, it becomes the responsibility of the executive branch—in particular the attorney general, the state's "chief legal officer"<sup>158</sup>—to enforce and defend it.<sup>159</sup> Indeed, attorneys general can, and often do, intervene in private lawsuits in order to defend the constitutionality of statutes.<sup>160</sup> It is entirely appropriate for them to be called upon to defend statutes like these, which enact social policy on

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154. Cf. *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948) (finding state action where "states have made available to such [private] individuals the full coercive power of government" through judicial enforcement of private, racially restrictive covenants).

155. See, e.g., *Tenney v. Brandhove*, 341 U.S. 367, 372–78 (1951) (detailing the scope of legislative immunity); *Bradley v. Fisher*, 80 U.S. 335, 347–49 (1871) (discussing judicial immunity).

156. Had the governor vetoed the legislation, it could have taken effect only upon the legislature's override. In this case, the plaintiffs' injury would not be traceable to the governor, but, as I argue below, plaintiffs should still be allowed to sue the attorney general. Moreover, a similar causal line could be drawn to other officials who played a role in making the statute effective. See, e.g., *Allied Artists Pictures Corp. v. Rhodes*, 473 F. Supp. 560, 563 (S.D. Ohio 1979) (hearing a case where the plaintiffs sued, inter alia, the secretary of state, who accepted the act for filing and thus caused it to become part of the Revised Code of Ohio). *But see id.* at 569–70 (finding that the secretary of state lacked a sufficient connection to the enforcement of the act and was thus protected by the principles of sovereign immunity).

157. A governor's signing of an unconstitutional statute into law is a sufficient causal connection to support jurisdiction even under the Tenth Circuit's more stringent—and probably erroneous—requirement of "but for" causation. Compare *Nova Health Sys. v. Gandy*, 388 F.3d 744, 750–51 (10th Cir. 2004) (suggesting a "but for" causation requirement for standing), *with id.* at 756 & n.1 (Briscoe, J., concurring in part and dissenting in part) (disputing the majority's requirement of "but for" causation as unsupported by precedent). See also *supra* note 142.

158. See, e.g., LA. CONST. art. IV, § 8. In some states, the governor is constitutionally or statutorily entrusted with the general power to enforce the state's laws or to see that the laws are faithfully executed. See *Allied Artists Pictures Corp.*, 473 F. Supp. at 566–67.

159. See LA. REV. STAT. ANN. § 49:257 (2003) ("Notwithstanding any other law to the contrary, the attorney general, at his discretion, shall represent or supervise the representation of the interests of the state in any action or proceeding in which the constitutionality of a state statute . . . of the legislature is challenged or assailed."). See also *id.* § 13:4448 (1991) ("Prior to adjudicating the constitutionality of a statute of the state of Louisiana, the courts of appeal and the Supreme Court of Louisiana shall notify the attorney general of the proceeding and afford him an opportunity to be heard.").

160. See, e.g., LA. CONST. art. IV, § 8 ("As necessary for the assertion or protection of any right or interest of the state, the attorney general shall have authority . . . to institute, prosecute, or intervene in any civil action or proceeding . . .").

behalf of the state in a constitutionally suspect way.<sup>161</sup> In *Mobil Oil Corp. v. Attorney General*, the Fourth Circuit relied heavily on the state attorney general's right to intervene when it held that a challenge to provisions of the Virginia Petroleum Products Franchise Act presented an Article III case or controversy between the attorney general and the plaintiffs.<sup>162</sup> The attorney general had argued that her enforcement power under the statute was discretionary and that the statute was "intended to be enforced by private suits."<sup>163</sup> The Fourth Circuit deemed this "irrelevant," noting that the attorney general could, in any such private suit, intervene to defend the statute's constitutionality.<sup>164</sup> The court concluded, "[This] case is precisely the one for which the Declaratory Judgments [sic] Act was designed. Public policy should encourage a person aggrieved by laws he considers unconstitutional to seek a declaratory judgment against the arm of the state entrusted with the state's enforcement power."<sup>165</sup>

Requiring the injury to be traceable to an individual or entity who might file a private suit under the statute is equivalent to denying a constitutional challenge altogether. The Tenth Circuit in *Nova* considered any threat posed by the named defendants too speculative, noting that "nothing in the record distinguishes these defendants from any other party who might one day have the occasion to seek compensatory damages under the challenged statute as a civil plaintiff."<sup>166</sup> Of course, this could be said of any given potential claimant. Because the ability to sue for damages under the statute depends upon unpredictable events, abortion providers cannot know in advance who will sue them.<sup>167</sup> If they are unable to obtain prospective relief, their safest course is to comply with the statute. Those targeted by self-executing, private liability schemes would thus take cold comfort from the *Okpalobi* majority's assurance that "anyone exposed to actual liability under . . . [such a] statute has immediate redress—that is to say, a defendant sued by a private plaintiff . . . can immediately and

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161. Whether a sued state official must have some specific "connection" to the challenged statute in order to overcome claims of sovereign immunity is a different question, addressed by the *Ex parte Young* analysis. See *infra* Part III.C.2 (discussing Eleventh Amendment sovereign immunity analysis).

162. See *Mobil Oil Corp. v. Attorney Gen.*, 940 F.2d 73, 75–77 (4th Cir. 1991).

163. *Id.* at 76.

164. *Id.* at 76–77.

165. *Id.* at 75.

166. See *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1153 (10th Cir. 2005).

167. Under the Oklahoma statute, for example, a cause of action for damages would only arise upon a minor patient's need for medical treatment *after* an abortion. As such, future abortion patients would have neither an immediate cause of action against providers nor an anticipation of some cause of action. See OKLA. STAT. ANN. tit. 63, § 1-740 (West 2004).

forthwith challenge the constitutionality of the statute.”<sup>168</sup> If they cease to engage in the targeted conduct—a result the statutes seem designed to produce—these individuals will never obtain redress, immediate or otherwise.

c. Redressability Requirement

Redressability, the third element required for Article III standing, was also a sticking point for the courts in *Okpalobi* and *Nova*.<sup>169</sup> The Supreme Court has stated that “when a plaintiff’s standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is *likely to be redressed by a favorable decision*.”<sup>170</sup> Redressability does not imply absolute certainty that the requested relief will redress the injury. As the Supreme Court has noted, “Our recent cases have required no more than a showing that there is a ‘substantial likelihood’ that the relief requested will redress the injury claimed . . . .”<sup>171</sup>

A declaratory judgment against the governor or attorney general would have redressed the plaintiffs’ injuries by providing them sufficient assurance to continue providing abortions. As certain as one might be that a statute is unconstitutional, when faced with potentially grave financial consequences, risk-averse individuals will be deterred by even a small chance that a court might disagree. A lower federal court’s declaration of unconstitutionality would not technically be binding upon state courts. But in confirming a plaintiff’s assessment of the statute’s infirmity, the declaration would give plaintiffs the comfort needed to resume providing abortions.<sup>172</sup>

A declaratory judgment, although not officially binding on private parties, would also likely deter private lawsuits. The Supreme Court has found redressability when actors who were not parties to a lawsuit could be expected to amend their conduct in response to a court’s declaration. For example, in *Franklin v. Massachusetts*, plaintiffs sued the Secretary of Commerce and the President in challenging the allocation of the Department of Defense’s overseas employees to particular states for

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168. *Okpalobi v. Foster*, 244 F.3d 405, 429 n.40 (5th Cir. 2001) (en banc).

169. *See Nova Health Sys.*, 416 F.3d at 1158–60; *Okpalobi*, 244 F.3d at 426–27.

170. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976) (emphasis added).

171. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 75 n.20 (1978).

172. *See, e.g., Okpalobi*, 244 F.3d at 436 (Benavides, J., concurring in part and dissenting in part) (“The requested declaration sufficiently redresses [the] injury by granting the plaintiffs a substantial basis for confidence in the constitutionality of their conduct.”).

reapportionment purposes in the 1990 census.<sup>173</sup> Justice O'Connor questioned the propriety of an injunction against the President, but she concluded that redressability was met in any event because "the injury alleged [was] likely to be redressed by declaratory relief against the Secretary alone."<sup>174</sup> She further explained, "[W]e may assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision by the District Court, even though they would not be directly bound by such a determination."<sup>175</sup>

Even if a private lawsuit were brought, a declaratory judgment would help secure a quick victory for the defendants because a court would likely find the prior determination of unconstitutionality persuasive. Moreover, in response to the declaration of unconstitutionality, the legislature might repeal or amend the statute.<sup>176</sup> In the absence of such legislative action, the attorney general might issue an opinion advising that private lawsuits brought under the act would fail due to the statute's unconstitutionality,

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173. See *Franklin v. Massachusetts*, 505 U.S. 788, 790–91 (1992).

174. *Id.* at 803 (O'Connor, J.).

175. *Id.* Justice O'Connor's views in *Franklin* contradict the Tenth Circuit's assertion that redressability must be determined solely by a judgment's effect on the named defendants. See *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1158–60 (10th Cir. 2005) (defining redressability solely in terms of any effect on the defendants in the case). While only three Justices joined the portion of Justice O'Connor's opinion that found redressability, a majority of Justices implicitly agreed that the requirements for standing were met. See *Franklin*, 505 U.S. at 824 n.1 (Scalia, J., concurring in part and dissenting in part) ("Although only a plurality of the Court joins that portion of Justice O'Connor's opinion which finds standing (Part III), I must conclude that the Court finds standing since eight Justices join Part IV of the Court's opinion discussing the merits of appellees' constitutional claims.").

In *Lujan v. Defenders of Wildlife*, Justice Scalia asserted that redressability was lacking where the named defendant, the Secretary of the Interior, lacked binding authority over the funding agencies whose decisions to fund particular projects caused the alleged harm. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568–69 (1992) (Scalia, J.). But this part of Scalia's opinion was not joined by a majority of the Court; other justices expressly refused to reach the issue of redressability. See, e.g., *id.* at 580 (Kennedy, J., concurring in part and concurring in the judgment) (noting that the plaintiff's failure to show an injury was dispositive and therefore the issue of redressability need not be addressed).

Moreover, once the element of causation has been established, the Court has seemed less concerned about connecting the element of redressability to the named defendants. Instead, the Court has focused on the ability of the courts to redress the claimed injury. See, e.g., *Utah v. Evans*, 536 U.S. 452, 459 (2002) ("A lawsuit does not fall within this grant of judicial authority unless, among other things, courts have the power to 'redress' the 'injury' that the defendant allegedly 'caused' the plaintiff.").

176. See, e.g., *Okpalobi*, 244 F.3d at 440 n.13 (Benavides, J., concurring in part and dissenting in part) (noting the persuasive effect that a declaratory judgment might have on a state legislature).

further deterring private suits and giving plaintiffs comfort to resume the targeted conduct.<sup>177</sup>

The redressability requirement is satisfied by these likely effects of a declaratory judgment, even though the effects cannot be assured. As the Court recently suggested in *Utah v. Evans*, as long as the controversy before a court is concrete and adversarial, redressability “as a practical matter” must only be likely, not certain.<sup>178</sup> Moreover, the court’s order need not directly cause the action that ultimately redresses a plaintiff’s injury. The Court in *Evans* found standing met where “the courts would have ordered a change in a legal status . . . and the *practical consequence* of that change would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered.”<sup>179</sup>

The declaratory judgment remedy is precisely suited to redress injury caused by regulation that “imposes costly, self-executing compliance burdens.”<sup>180</sup> Judge Benavides, dissenting in *Okpalobi*, noted that Louisiana’s statute presented “what this Court has recognized as the classic situation for declaratory relief.”<sup>181</sup> Indeed, the legislative history of the federal Declaratory Judgment Act recognized that declaratory judgments have “been especially useful in avoiding the necessity . . . of having to act at one’s peril . . . or abandon one’s rights because of a fear of incurring damages.”<sup>182</sup>

#### d. Rationale Underlying the Article III Standing Requirements

In considering whether the discrete elements of the Article III standing test are met by plaintiffs challenging unconstitutional, self-enforcing private liability schemes, it is important not to lose sight of the underlying purpose of that test. The requirements of injury in fact, causation, and

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177. See, e.g., LA. REV. STAT. ANN. § 49:251 (2003) (providing that, upon request of the governor or “any political subdivision,” the attorney general shall give written opinions on “all questions of law”).

178. See *Evans*, 536 U.S. at 460 (noting that, in *Franklin*, 505 U.S. at 803 (O’Connor, J.), four justices found no further obstacle to standing if redress merely seemed likely).

179. *Id.* at 464 (emphasis added). See also *id.* at 461 (noting that the plaintiffs in *Franklin* and in *Evans* “reasonably believed that the Secretary’s recertification, as a practical matter, would likely lead to a new, more favorable, apportionment of Representatives”).

180. See *Minn. Citizens Concerned for Life v. FEC*, 113 F.3d 129, 132 (8th Cir. 1997) (considering that such hardship meets the requirements for a declaratory judgment remedy against an unconstitutional federal administrative regulation).

181. *Okpalobi*, 244 F.3d at 435 (Benavides, J., concurring in part and dissenting in part) (citing *Tex. Employers’ Ins. Ass’n v. Jackson*, 862 F.2d 491, 507 n.22 (5th Cir. 1988) (en banc) (stating same); *Nat’l Rifle Ass’n of Am. v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997) (stating same)).

182. See S. REP. NO. 73-1005, at 2–3, 6 (1934).

redressability are meant to substantiate the existence of a real case or controversy, as the Court may not issue advisory opinions.<sup>183</sup> The test ensures that each party has “such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.”<sup>184</sup>

As explained above, an adversarial stance is clearly present in cases challenging the constitutionality of self-enforcing tort laws that implement social policy. The state has an interest in defending the law, which it enacted in order to achieve a particular social goal.<sup>185</sup> Moreover, the state officials who enacted the laws are duty bound to uphold the federal Constitution.<sup>186</sup> The state is thus better positioned than private litigants to defend the constitutionality of such laws and has a direct interest in doing so.<sup>187</sup> As Judge Benavides noted in *Okpalobi*, “I have no doubt that the Attorney General’s interest in the constitutionality of the state’s laws guaranteed a strong advocate and served to identify and develop for this Court, and the district court, the relevant arguments.”<sup>188</sup>

It is appropriate to sue the governor or the attorney general even where these officials are themselves not personally invested in defending the statute.<sup>189</sup> State officials are occasionally reluctant to defend state laws against constitutional challenges, but this does not negate the fact that the state has caused the plaintiffs’ injury, nor does it undermine the appropriateness of requiring the attorney general or the governor to defend

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183. See, e.g., *Liverpool, N.Y. & Phila. S.S. Co. v. Comm’rs of Emigration*, 113 U.S. 33, 39 (1885) (holding that the Court has no power to declare any statute void unless the legal rights of litigants are being adjudicated in an actual case or controversy).

184. See *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72 (1978) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

185. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982) (noting that the “power to create and enforce a legal code” is among the most easily identifiable sovereign interests and is “regularly at issue in constitutional litigation”).

186. U.S. CONST. art. VI (requiring that state legislators and governors “shall be bound by Oath or Affirmation, to support this Constitution”).

187. See *Diamond v. Charles*, 476 U.S. 54, 65 (1986) (“Because the State alone is entitled to create a legal code, only the State has the kind of ‘direct stake’ identified in *Sierra Club v. Morton*, 405 U.S., at 740, in defending the standards embodied in that code.”). Cf. *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (O’Connor, J.) (“The Secretary certainly has an interest in defending her policy determinations concerning the census; even though she cannot herself change the reapportionment, she has an interest in litigating its accuracy.”).

188. *Okpalobi v. Foster*, 244 F.3d 405, 436 (5th Cir. 2001) (Benavides, J., concurring in part and dissenting in part).

189. See, e.g., *Romer v. Evans*, 517 U.S. 620, 625 (1996) (“Although Governor Romer had been on record opposing the adoption of Amendment 2, he was named in his official capacity as a defendant, together with the Colorado Attorney General and the State of Colorado.”).

the state's conduct.<sup>190</sup> *Romer v. Evans* provides a particularly stark example of this principle.<sup>191</sup> In *Romer*, the Colorado governor had publicly opposed the adoption of "Amendment 2," a state constitutional amendment that nullified all state and local laws prohibiting discrimination based on sexual orientation.<sup>192</sup> Not only did Governor Romer oppose the amendment, but he was also presumably charged with enforcing the very state laws that the constitutional amendment was intended to nullify.<sup>193</sup> Nevertheless, the Supreme Court never questioned the propriety of suing Romer, notwithstanding the state's lack of any formal role in "enforcing" the amendment, the state's countervailing duty to enforce the nullified laws, and Romer's officially stated opposition to the amendment.<sup>194</sup>

Paradoxically, concrete adverseness between the state and those challenging the law may become particularly evident at the moment the designated state official refuses to defend it. When New Jersey, over then-Governor Whitman's veto, passed a "partial-birth abortion" ban that contained several obvious constitutional infirmities, the New Jersey attorney general refused to defend it.<sup>195</sup> Unwavering in its determination to defend the statute, the legislature appointed private counsel to represent the state's interests, and the lawsuit proceeded with the attorney general as the named defendant.<sup>196</sup> The legislature's tenaciousness in defending its statute underscored the adverseness between the plaintiffs and the state in that case.

## 2. Sovereign Immunity

In *Okpalobi*, the en banc plurality was wrong to conclude that sovereign immunity should bar lawsuits challenging a state's enactment of an unconstitutional self-executing, private liability scheme.<sup>197</sup> The

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190. Moreover, if the attorney general declines to defend a law, the case may be settled by a consent decree in which the attorney general acknowledges (explicitly or implicitly) the statute's unconstitutionality. *See, e.g.,* *United States v. Seminole County Sch. Dist.*, 553 F.2d 992, 993–94 (5th Cir. 1977) (describing a consent decree under which the school board "conceded the existence of a . . . constitutional violation"). This may give sufficient comfort to those subject to the law to allow them to continue engaging in the prohibited activity.

191. *See Romer*, 517 U.S. at 624–25.

192. *See id.*

193. *See id.* at 624 (noting that the amendment "prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect . . . gays and lesbians").

194. *See id.* at 625–26 (noting the governor's status as a defendant and continuing to adjudicate the case without mention of any issues of standing).

195. *See Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 131 (3d Cir. 2000).

196. *See id.*

197. *Compare Okpalobi v. Foster*, 244 F.3d 405, 410–24 (5th Cir. 2001) (en banc) (analyzing, under the Eleventh Amendment doctrine articulated in *Ex parte Young*, the propriety of suing the

Eleventh Amendment has long been interpreted to protect a state's sovereign immunity against more than just the suits that are described in the Amendment itself.<sup>198</sup> Although the Amendment's text facially protects states from being subjected to suits under federal diversity jurisdiction, the Amendment has been held to protect a state from suits by its own citizens.<sup>199</sup> It has also been extended to suits invoking federal question rather than diversity jurisdiction.<sup>200</sup> Unlike the limitations on a federal court's power set forth in Article III, the Amendment does not prescribe an absolute jurisdictional limit—states may waive their immunity by consenting to suit and Congress may in certain instances abrogate states' immunity.<sup>201</sup> Nevertheless, the Court has described sovereign immunity as rooted in the very structure of the Constitution, asserting that “the scope of the States' immunity from suit is demarcated not by the text of the

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governor and other state officials to enjoin a tort liability statute), *with id.* at 436–41 (Benavides, J., concurring in part and dissenting in part) (cruising the en banc plurality's analysis of *Ex parte Young*). As Judge Benavides wrote, the plurality's approach “neglects our constitutional responsibility, expressed in *Young*, to redress ongoing violations of federal law and thus insure the supremacy of the Constitution.” *Id.* at 437.

198. The Amendment provides: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI.

There is substantial dispute as to whether this expansive interpretation of the Eleventh Amendment's scope is consistent with constitutional history and American federalism. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 760–61 (1999) (Souter, J., dissenting) (noting that expansive Eleventh Amendment sovereign immunity is “at war with” the “essence of American federalism”); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247–48 (1985) (Brennan, J., dissenting) (noting that an expansive Eleventh Amendment doctrine “diverges from text and history virtually without regard to underlying purposes or genuinely fundamental interests”); Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1203–10 (2001) (questioning whether sovereign immunity is textually based in the Constitution).

199. *Compare* U.S. CONST. amend. XI, *with* *Hans v. Louisiana*, 134 U.S. 1, 15–17 (1890) (extending Eleventh Amendment immunity to suits by a state's own citizens).

200. *See, e.g.*, *Seminole Tribe v. Florida*, 517 U.S. 44, 47, 54–55 (1996) (applying the Eleventh Amendment to broadly protect states from suits, even in federal question cases).

201. Congress can, subject to its authority under Section 5 of the Fourteenth Amendment, abrogate a state's sovereign immunity when it is enforcing the substantive provisions of the Fourteenth Amendment. *See* *Fitzpatrick v. Bitzer*, 427 U.S. 445, 451–56 (1976). But the Court has refused to expand Congress's ability to abrogate a state's sovereign immunity beyond the context of the Fourteenth Amendment. *See* *Seminole Tribe*, 517 U.S. at 59–73 (holding that constitutional provisions antecedent to the Eleventh Amendment, such as the Indian Commerce Clause, could not be used to abridge state immunity). As a further limitation, the Court requires “unequivocal statutory language” from Congress before recognizing abrogation of state immunity. *See* *Atascadero State Hosp.*, 473 U.S. at 246. Congress may, however, authorize suits against government officials rather than against the state directly. *See* *Seminole Tribe*, 517 U.S. at 75 n.17 (suggesting that Congress has authority to authorize federal jurisdiction under *Ex parte Young*); *id.* at 173–74 (Souter, J., dissenting) (noting that, as government officials never have authority to violate the Constitution, the Eleventh Amendment does not prevent suits against them).

Amendment alone but by fundamental postulates implicit in the constitutional design.”<sup>202</sup>

Sovereign immunity has been used to support ever-growing encroachments on the ability to vindicate federal rights when they are violated by the states.<sup>203</sup> This trend has included a narrowing of the contexts in which *Ex parte Young* may be invoked—the Court has established now-familiar categories of cases in which Article III power is precluded against even state officials. For example, the *Young* doctrine may not be applied if the relief sought is a retroactive award requiring the payment of funds from the state treasury,<sup>204</sup> if Congress has otherwise prescribed a detailed remedial scheme for redressing the violation of federal law,<sup>205</sup> or if the case concerns a state’s title to sovereign lands or waters.<sup>206</sup>

Despite this narrowing trend, the Supreme Court has repeatedly expressed its commitment to the *Young* doctrine as necessary to ensure the supremacy of federal law in other contexts.<sup>207</sup> The Court recently affirmed the doctrine’s vitality in *Verizon Maryland, Inc. v. Public Service Commission*.<sup>208</sup> In *Verizon*, Justice Scalia wrote for a unanimous Court in holding that Eleventh Amendment immunity posed no bar to Verizon’s suit

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202. See *Alden*, 527 U.S. at 729. But see sources cited *supra* note 198 (supporting a contrary position).

203. See, e.g., *Alden*, 527 U.S. at 711–12 (refusing to allow plaintiffs to vindicate a state’s alleged violation of their federal rights, granted to them under the Fair Labor Standards Act of 1938).

204. *Edelman v. Jordan*, 415 U.S. 651, 668–69, 677 (1974) (limiting Article III remedial power over states to prospective injunctive relief rather than retroactive monetary awards).

205. *Seminole Tribe*, 517 U.S. at 73–76 (holding that, as Congress had enacted a detailed remedial scheme for the rights in question, Article III courts were powerless to supplant that regime).

206. *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 283–88 (1997) (holding that, where a case attempts to adjudicate a state’s ownership of land or water, the outcome is as “intrusive” as a retroactive monetary award).

207. See *id.* at 269, 281 (reiterating that the *Ex parte Young* doctrine has vitality where an “allegation of an ongoing violation of federal law” requires prospective relief); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (“Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights.”).

208. See *Verizon Md., Inc. v. Pub. Serv. Comm’n*, 535 U.S. 635, 645–48 (2002). The facts of *Verizon* may cast some doubt upon whether the decision truly reflects the robustness of the *Young* doctrine. Although the majority opinion discusses the sovereign immunity question as a straightforward application of *Ex parte Young*, the Court’s willingness to subject a state to suit in federal court in this instance may have been influenced by the nature of the suit. Compare *id.* (applying *Ex parte Young*), with *id.* at 650–51 (Souter, J.) (noting that the issue in the case was one of a state interpreting federal law pursuant to a congressional grant of authority, wherein the plaintiff was merely requesting a “different adjudication of a federal question by means of appellate review”). Arguably, such a case does not affront a state’s dignity, unlike a suit in which a plaintiff asks a federal court to invalidate a state law. Indeed, Justice Souter questioned whether, in light of these facts, *Verizon* implicated the Eleventh Amendment at all. *Id.* at 649.

to enforce its alleged rights under the Telecommunications Act of 1996.<sup>209</sup> “In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit,” the Court wrote, “a court need only conduct a ‘straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.’”<sup>210</sup>

The *Ex parte Young* doctrine plays a particularly important role if there is no state forum in which to seek redress<sup>211</sup> and if the rights protected by the Fourteenth Amendment are at stake.<sup>212</sup> As Judge Benavides noted in *Okpalobi*, suits challenging unconstitutional, self-enforcing tort liability schemes “implicate[] the precise concerns regarding the supremacy of constitutional rights that precipitated the *Young* line of cases.”<sup>213</sup> Indeed, in a passage strikingly evocative of the legislative arrogance exercised by the Louisiana and Oklahoma legislatures, the respondent’s brief in *Ex parte Young* asserted:

It has become the aim of some legislatures to frame their enactments with such cunning adroitness, and to hedge them about with such savage and drastic penalties, as to make it impossible to test the validity of such statutes in the courts save at a risk no prudent man would dare to assume. . . .

. . . If it shall be held that a state statute may be so adroitly framed that the Eleventh Amendment will bar any suit in the Federal courts of equity jurisdiction, then no corporation nor individual will dare assume the risk of the savage punishments which may be inflicted under such acts, and legislation which flagrantly violates the provisions of the Fourteenth Amendment will be made operative for all practical purposes.<sup>214</sup>

The *Ex parte Young* Court expressed similar concern that self-enforcing statutes would effectively deny a forum for challenging their constitutionality:

Another obstacle to making the test [of constitutionality] on the part of the company might be to find an agent or employé [sic] who would

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209. *See id.* at 648.

210. *Id.* at 645 (quoting *Coeur d’Alene Tribe*, 521 U.S. at 296 (O’Connor, J., concurring in part and concurring in the judgment)).

211. *Coeur d’Alene Tribe*, 521 U.S. at 271–72 (Kennedy, J.). State fora are not reliably available for pre-enforcement constitutional challenges to self-enforcing state tort laws. *See infra* note 300.

212. *See id.* at 279; *Seminole Tribe v. Florida*, 517 U.S. 44, 59 (1996); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

213. *Okpalobi v. Foster*, 244 F.3d 405, 438 (5th Cir. 2001) (en banc) (Benavides, J., concurring in part and dissenting in part).

214. *See Ex parte Young*, 209 U.S. 123, 141–42 (1908) (quoting the respondent’s brief).

disobey the law, with a possible fine and imprisonment staring him in the face if the act should be held valid. . . . The wonder would be that a single agent should be found ready to take the risk.<sup>215</sup>

The Court echoed the petitioners' fear that such a denial of judicial relief might be the deliberate product of legislative arrogance.<sup>216</sup> The Court also implied that, in order to ensure an opportunity to raise the constitutional claims, a person would have to defy the statute repeatedly. If the person violated the statute only once and then resumed compliance in order to minimize the consequences, "the prosecutor might not avail himself of the opportunity to make the test [at all, or] . . . several years might elapse before there was a final determination of the question."<sup>217</sup> The Court considered this situation unacceptable.<sup>218</sup>

The only salient feature of the Louisiana and Oklahoma laws distinguishing them from the kind of statute challenged in *Ex parte Young* is that the former place enforcement in private hands. But it would elevate form over substance to allow a state to escape constitutional accountability merely because of this "structural anomaly,"<sup>219</sup> particularly where the statute so clearly implicates the very concerns addressed by the *Ex parte Young* Court. As Judge Benavides pointed out, "[T]he Act's unique authorization of private strict liability lawsuits against providers of abortions burdens the right to an abortion to the same extent as legislation granting an Attorney General the power to prosecute or fine individuals for performing abortions."<sup>220</sup> That procedural idiosyncrasy ought not to "render Louisiana any more immune from challenge in federal court."<sup>221</sup>

As with his Article III analysis, the flaw in Judge Jolly's Eleventh Amendment analysis lies in his refusal to acknowledge the state's role in

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215. *Id.* at 163–64. *See also id.* at 146 ("The necessary effect and result of such legislation must be to preclude a resort to the courts (either state or Federal) for the purpose of testing its validity.>").

216. *See id.* at 146. The Court stated that

"when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws."

*Id.* (quoting *Cotting v. Kan. City Stock Yards Co.*, 183 U.S. 79, 102 (1901)) (emphasis added).

217. *Id.* at 163.

218. *See id.*

219. *See Okpalobi v. Foster*, 244 F.3d 405, 438 (5th Cir. 2001) (en banc) (Benavides, J., concurring in part and dissenting in part) (asserting that constitutional rights are equally burdened under a private regime).

220. *Id.*

221. *Id.*

causing the plaintiffs' injury.<sup>222</sup> Judge Jolly's opinion takes the *Young* fiction far too literally. As Judge Benavides wrote, "[T]he opinion's connection requirement assumes that the fiction of *Ex parte Young* has some real meaning in the Eleventh Amendment context—that it is the individual officer, not the state itself that is the real party in interest. This is simply not the case."<sup>223</sup>

The *Ex parte Young* Court, like the townspeople observing the emperor's new clothes, deliberately disregarded the obvious in order to create an exception to sovereign immunity, all the while disclaiming any limitation on a state's sovereignty.<sup>224</sup> But the doctrine is called a "fiction" for good reason. As the Supreme Court has recently pointed out, "[The] commonsense observation of the State's real interest when its officers are named as individuals has not escaped notice or comment from this Court, either before or after *Young*."<sup>225</sup> Among the Justices of the *Ex parte Young* Court, it was Justice Harlan in dissent who exposed the farce, pointing out that the suit was brought against Attorney General Young "as, and only because he was, Attorney General of Minnesota."<sup>226</sup>

Commentators and court decisions have since highlighted numerous incongruities belying the claim that the sued official does not represent the state's interests. For example, while the *Ex parte Young* fiction purports to remove the state as a player, a plaintiff must establish "state action" to prove a constitutional violation.<sup>227</sup> Similarly, Rule 25(d) of the Federal Rules of Civil Procedure provides that the name of a state official is

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222. *Cf. id.* at 410–24 (Jolly, J.) (focusing on the fact that the state officials named as defendants had no direct enforcement role in the statute).

223. *See id.* at 438 (Benavides, J., concurring in part and dissenting in part).

224. *Compare Ex parte Young*, 209 U.S. 123, 159 (1908) (acknowledging that the plaintiffs "care nothing about any action which Mr. Young might take or bring as an ordinary individual"), *with id.* (characterizing the case as "not affect[ing] the State in its sovereign or governmental capacity" and as merely addressing "an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce [an unconstitutional] legislative enactment").

225. *See Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997). *See also* Carlos Manuel Vasquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859, 874 (2000) (describing the evolution of *Ex parte Young* doctrine and the modern Court's recognition that suits against state officials are tantamount to suits against the state).

226. *Ex parte Young*, 209 U.S. at 173–74 (Harlan, J., dissenting). Justice Harlan argued that the availability of a state forum in which to assert the act's unconstitutionality was sufficient, and that "a decent respect for the States requires us to assume . . . that the state courts will enforce every right secured by the Constitution." *See id.* at 176. A state forum may not always be available, however. *Cf. infra* note 300 (addressing the availability of state fora).

227. *See, e.g., Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 685 (1982) ("There is a well-recognized irony in *Ex parte Young*; unconstitutional conduct by a state officer may be 'state action' for the purposes of the Fourteenth Amendment yet not attributable to the State for the purposes of the Eleventh.").

automatically substituted for the name of his predecessor in litigation brought pursuant to the *Ex parte Young* exception.<sup>228</sup> This rule would make no sense if it were simply a rogue state official, rather than the state, who was responsible for the claimed injury. Moreover, the very fact that the state officer is sued in that officer's official capacity gives rise to the invocation of sovereign immunity; if the officer was merely sued in a personal capacity, the state would have neither the need nor the basis to claim immunity from such a suit.<sup>229</sup> That the state official is acting on behalf of the state is further underscored by the Court's rejection of claims in such cases that officials were acting *ultra vires*.<sup>230</sup>

These apparent paradoxes point to the obvious: in a suit brought under the *Ex parte Young* exception, the plaintiff is essentially suing the state. In recent years, the Court has openly conceded this point.<sup>231</sup> Moreover, the Court has implicitly recognized the limits of the fiction by largely abandoning reliance on the "connection" requirement as a basis for dismissing a case on sovereign immunity grounds.<sup>232</sup>

In *Okpalobi*, Judge Jolly made much of the lack of a "connection" between the plaintiffs' injury and the named defendants.<sup>233</sup> He read "connection" to mean the state's ability to enforce the statute.<sup>234</sup> *Ex parte Young* itself is unclear about how close or how direct a connection must exist between the sued official and the challenged statute. The *Young* Court

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228. See FED. R. CIV. P. 25(d). See also *Okpalobi*, 244 F.3d at 439 (Benavides, J., concurring in part and dissenting in part) (noting the same). This procedure and the fiction that underlies it were well illustrated in the challenge to New Jersey's "partial-birth abortion" ban. Attorney General Peter Verniero, in office when the ban became law, refused to defend the statute. See *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 127, 131 (3d Cir. 2000). Although the legislature appointed private counsel to represent the state in defending the ban, the attorney general remained the named defendant. See *id.* at 131. When the attorney general later left office, the lawsuit was recaptioned to reflect the new attorney general, John Farmer, Jr. See *id.* at 127, 131.

229. See *Kentucky v. Graham*, 473 U.S. 159, 166–68 (1985) (noting that officials sued in their capacity as state officers may be able to raise personal immunity defenses based on their reasonable reliance on existing law).

230. See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984) (noting that state officials act *ultra vires* only when they act without any authority whatsoever). In *Pennhurst*, the Court held that the state officer named as a defendant "had nothing to gain personally" and therefore was acting in his official capacity. See *id.* at 107–08.

231. See, e.g., *Diamond v. Charles*, 476 U.S. 54, 57 n.2 (1986) (stating that "[a] suit against a state officer in his official capacity is, of course, a suit against the State"); *Graham*, 473 U.S. at 165–66 (noting that suits against state agents are just another way of pleading actions against the state).

232. Cf. *Okpalobi*, 244 F.3d at 439 (Benavides, J., concurring in part and dissenting in part) ("Judge Jolly's opinion does not cite a single modern Supreme Court case that relies on its connection requirement to support dismissal of an *Ex parte Young* action on Eleventh Amendment grounds.").

233. See *id.* at 416–19 (Jolly, J.).

234. See *id.* at 416.

noted that, in order to be subject to suit, a state official must have “some connection with the enforcement of the act” being challenged.<sup>235</sup> The Court distinguished *Fitts v. McGhee*—in which the Eleventh Amendment was held to bar a suit against the attorney general and the governor of Alabama<sup>236</sup>—on the grounds that there was no “close official connection” in *Fitts* between the alleged unconstitutional act and the defendant state officers.<sup>237</sup> At the same time, the *Ex parte Young* Court said, the duty to enforce a statute “is sufficiently apparent when such duty exists under the general authority” of state law, even though such authority is not expressly granted by the alleged unconstitutional statute.<sup>238</sup>

Courts should not adhere to a rigid interpretation of the “connection” requirement when they evaluate coercive, self-enforcing tort laws. A state that enacts a self-executing scheme effectively enforces it simultaneously, by attaching so great a risk to the targeted conduct that actual enforcement is not needed to stop the plaintiffs from engaging in it.<sup>239</sup> The attorney general or governor also retains the more general power to represent the state’s interest in enforcing the law by intervening in private suits.<sup>240</sup> Moreover, the modern Court acknowledges that the state is the real party in interest in *Ex parte Young* cases.<sup>241</sup> This renders the “connection” requirement, which was created to support the fiction, significantly less important.

To the extent that the Court still endorses a “connection” inquiry, such a connection appears to be subsumed by the elements required for Article III standing.<sup>242</sup> In challenges to self-executing, private liability schemes, there is a clear causal nexus between the plaintiffs’ injury and the state—the plaintiffs’ cessation of protected conduct is directly traceable to the

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235. See *Ex parte Young*, 209 U.S. 123, 157 (1908).

236. *Id.* at 156–57 (discussing *Fitts v. McGhee*, 172 U.S. 516, 529–30, 533 (1899)).

237. *Id.* (discussing *Fitts*, 172 U.S. at 529–30).

238. *Id.* at 158 (noting that a state officer’s enforcement power “might exist by reason of the general duties of the officer to enforce [the statute] as a law of the State”).

239. See *Allied Artists Pictures Corp. v. Rhodes*, 473 F. Supp. 560, 570–71 (S.D. Ohio 1979), *aff’d*, 679 F.2d 656, 665 (6th Cir. 1982) (arguing that given the coercive effect of the challenged statute, “enforcement arguably commenced against plaintiffs upon its enactment”). See also *supra* notes 214–218 and accompanying text (describing the Court’s concern in *Ex parte Young* regarding coercive and unconstitutional state statutes).

240. See *supra* notes 158–164 and accompanying text (discussing the rights and duties of governors or attorneys general to enforce their states’ laws and to intervene in suits as necessary).

241. See *supra* text accompanying notes 231–232 (discussing how the Court recognizes the legal fiction of *Ex parte Young*).

242. See *Okpalobi v. Foster*, 244 F.3d 405, 439 (5th Cir. 2001) (en banc) (Benavides, J., concurring in part and dissenting in part) (suggesting that the Court’s modern Article III standing doctrine obviates the “connection” requirement under *Ex parte Young*).

state's enactment of the unconstitutional, self-enforcing statute. This causal nexus suffices to "connect" the state to the statute. The *Ex parte Young* doctrine, as it is applied by the Court today, requires no more than this.

Pre-enforcement suits seeking only declarations of unconstitutionality are particularly uncontroversial applications of *Ex parte Young* because they are less apt to run afoul of core sovereignty concerns. In the first place, they are clearly prospective. Thus, they do not implicate the retroactive, monetary relief the Court has said is impermissible under *Ex parte Young*.<sup>243</sup> The Court has repeatedly reaffirmed that, under *Young*, "the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law."<sup>244</sup> Moreover, even when considering prospective relief, the Court has distinguished between declaratory and injunctive relief, acknowledging that a declaration of unconstitutionality is the less intrusive remedy.<sup>245</sup> The declaratory judgment remedy was expressly intended as a "milder alternative" to an injunction, one that does not carry the same concerns about inappropriate interference with state autonomy.<sup>246</sup> In *Steffel v. Thompson*, the Court recognized that "different considerations" underlie the decision whether to grant declaratory relief.<sup>247</sup> And although a federal court has discretion to deny a declaratory judgment,<sup>248</sup> a claim for an

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243. See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 677 (1974) (noting that a federal court's remedial power under the Eleventh Amendment is limited to prospective injunctive relief rather than retroactive monetary relief).

244. See *Green v. Mansour*, 474 U.S. 64, 68 (1985) (noting that such prospective relief is implicitly required by the Supremacy Clause). See also, e.g., *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002) (arguing that, in order to determine whether the doctrine of *Ex parte Young* applies, "a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective'" (quoting *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring))).

245. See *Steffel v. Thompson*, 415 U.S. 452, 469–71 (1974) (citing *Perez v. Ledesma*, 401 U.S. 82, 124–26 (1971) (Brennan, J., concurring in part and dissenting in part)).

246. See *Perez*, 401 U.S. at 111. As Justice Brennan wrote:

[C]onsiderations of federalism are not controlling when no state prosecution is pending and the only question is whether declaratory relief is appropriate. In such case [sic], the congressional scheme that makes the federal courts the primary guardians of constitutional rights, and the express congressional authorization of declaratory relief, afforded because it is a less harsh and abrasive remedy than the injunction, become the factors of primary significance.

*Id.* at 104.

247. See *Steffel*, 415 U.S. at 469–70 (1974). See also *id.* at 484 (Rehnquist, J., concurring) (observing that a declaration of unconstitutionality may lead to various avenues of relief, all "reached voluntarily by the States and [thus] completely consistent with the concepts of federalism").

248. The Court summarized its view of such discretion in *Green v. Mansour*:

[W]e have also held that the declaratory judgment statute "is an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant." The propriety of issuing a declaratory judgment may depend upon equitable considerations, and is also

ongoing constitutional violation by a state provides a strong basis for such relief.<sup>249</sup>

To reject sovereign immunity as a bar to suits against self-executing, private liability schemes is to acknowledge the state's responsibility in causing the plaintiff's injury. But should the state be called upon to defend every unconstitutional law that it enacts? Or should it be held accountable only where a law addresses an issue of considerable public interest?

The Fifth Circuit panel in *Okpalobi* adopted the latter approach in deciding that sovereign immunity did not bar the suit. The panel found Louisiana's anti-abortion tort statute was "designed to implement and serve the public interest of the state," thereby justifying suit against the attorney general and governor.<sup>250</sup> The court relied upon *Allied Artists Pictures Corp. v. Rhodes*,<sup>251</sup> a 1979 federal district court opinion from the Southern District of Ohio, which examined "the nature of the law and its place on the continuum between public regulation and private action" to determine whether sovereign immunity applied.<sup>252</sup> In *Allied Artists*, the court distinguished a statute that "regulates relationships between private parties" from a statute that "create[s] rights and relationships of substantial public interest."<sup>253</sup> The court contended that the public interest underlying a statute of the former kind could be "amply protected" through private litigation, whereas the public interest in a statute affecting substantial public rights could not.<sup>254</sup> Statutes addressing a matter of substantial public interest presented a "real, not ephemeral, likelihood" that the powers of the named state defendants "will be employed against plaintiffs' interests."<sup>255</sup> The court thus implied that the state's likely involvement in implementing such statutes satisfied the "connection" requirement of *Ex parte Young*.

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"informed by the teachings and experience concerning the functions and extent of federal judicial power."

*Green*, 474 U.S. at 72 (quoting *Pub. Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 241, 243 (1952)).

249. See, e.g., *Mobil Oil Corp. v. Attorney Gen.*, 940 F.2d 73, 75 (4th Cir. 1991). For example, in *Mobil Oil*, the Fourth Circuit stated,

We think that Mobil's case is precisely the one for which the Declaratory Judgments [sic] Act was designed. Public policy should encourage a person aggrieved by laws he considers unconstitutional to seek a declaratory judgment against the arm of the state entrusted with the state's enforcement power, all the while complying with the challenged law, rather than to deliberately break the law and take his chances in the ensuing suit or prosecution.

*Id.*

250. See *Okpalobi v. Foster*, 190 F.3d 337, 347 (5th Cir. 1999) (quoting *Allied Artists Pictures Corp. v. Rhodes*, 473 F. Supp. 560, 569 (S.D. Ohio 1979), *aff'd*, 679 F.2d 656 (6th Cir. 1982)).

251. *Allied Artists Pictures Corp.*, 473 F. Supp. 560.

252. *Okpalobi*, 190 F.3d at 345-47 (summarizing the analysis in *Allied Artists*).

253. *Allied Artists Pictures Corp.*, 473 F. Supp. at 568.

254. See *id.*

255. *Id.*

The *Allied Artists* test has the appeal of appearing to retain the connection-to-enforcement requirement of *Ex parte Young*, by assuming that a greater threat of state intervention exists in a private enforcement scheme if the law regulates a matter of public concern. The test, however, relies on an illusory distinction among statutes, rendering the test ultimately unworkable. The statute at issue in *Allied Artists* itself addressed bidding practices among motion picture distributors and exhibitors.<sup>256</sup> The district court found that this statute fell on the public policy end of the spectrum, as it “amount[ed] to state regulation of movie producers and distributors,” which was an “exercise of the state’s regulatory power . . . designed to implement and serve the public interest of Ohio.”<sup>257</sup> The court concluded this despite the lack of any state-enforced penalties in the statute.<sup>258</sup> The court, however, just as easily could have described the statutory scheme as merely regulating contractual “relationships between private parties.”<sup>259</sup>

The court in *Allied Artists* cited another statute that further demonstrates the illusory distinction between laws implementing public policy and those regulating private behavior. The *Allied Artists* court distinguished a New York statute that permitted a wife, but not a husband, to recover from her spouse the costs she incurred in a divorce action.<sup>260</sup> In the case challenging that statute, the Federal District Court for the Southern District of New York rejected the challenge on Eleventh Amendment grounds, finding no sufficient connection between the named defendants—the attorney general and the governor—and the statute.<sup>261</sup> The court in *Allied Artists* considered this statute to be at the private “end of the continuum”—a statute that merely “regulates relationships between private

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256. See *id.* at 561–62 (describing the statute that prohibited “blind bidding,” a process in which theatre owners were forced to bid on exhibition rights without having seen the movies themselves).

257. See *id.* at 569. The Sixth Circuit agreed. *Allied Artists Pictures Corp. v. Rhodes*, 679 F.2d 656, 665 n.5 (6th Cir. 1982). In affirming the district court, the Sixth Circuit stated, “Even in the absence of specific state enforcement provisions, the substantial public interest in enforcing the trade practices legislation involved here places a significant obligation upon the Governor to use his general authority to see that state laws are enforced.” *Id.*

258. See *Allied Artists Pictures Corp.*, 473 F. Supp. at 561–62 (reprinting the statute in suit, which lacks any criminal penalty).

259. See *id.* at 568. Indeed, the defendants in *Allied Artists* argued for this characterization of the statute. See *id.* at 569.

260. See *id.* at 567 (discussing *Gras v. Stevens*, 415 F. Supp. 1148, 1152 (S.D.N.Y. 1976) (deciding the issue of sovereign immunity in a constitutional challenge to N.Y. DOM. REL. LAW § 237)).

261. See *Gras*, 415 F. Supp. at 1152. The court in *Gras* stated, “[W]e know of no case in which the general duty of a governor to enforce state laws has been held sufficient to make him a proper party defendant in a civil rights action attacking the constitutionality of a state statute concerning . . . private civil actions.” *Id.*

parties.”<sup>262</sup> Of course, this New York statute could just as easily be described as addressing public policy concerns, such as the disproportionate economic impact of divorce upon women. Thus, the *Allied Artists* test seems to invite a semantic game in which courts could reach opposite results depending on how they characterize the interest underlying the statute at issue.

The *Allied Artists* test relies on an artificial public-private dichotomy that has been rightfully called into question.<sup>263</sup> Courts need not wrestle with this problematic distinction when addressing acts of legislative arrogance. When a state legislature enacts a law that unconstitutionally forces some of its citizens to desist from certain actions, we should assume that it has some public policy justification for doing so. That interest on the part of the state is also what makes it appropriate to hold the state constitutionally accountable for its actions.<sup>264</sup>

#### IV. STATE LEGISLATIVE ARROGANCE: A THREAT TO CONSTITUTIONAL PRINCIPLES

To a significant degree, our very constitutional structure was designed to address the dangers of legislative arrogance.<sup>265</sup> James Madison and Alexander Hamilton were deeply wary of legislative power, and their apprehension reverberates through the *Federalist Papers*.<sup>266</sup> They distrusted legislators’ loyalty to majoritarian interests, recognizing that this fidelity could too easily be employed to infringe on individual rights.<sup>267</sup>

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262. See *Allied Artists Pictures Corp.*, 473 F. Supp. at 568–69.

263. See, e.g., Metzger, *supra* note 16, at 1446–48 (examining whether the distinction in constitutional law between state action and private action is illusory and whether such a distinction should be abandoned).

264. The state’s essential role in acts of legislative arrogance also alleviates concern over a slippery slope that abandonment of the public-private distinction might invite in other contexts. *Cf. id.* at 1448 (discussing the need for the state action doctrine as a guard against turning “every question of government policy . . . [into] a constitutional issue”).

265. *Cf. Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (noting that defining the scope of federal constitutional limits on state power “was foremost in the minds of the [F]ramers”).

266. See, e.g., THE FEDERALIST NO. 62 (James Madison), *supra* note 7, at 315 (noting “the propensity of all single and numerous assemblies, to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders, into intemperate and pernicious resolutions”).

267. See Jack N. Rakove, *Law and Political Culture: The Madisonian Moment*, 55 U. CHI. L. REV. 473, 492 (1988). See also Calabresi, *supra* note 16, at 122–23 & n.139 (discussing factors explaining American legislative propensities to enact “hasty and ill-considered” laws that infringe on fundamental rights). As Madison stated, “[T]he invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.” Letter from James

Within the architecture of the Constitution, federal courts bear the burden of curbing legislative arrogance.

Legislative arrogance at the state level implicates two constitutional principles: the proper balance of power among coordinate branches of government, and the proper division of authority between federal and state governments. Madison and Hamilton were concerned with each of these. Their attentiveness in the *Federalist Papers* to the potential for legislative tyranny and the threat it poses to these constitutional principles highlights the importance of the federal judiciary as a check on acts of legislative arrogance like those exercised in Louisiana and Oklahoma.

Both Hamilton and Madison argued for the importance of bolstering the executive and judicial branches, particularly the latter, in order to curb legislative abuses.<sup>268</sup> Madison argued that the judiciary was necessary “to restrain the legislature from encroaching on the other co-ordinate departments, or on the rights of the people at large; or from passing laws unwise in their principle, or incorrect in their form.”<sup>269</sup> Both men saw the judiciary as important, but ultimately weak. “[T]he supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is in reality a phantom,” wrote Hamilton.<sup>270</sup> “Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system.”<sup>271</sup>

Legislative arrogance, far more than judicial arrogance, was the thing to be feared.<sup>272</sup> Already susceptible to violating the Constitution under

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Madison to Thomas Jefferson (Oct. 17, 1788), in 11 PAPERS OF MADISON 298 (Robert A. Rutland et al. eds., 1977); Rakove, *supra*, at 492 (quoting same).

268. See, e.g., THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 7, at 393 (extolling the power of the judiciary to serve as a “barrier to the encroachments and oppressions of the representative body”); Rakove, *supra* note 267, at 494–95 (suggesting that Madison viewed the judiciary as fulfilling a more important role in a federalist system than the executive and noting Madison’s wariness of “legislative usurpations”).

269. Rakove, *supra* note 267, at 493 (quoting speeches of James Madison).

270. THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 7, at 411.

271. *Id.* Hamilton famously called the judiciary “the least dangerous” branch of the federal government—the branch least likely to endanger constitutional rights. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 7, at 393. To the extent that the Framers were at all concerned with judicial power, they were not motivated to shield Congress’s enactments from constitutional review, much less to protect the acts of state legislatures from constitutional challenge. See Mickenberg, *supra* note 5, at 511–12.

272. Commentators have pointed to the propensity of legislatures to shirk constitutional responsibility in other contexts. Guido Calabresi, for example, has discussed what he calls legislative “hiding,” in which legislatures avoid “difficult issues that may be politically dangerous to decide

majoritarian pressure, legislators, elected for limited terms, could not be expected to police themselves.<sup>273</sup> “[O]n account of the natural propensity of [legislative] bodies to party divisions, there will be no less reason to fear, that the pestilential breath of faction may poison the fountains of justice,” Hamilton warned.<sup>274</sup> The judiciary was the branch far better equipped to hear the “voice both of law and of equity.”<sup>275</sup>

Madison, in particular, was especially mindful of the unique concerns posed by state legislative arrogance and the need to hold states constitutionally accountable in order to protect individual rights.<sup>276</sup> Madison saw the states as potential hotbeds for political factions, warning of “[t]he influence of factious leaders [who] may kindle a flame within their particular States.”<sup>277</sup> For Madison, the Union served as a check upon the “mischiefs” of factions within the states, which otherwise could ignite “common passion” among “a majority of the whole,” with nothing to prevent the majority from “sacrific[ing] the weaker party or an obnoxious individual.”<sup>278</sup> Moreover, Madison believed that final authority as to the division of power between the federal and state governments must lie with the federal government.<sup>279</sup> Without federal supremacy, Madison contended,

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openly.” See Calabresi, *supra* note 16, at 119 (noting that judicial enforcement is necessary to ensure accountability). For example, legislatures may fail to delegate authority in a sufficiently explicit manner, or they may delegate functions to private entities that are not sufficiently accountable to the public. See *id.* at 104; Metzger, *supra* note 16, at 1394–1400 (analyzing governmental privatization as legislative avoidance of constitutional accountability). Likewise, legislatures may persistently refuse to repeal old laws. See Calabresi, *supra* note 16, at 104.

273. THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 7, at 410 (noting that, “[f]rom a body which had had even a partial agency in passing bad laws, we could rarely expect a disposition to temper and moderate them in the application,” and that “[s]till less could it be expected, that men who had infringed the [C]onstitution, in the character of legislators, would be disposed to repair the breach, in the character of judges.”).

274. *Id.*

275. See *id.* See also THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 7, at 393.

276. See, e.g., Rakove, *supra* note 267, at 496 (noting Madison’s “ever unflattering portrait of state legislators” and his observation that “the parochialism of state lawmakers would not magically disappear with the adoption of the Constitution” such that “individual and minority rights within the states would remain vulnerable to repeated violations”). See also Bernard W. Bell, *Marbury v. Madison and the Madisonian Vision*, 72 GEO. WASH. L. REV. 197, 234 (2003) (discussing threats posed by state parochialism to federal constitutional rights).

277. See THE FEDERALIST NO. 10 (James Madison), *supra* note 7, at 48.

278. *Id.* at 46. See also Rakove, *supra* note 267, at 479–80, 496–97 (discussing Madison’s “acute diagnosis of the parochial allegiances of state legislators and citizens”).

279. See THE FEDERALIST NO. 39 (James Madison), *supra* note 7. See also GARRY WILLS, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT 80–81 (1999) (arguing that Madison, concerned about state self-interest, adhered firmly to the view that final authority should rest with the federal government even as he soothed the states with the assurance of “residual” retained sovereignty).

the world would have seen for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society every where subordinate to the authority of the parts; it would have seen a monster in which the head was under the direction of the members.<sup>280</sup>

The federal judiciary was to serve as the critical check on state legislatures. As Hamilton explained, “[T]here ought always to be a constitutional method of giving efficacy to constitutional provisions. What for instance would avail restrictions on the authority of the State legislatures, without some constitutional mode of enforcing the observance of them?”<sup>281</sup> The mode of enforcement provided in the Constitution was “an authority in the federal courts, to over-rule such as might be in manifest contravention of the articles of union.”<sup>282</sup>

In *Marbury v. Madison*<sup>283</sup> and *Martin v. Hunter’s Lessee*,<sup>284</sup> the Supreme Court laid claim to its position among the coordinate branches as the final authority in matters of constitutional interpretation. In these decisions, the Court reaffirmed the importance of federal supremacy and the place of state legislatures within the constitutional landscape, declaring that “the legislatures of the states . . . in every case are, under the [C]onstitution, bound by the paramount authority of the United States . . . .”<sup>285</sup> The Court reiterated that federal supremacy guards against “state prejudices, state jealousies, and state interests,” ensures “uniformity of decisions throughout the whole United States,” and guarantees that constitutional protections redound to the “common and equal benefit of all of the people of the United States.”<sup>286</sup> The Court thus took on the role that Hamilton and Madison had envisioned for it: a check on potential legislative defiance of the Constitution. To tolerate acts of defiance by state legislatures that disagree with the Supreme Court’s rulings would run afoul of Justice Marshall’s famous reminder in *Marbury*: “It is emphatically the

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280. THE FEDERALIST NO. 44 (James Madison), *supra* note 7, at 231. *See also* WILLS, *supra* note 279, at 81 (quoting the same); THE FEDERALIST NO. 33 (Alexander Hamilton), *supra* note 7 (defending need for federal supremacy).

281. THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 7, at 403.

282. *See id.* Hamilton suggested that a federal veto over state laws could serve as a check on state power. *Id.* (proposing a “direct negative on the State laws” as an option for ensuring federal supremacy). Madison had originally argued for such a federal governmental veto, but ultimately settled for the Supremacy Clause with anticipated Supreme Court review. *See* WILLS, *supra* note 279, at 77–78, 82; Rakove, *supra* note 267, at 497–98.

283. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

284. *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheaton) 304 (1816).

285. *Martin*, 14 U.S. at 343–44.

286. *Id.* at 347–48.

province and duty of the judicial department to say what the law is. . . . [And] if a law be in opposition to the [C]onstitution . . . the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.”<sup>287</sup>

These important functions of federal supremacy are undermined by the Louisiana and Oklahoma legislatures’ acts of legislative arrogance. In both states, local antichoice sentiment—out of step with the Court’s protection of individual rights—prevailed. In Oklahoma, teenagers seeking abortions were subjected to a standard for parental involvement that did not comply with what the Supreme Court has said is necessary to protect their constitutional rights.<sup>288</sup> When courts allow a state legislature to defy the Constitution in this way and fail to hold it accountable, they give the state legislature “a practical and real omnipotence.”<sup>289</sup> The Fifth Circuit’s meek disavowal of its duty to hold the Louisiana legislature accountable in *Okpalobi*—“we are powerless to act except to say that we cannot act”<sup>290</sup>—ignores the constitutionally significant implications of the state legislature’s conduct.<sup>291</sup>

The Supreme Court has not retreated from constitutional principles in a way that would support the Fifth and Tenth Circuits’ refusal to hold the Louisiana and Oklahoma legislatures constitutionally accountable. Certainly when it comes to the balance of power between the legislative and judicial branches, the Court has on numerous recent occasions emphatically asserted its role as the final arbiter of constitutional interpretation. For example, in *United States v. Lopez*, the Court declared that “whether particular operations affect interstate commerce sufficiently

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287. See *Marbury*, 5 U.S. at 177–78.

288. See *supra* Part III.B (discussing the Oklahoma statute). In 2005, the Oklahoma Legislature enacted a parental involvement law that, unlike the 2001 law, includes a medical emergency exception and a judicial bypass process, and also carries criminal penalties directly enforced by the state. See OKLA. STAT. ANN. tit. 63, §§ 1-740.1 to -740.5. (West Supp. 2006) (discussing the statutory amendments). This statute is currently under challenge, although the law is in effect. See *Nova Health Sys. v. Edmonson*, 373 F. Supp. 2d 1234, 1235–40, 1242–44 (N.D. Okla. 2005) (denying the plaintiff’s motion to enjoin enforcement of the amended Oklahoma statute and denying injunctive relief pending appeal).

289. See *Marbury*, 5 U.S. at 178.

290. See *Okpalobi v. Foster*, 244 F.3d 405, 409 (5th Cir. 2001) (en banc). Cf. *id.* at 433 (Benavides, J., concurring in part and dissenting in part) (“I believe the duty of this Court to protect constitutional rights and thereby ensure the supremacy of the Constitution over state laws outweighs the sovereign right of states to immunity from suit in federal court.”).

291. See, e.g., *United States v. Peters*, 9 U.S. (5 Cranch) 115, 136 (1809) (Marshall, C.J.) (“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 [C]onstitution itself becomes a solemn mockery . . .”).

to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.”<sup>292</sup> The Court has asserted its power to decide whether particular activities affect interstate commerce even when Congress makes detailed and specific findings documenting such effects.<sup>293</sup> In fact, the Rehnquist Court’s expansive view of its own power has fueled allegations that the Court exceeded its authority in many of these cases.<sup>294</sup>

The Court’s decisions in *Lopez* and *United States v. Morrison* reflect its current tendency to skew the balance toward the states when weighing close cases of federal versus state authority.<sup>295</sup> But they also reflect the Court’s perception of the limits of legislative power. “Under our written Constitution,” the Court admonished in *Morrison*, “the limitation of congressional authority is not solely a matter of legislative grace.”<sup>296</sup> Emphatically reaffirming the Court’s role as the “ultimate expositor of the constitutional text,” the Court invoked Madison and Hamilton’s fears of legislative arrogance: “[T]he Framers adopted a written Constitution that further divided authority at the federal level *so that the Constitution’s provisions would not be defined solely by the political branches* nor the scope of legislative power limited only by public opinion and the legislature’s self-restraint.”<sup>297</sup> *City of Boerne v. Flores* underscores the current Court’s remarkable readiness to view legislation that is based on disagreement with the Court’s rulings as legislative arrogance.<sup>298</sup> Thus, the

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292. *United States v. Lopez*, 514 U.S. 549, 557 n.2 (1995) (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273 (1964)).

293. *See United States v. Morrison*, 529 U.S. 598, 614 (2000).

294. *See, e.g.*, MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 99–102 (1999); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001); Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953 (2000); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimmel*, 110 YALE L.J. 441 (2000).

295. *See Morrison*, 529 U.S. at 615 (“[T]he concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution’s distinction between national and local authority seems well founded.”).

296. *See id.* at 616.

297. *See id.* at 616 n.7 (emphasis added).

298. *See City of Boerne v. Flores*, 521 U.S. 507, 512, 536 (1997). In *Boerne*, the Court ruled that the Religious Freedom Restoration Act—Congress’s direct response to the Court’s much-criticized decision in *Employment Division v. Smith*, 494 U.S. 872 (1990)—exceeded Congress’s powers under Section 5 of the Fourteenth Amendment. *See City of Boerne*, 521 U.S. at 512, 536. What Congress did in enacting the Religious Freedom Restoration Act cannot be compared with the legislative arrogance exercised by Louisiana’s and Oklahoma’s legislatures.

First, it is debatable whether Congress in fact exceeded its powers by conferring *more* protection to religious exercise than the Court said is constitutionally required. Thus, some of the Court’s recent restrictions of Congress’s power could be seen as driven more by the Court’s own political agenda than

Court's recent treatment of the proper balance of power among coordinate branches of government suggests that the Court would mandate that federal courts halt acts of constitutional disobedience by states.

The Court's reluctance to defer to the political branches' interpretations of the Constitution applies with much greater force to the kind of legislative arrogance exercised by Louisiana and Oklahoma. The federal courts' duty to check legislative power is especially compelling when legislative acts impinge on, rather than expand on, constitutional freedoms. Judicial intervention is critical in such cases in order to protect minorities from the tyranny of the majority.<sup>299</sup> If the Court believed that Congress overstepped its bounds in *Morrison* and *Lopez*, it should without question view state legislative arrogance as an impermissible appropriation of power by state government.<sup>300</sup>

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by the belief that Congress was acting arrogantly. Cf. generally STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005) (arguing that the Court should grant greater deference to Congress). Louisiana and Oklahoma's *infringement* of individual rights that the Court has said are constitutionally protected is a very different matter than that raised in *City of Boerne*.

Second, the states' legislative arrogance lies not merely with their direct contravention of the Court's rulings but with their refusal to submit these acts of defiance to judicial scrutiny. See *infra* note 321 and accompanying text (quoting Judge Parker's observation that Oklahoma's statute was designed to evade judicial review). South Dakota's recent enactment of a near-total ban on abortions, in contrast, is an example of legislative defiance that nevertheless contemplates judicial review. See Women's Health and Human Life Protection Act, H.B. 1215, 2006 Leg. Sess. (S.D. 2006) (enacted) (making performance of an abortion—except to save a woman's life—a felony); John Holusha, *South Dakota Governor Signs Abortion Ban*, N.Y. TIMES, Mar. 6, 2006, Washington Section (describing Governor Rounds's acknowledgement that the law's implementation would be delayed pending a court challenge).

299. See, e.g., Gerald E. Rosen & Kyle W. Harding, *Reflections upon Judicial Independence as We Approach the Bicentennial of Marbury v. Madison: Safeguarding the Constitution's "Crown Jewel,"* 29 FORDHAM URB. L.J. 791, 798 (2002) ("[G]enuflecting before polling data is not—and must not be—part of a judge's job description. . . . [I]f a popular law clearly contradicts constitutional freedoms, the Court has a duty to strike it down.").

300. The federal courts' role in curbing legislative arrogance is critical notwithstanding the potential availability of state fora in which to bring constitutional challenges. First, state courts often are not available: many state courts would dismiss constitutional challenges to these statutes by applying justiciability principles that parallel the requirements of Article III, see, e.g., *supra* note 12, even though they are not required to do so, see *Asarco Inc. v. Kadish*, 490 U.S. 605, 617 (1989). Second, access to state fora is uncertain and contingent at best, even in states that generally employ more generous justiciability doctrines. Some states, for example, will not apply their own, more generous, standing doctrines to claims brought under the Federal Constitution. See, e.g., *Urban League of Essex County v. Twp. of Mahwah*, 370 A.2d 521, 524 (N.J. Super. Ct. App. Div. 1977). See also Susan N. Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 BROOK. L. REV. 1057, 1116–17 & n.246 (1989) (discussing cases). Moreover, the typical expansions of standing principles—such as relaxing the injury-in-fact requirement, disregarding mootness, or permitting advisory opinions—generally would not help plaintiffs bringing constitutional challenges to self-enforcing tort laws. See, e.g., *Asarco*, 490 U.S. at 616–17 (noting that it was a state court's prerogative to hear generalized grievances brought by taxpayers and a teachers association which would have been insufficient under Article III); *DeFunis v.*

When considering the proper division of power between federal and state governments under our federalist system, the current Court appears increasingly willing to sacrifice federal supremacy to state sovereignty.<sup>301</sup> But a closer look at recent Supreme Court erosions of federal supremacy suggests the Court is observing a distinction between federal *legislative* supremacy and federal *judicial* supremacy as applied to constitutional interpretation and enforcement. In these decisions, the Court has been systematically “restricting the powers of Congress and enlarging the areas where the states can escape effective control by Congress.”<sup>302</sup> These cases thus reflect the Court’s eagerness to protect the states from *congressional* mandates where it believes Congress has encroached on powers constitutionally meant to be retained by the states. In *Morrison* and *Lopez*, for example, the Court emphasized that the Founders deliberately reposed the police power in the states, not in the federal government.<sup>303</sup> Recent sovereign immunity decisions show that the Court continues to protect the states from what it perceives as *congressional* overreaching.<sup>304</sup> In striking

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Odegaard, 416 U.S. 312, 316 (1974) (holding that the claim before it was moot under Article III, although the claim was justiciable under Washington state law); *In re Hines*, 732 N.E.2d 274, 275 (Mass. 2000) (holding that only the legislature, governor, and executive council—not private citizens—may seek advisory opinions, and only in limited circumstances). See also William A. Fletcher, *The “Case or Controversy” Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263, 285 (1990) (pointing out that advisory opinions are not adequate substitutes for decisions in litigated cases as they are not binding on subsequent courts and lack res judicata and collateral estoppel effect). Third, a plaintiff who brings a federal constitutional claim in state court because Article III standing is lacking cannot appeal an adverse decision to the Supreme Court (although the defendants could). See Fletcher, *supra*, at 281–82 (arguing that state courts should be required to adhere to Article III case or controversy requirements when adjudicating questions of federal law, in part to avoid this anomalous result). Finally, federal courts may simply be the more appropriate forum in which to vindicate federal constitutional rights. See, e.g., Akhil Reed Amar, *A Neofederalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985) (arguing that the Framers intended to require that some federal court be open to hear and resolve any given federal question); Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988) (proposing that litigants bringing federal constitutional claims should generally be able to choose their forum, federal or state); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing that state courts will not protect federal constitutional rights as forcefully as would federal district courts).

301. See JOHN T. NOONAN, JR., *NARROWING THE NATION’S POWER: THE SUPREME COURT SIDES WITH THE STATES* 4 (2002) (“[T]he sovereign immunity of the states is at the center of an explosive package disturbing the ascendancy of the nation over its parts.”).

302. *Id.* at 3–4.

303. See *United States v. Morrison*, 529 U.S. 598, 618 (2000); *United States v. Lopez*, 514 U.S. 549, 566 (1995).

304. See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91–92 (2000) (holding that Congress could not abrogate state sovereign immunity under the Age Discrimination in Employment Act); *Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding that Congress lacked the power to subject states to private damage suits under the Fair Labor Standards Act); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647–48 (1999) (holding that Congress lacked the power to subject states

the balance in the states' favor, the Court simultaneously has solidified its own position as the ultimate arbiter of the Constitution's meaning.<sup>305</sup>

The current Court's view of federal supremacy thus sees Congress's power vis-à-vis the states as comparatively weak or limited when contrasted with that of the Supreme Court. In *New York v. United States*, for example, the Court recently drew an explicit distinction between the power of "federal courts to order state officials to comply with federal law" and the power of Congress to do so.<sup>306</sup> The Court explained,

[T]he text of the Constitution plainly confers this authority on the federal courts . . . [it] contains no analogous grant of authority to Congress. Moreover, the Supremacy Clause makes federal law paramount over the contrary positions of state officials; the power of federal courts to enforce federal law thus presupposes some authority to order state officials to comply.<sup>307</sup>

No matter how one views the Court's recent balancing of state and congressional power,<sup>308</sup> state legislative arrogance presents the Court with a very different question. Recent decisions do not foretell with certainty how the Court would answer it. But the Court's insistence on its superiority in matters of constitutional interpretation suggests that it would look askance at state legislatures' attempts to usurp the Court's own power by first defying its rulings and then deliberately circumventing federal judicial

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to patent infringement suits under the Patent and Plant Variety Protection Remedy Clarification Act); *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996) (holding that Congress could not abrogate state sovereign immunity under the Indian Gaming Regulatory Act). While not all of the Court's recent expansions of sovereign immunity fit this pattern, they also do not reveal a willingness on the Court's part to immunize state legislative defiance of the Court's own constitutional interpretations. See generally NOONAN, *supra* note 301 (discussing the Court's recent sovereignty immunity rulings); Chemerinsky, *supra* note 198 (same).

305. Cf. Mark R. Killenbeck, *Madison, M'Culloch, and Matters of Judicial Cognizance: Some Thoughts on the Nature and Scope of Judicial Review*, 55 ARK. L. REV. 901, 901-02 (2003) (noting that Justices Rehnquist, O'Connor, Kennedy, Scalia, and Thomas have taken "a judicial supremacy approach," asserting "that they have a constitutionally mandated responsibility to insure that federal initiatives in fact regulate commerce and in so doing do not violate the dignity of the sovereign states"). But see Bell, *supra* note 276, at 213 (arguing that it is a recent phenomenon that the Court shows deference to state sovereignty over Congress's attempts to define the substantive scope of rights).

306. See *New York v. United States*, 505 U.S. 144, 179 (1992).

307. See *id.* But see *id.* at 199-207 & n.3 (White, J. concurring in part and dissenting in part) (arguing that history supports a more expansive understanding of congressional authority than that offered by the majority); *id.* at 210-13 (Stevens, J., concurring in part and dissenting in part) (same).

308. The Court's expansion of state sovereign immunity at the expense of federal rights is subject to powerful criticism. See, e.g., Chemerinsky, *supra* note 198, at 1201-10 (arguing that "[s]overeign immunity is an anachronistic relic and the entire doctrine should be eliminated from American law" and questioning any constitutional basis for the doctrine).

review.<sup>309</sup> The Court historically has been hostile to open disobedience of its rulings by state legislatures. For example, in *Cooper v. Aaron*, the Court forcefully condemned the Arkansas legislature's defiance of its decision in *Brown v. Board of Education*.<sup>310</sup> Pointing the blame for the state's disastrous failure to desegregate its schools squarely at the Arkansas legislature and governor,<sup>311</sup> the Court emphasized the importance of holding the state constitutionally accountable: "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 Court warned, "the [C]onstitution itself becomes a solemn mockery."<sup>312</sup> The Court identified the state's act of legislative arrogance as a failure of loyalty to the Constitution: "No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it."<sup>313</sup>

*Romer v. Evans* offers a more recent indication that the Court continues to frown upon state legislative disregard for its rulings.<sup>314</sup> In *Romer*, the Court invalidated a Colorado constitutional amendment that prevented state and local government from enforcing laws forbidding discrimination based on sexual orientation. The Court characterized the amendment as a defiance of Court-established constitutional norms, asserting that it "confounds th[e] normal process" of equal protection

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309. Because legislative arrogance entails ignoring pronouncements the Supreme Court has already made on controversial issues, the Court has no reason to engage in the kind of avoidance techniques it might otherwise use to avoid deciding contentious questions. See generally LISA A. KLOPPENBERG, PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF THE LAW (2001).

Of course, Louisiana's and Oklahoma's particular acts of legislative arrogance would pose an interesting conundrum for some members of the current Court. Among the Justices who have been the most zealous in curbing perceived legislative arrogance by Congress are the ones who believe that *Roe v. Wade*, 410 U.S. 113 (1973), should be overturned. But one can imagine other uses of the same legislative paradigm that would not pose the same dilemma for these Justices. See *supra* notes 31–35 and accompanying text (illustrating other potential applications for legislative arrogance).

310. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). In *Cooper*, the Court considered Arkansas's actions to be a repudiation of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution" which "has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." *Cooper*, 358 U.S. at 18.

311. *Cooper*, 358 U.S. 15 (asserting that the deplorable conditions in Arkansas schools were "directly traceable to the actions of legislators and executive officials of the State of Arkansas, taken in their official capacities, which reflect their own determination to resist this Court's decision in the *Brown* case").

312. See *id.* at 18 (quoting *United States v. Peters*, 9 U.S. (5 Cranch) 115, 136 (1809) (Marshall, C.J.)).

313. See *id.*

314. See *Romer v. Evans*, 517 U.S. 620, 631–36 (1996).

review to impose “a broad and undifferentiated disability on a single named group.”<sup>315</sup> The Court noted that such legislative arrogance was “unprecedented in our jurisprudence.”<sup>316</sup> The Court emphasized, “It is not within our constitutional tradition to enact laws of this sort.”<sup>317</sup>

In the face of the Court’s strong reaffirmations of the federal judiciary’s role to curb legislative encroachments on the Constitution, the Fifth and Tenth Circuits’ timidity in dealing with obvious acts of state legislative arrogance is somewhat mystifying. It seems troublingly parochial for a federal court to adhere so rigidly to the letter of Article III standing requirements and the *Ex parte Young* fiction as to allow legislative acts that directly disregard fundamental constitutional principles. Such formalism seems especially unwarranted when applied to the *Ex parte Young* doctrine, whose fiction was created for the very purpose of addressing this kind of legislative recalcitrance.<sup>318</sup>

Allowing state legislatures to ignore the Supreme Court’s constitutional interpretations invites a unique kind of crisis far worse than if Congress alone did so. Hamilton warned of the “hydra in government” that would result if state courts were permitted to reach their own interpretations of the Constitution.<sup>319</sup> This same chaos, or worse, would follow if state legislatures could disregard the Supreme Court’s constitutional rulings with impunity. Justice Holmes shared this concern, asserting, “I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.”<sup>320</sup>

Legislative arrogance implicates more than the enactment of brazenly unconstitutional state laws, which federal courts can and routinely do invalidate. It also implicates the legislature’s refusal to recognize its own place in the constitutional hierarchy and to submit its acts to the scrutiny of the federal courts. Judge Parker, who dissented in *Okpalobi*, specifically condemned this aspect of the Louisiana legislature’s actions:

By privatizing the enforcement of unlimited monetary damages, which is undoubtedly a state-sanctioned penalty, the State is attempting to avoid

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315. *Id.* at 632–33.

316. *See id.* at 633.

317. *Id.*

318. *See supra* notes 211–218 and accompanying text (discussing *Ex parte Young*).

319. *See* THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 7, at 403.

320. *See* OLIVER WENDELL HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 291, 295–96 (1920).

defending a patently unconstitutional law while simultaneously effecting a coercive impact so drastic that abortion providers have no choice but to cease operations. This purpose is illegitimate not only because Act 825 unduly burdens a constitutionally protected right, but also because it seeks to evade judicial review.<sup>321</sup>

The Court has created and employed timeworn legal devices specifically to ensure states' constitutional accountability and prevent such evasions of judicial review. The *Ex parte Young* doctrine itself has survived for almost one hundred years. Similarly, the doctrine of state action exists to ensure that the government cannot escape constitutional accountability by delegating authority to the private sphere or by aiding private infringement of constitutionally protected rights.<sup>322</sup> In *Shelley v. Kraemer*, the Court found state action in the judicial enforcement of private, racially restrictive covenants—this judicial enforcement constituted the sole link between the private agreements and the state.<sup>323</sup> Nevertheless, the Court found state action, stressing that state action “refers to exertions of state power in all forms.”<sup>324</sup> Legislative arrogance implicates the state much more directly. State courts are charged with enforcing the statute by hearing the private suits it authorizes, but, more importantly, the state is responsible for creating the entire liability scheme. Like the state action doctrine, principles of case or controversy and the *Ex parte Young* doctrine have the flexibility to ensure constitutional accountability where the state is not just complicit in, but the enabler of, private infringement of constitutional rights.

Federal courts should not shirk their responsibility to employ these doctrines to hold recalcitrant state legislatures constitutionally accountable for acts of legislative arrogance. Especially where such arrogance infringes individual rights, federal courts' role as a check on legislatures' overassertive impulses is critical. As Justice Breyer has observed, an independent judiciary fulfills its role as protector of “democratically

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321. See *Okpalobi v. Foster*, 244 F.3d 405, 443 (5th Cir. 2001) (en banc) (Parker, J., dissenting).

322. But see Metzger, *supra* note 16, at 1421–37 (arguing that the existing state action doctrine is not up to the task of ensuring constitutional accountability).

323. See *Shelley v. Kraemer*, 334 U.S. 1, 19–20 (1948). See also *Reitman v. Mulkey*, 387 U.S. 369, 374–75, 378–79 (1967) (upholding the state court's finding that a provision of the California Constitution embodied the state's unconstitutional facilitation of private discrimination); *id.* at 379–81 (discussing additional cases invalidating state-supported private discrimination).

324. See *Shelley*, 334 U.S. at 20. See also *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 264–65 (1964) (asserting that a state court's application of state law in a private lawsuit constitutes state action subject to First Amendment requirements). As the *New York Times Co.* Court held, “It matters not that the law has been applied in a civil action . . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.” *Id.* at 265.

structured government and of basic liberties . . . by helping gradually to develop among citizens and legislators liberty-protecting habits based in part upon their expectation that liberty-infringing laws will turn out not to be laws.”<sup>325</sup>

The results of past Supreme Court and lower federal court decisions illustrate that the sky has not fallen when states have been called upon to defend the constitutionality of privately enforced statutes in pre-enforcement actions. Tort liability in the context of legislatively enacted social policy is not a totally new concept, although such liability has typically been ancillary to state enforcement mechanisms such as criminal penalties. In such cases, courts have usually addressed the tort provisions, even if the named defendants had no power to enforce them. For example, many “partial-birth abortion” bans have not only included criminal penalties, but have also allowed the woman’s sexual partner and/or her parents to sue for damages if they did not consent to the abortion.<sup>326</sup> In only two such cases did courts refuse to rule on the civil liability provision on the grounds of sovereign immunity or lack of standing.<sup>327</sup> Other courts struck down the statutes in their entirety, even though the named defendants had no power to enforce the civil liability provisions.<sup>328</sup> Some courts even addressed the civil liability provisions expressly.<sup>329</sup> Likewise, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the husband-notification provision in Pennsylvania’s omnibus abortion act provided only for a private cause of action by the husband and possible license revocation.<sup>330</sup> The Supreme Court invalidated the provision without considering whether the plaintiffs had sued the proper defendants, even

325. Stephen Breyer, *Judicial Review: A Practicing Judge’s Perspective*, 78 TEX. L. REV. 761, 774 (2000).

326. See, e.g., 18 U.S.C. § 1531(c) (Supp. 2003) (giving a private right of action in certain cases to the “father” and “maternal grandparents” of the fetus); LA. REV. STAT. § 40:1299.35.16(C) (2001) (same); R.I. GEN. LAWS § 23-4.12-4 (2005) (same).

327. See *Hope Clinic v. Ryan*, 249 F.3d 603, 605–06 (7th Cir. 2001) (citing *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) (en banc), to support denying the plaintiffs’ standing to challenge a civil provision); *Summit Med. Assocs. v. Pryor*, 180 F.3d 1326, 1329 (11th Cir. 1999)).

328. See, e.g., *Nat’l Abortion Fed’n v. Ashcroft*, 330 F. Supp. 2d 436, 440–41 483 (S.D.N.Y. 2004) (invalidating the federal “partial-birth abortion” ban for lacking a health exception and finding it “unnecessary” to address other issues), *aff’d in part sub nom. Nat’l Abortion Fed’n v. Gonzalez*, 437 F.2d 278 (2d Cir. 2006); *R.I. Med. Soc’y v. Whitehouse*, 66 F. Supp. 2d 288, 315–16 (D.R.I. 1999).

329. See *R.I. Med. Soc’y*, 66 F. Supp. 2d at 315–16. See also, e.g., *Causeway Med. Suite v. Foster*, 43 F. Supp. 2d 604, 615 (E.D. La. 1999), *aff’d*, 221 F.3d 811 (5th Cir. 2000). Ironically, the Fifth Circuit affirmed this ruling just one year before issuing its en banc decision in *Okpalobi*.

330. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 887–88 (1992).

though the named defendants had no enforcement power over that provision.<sup>331</sup>

It is just as appropriate to require the state to defend pre-enforcement challenges to freestanding, privately enforced provisions that the state has enacted. The Constitution contemplates judicial review as the means to ensure governmental accountability. As Erwin Chemerinsky points out, “The authority for litigation against the government is the Constitution itself and its assurance of the supremacy of federal law, government accountability, and due process.”<sup>332</sup> In the search for constitutional accountability in cases of legislative arrogance, courts should unflinchingly cast light on the *government’s* responsibility, rather than seeking to pin the blame on as-yet nonexistent private litigants, or on an individual, “rogue” official in the service of an obvious fiction.<sup>333</sup> This will require courts to reject overly formalistic readings of case or controversy requirements and the *Ex parte Young* doctrine. But in doing so, courts will be vindicating, not violating, basic constitutional principles.

## V. CONCLUSION

Our Constitution promises that the government may not infringe the constitutional rights of its citizens. For that promise to have any meaning, the government must be held accountable for such infringements. Under our constitutional system, the judiciary exists as a check to ensure that accountability. And yet, through artfully crafted legislation, state legislatures currently are infringing constitutional rights with impunity, shirking their constitutional responsibility by manipulating well-established principles designed to ensure that the government is held to account when it harms citizens through unconstitutional actions.

Federal courts should stop this trend. Regardless of how sympathetic an underlying state goal may be, or how frustrated a state may be by the Supreme Court’s decisions, it is far worse to permit state legislative arrogance to go unchecked. The core constitutional principles of federal

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331. *See id.* at 893–94, 898 (addressing the constitutionality of the provision without reference to standing or sovereign immunity concerns).

332. Chemerinsky, *supra* note 198, at 1219.

333. *Cf.* Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225, 225–30 (1986). Whitman argues that courts have become familiar with characterizing wrongs using the terminology of tort law, which leads courts to tend to couch constitutional harms in terms of an individual’s behavior being inconsistent with community norms. As Whitman notes, this diverts attention from the governmental institution that promulgates the harm. *See id.* Courts, including the Supreme Court, are thus likely to overlook the unique attributes of constitutional harms inflicted by governmental institutions. *See id.* at 257–60.

supremacy and the balancing of power among the branches of government are threatened by these actions, which invite an anarchy in which individual rights are constantly subject to shifting majorities. To take constitutional responsibility is to share constitutional authority the way our system of government intends, not to arrogate power because of disagreements with how other branches have exercised theirs. The federal courts should ensure that states who engage in legislative arrogance are held accountable by hearing pre-enforcement challenges to these acts. The legitimacy of such challenges is supported by a straightforward application of Article III case or controversy principles and the *Ex parte Young* doctrine, as well as by basic constitutional norms.

