Notre Dame Law Review

Volume 97 | Issue 5 Article 3

6-2022

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CONSTITUTIONAL TOLLING AND PREENFORCEMENT CHALLENGES TO PRIVATE RIGHTS OF ACTION

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A person wishing to challenge the constitutionality of a law that regulates their conduct typically may sue the government official responsible for enforcing that provision for declaratory and injunctive relief pursuant to Ex parte Young. *This approach is generally unavailable, however, when a plaintiff seeks preenforcement relief against laws that are enforceable exclusively through a private right of action. In such cases, there is no government official against whom to bring a typical* Young *claim, and constraints such as sovereign immunity and justiciability requirements often pose insurmountable obstacles. A person subject to an apparently unconstitutional law that is enforced solely through private litigation therefore faces the choice of either complying with the provision, thereby foregoing the exercise of their constitutional rights, or exercising their claimed rights in violation of the provision and running the risk of incurring potentially substantial liability if a court ultimately upholds the provision's validity.*

The most direct way to alleviate this problem would be for the Court to expand Ex parte Young*'s exception to sovereign immunity to allow rightsholders to sue some designated official to challenge laws that are only enforceable through private rights of action. This approach faces a series of serious doctrinal challenges, however. Even if the Court is unwilling to go so far,* Young *itself may nevertheless provide the foundation for at least partly resolving this dilemma.* Young *is best known for creating its broadly used exception to state sovereign immunity. But* Young *also suggested that, at least under certain circumstances, a person has the due process right to obtain a judicial ruling concerning a legal provision's validity without having to incur the risk*

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*of potentially substantial liability by violating it. The Court applied this principle in several post-*Young *cases, holding that when a party is unable to bring a preenforcement challenge to a legal provision under* Young*, they may raise their constitutional challenge as a defense in enforcement proceedings. Even if the court rejects that constitutional defense, the party is protected from substantial liability for violations of the challenged provision that occurred prior to the court's ruling. Some modern courts continue to recognize this "constitutional tolling" doctrine. By expressly reaffirming—with appropriate modifications and restrictions—the constitutional tolling doctrine, the Court could mitigate the potential chill to constitutional rights posed by laws that appear to regulate constitutionally protected conduct and are enforceable solely through private rights of action. And Congress could further help protect constitutional rights by enacting a federal statute abrogating state sovereign immunity against preenforcement constitutional challenges to such provisions.*

INTRODUCTION

When a person believes that a legal provision which regulates their conduct violates the U.S. Constitution or a federal statute, they generally have three alternatives. First, they may allow the potential penalties for violating that legal provision to chill their conduct, deterring them from performing their desired activities. If the provision actually is invalid, then the person will have been either deterred from exercising their constitutional rights or otherwise

subject to restrictions that the government lacked authority to implement.

Second, the person may violate the legal provision, running the risk of triggering an administrative proceeding, civil enforcement suit, or criminal prosecution. They may raise their constitutional argument as a defense in such proceedings. If the person prevails, they will not be subject to adverse legal consequences and res judicata will preclude the opposing party from relitigating the issue against them.[1] Conversely, if the court rejects their constitutional claim, then the person may face fines, penalties, and potentially even imprisonment.

Third, the person may often seek preenforcement relief by filing a lawsuit in federal court against the federal or state official responsible for enforcing the legal provision at issue.[2] The lawsuit may seek an injunction to bar that official from prosecuting the plaintiff under the challenged provision,[3] a declaratory judgment that the provision is unconstitutional,[4] or both.[5] If the person prevails, they cannot be subject to sanctions—at least by the government[6]—for their contemplated conduct. If, in contrast, the court rejects their constitutional claim, then they remain protected from civil or criminal liability so long as they did not violate the challenged legal provision.

Preenforcement litigation allows people to obtain judicial determinations of their rights without exposing themselves to the risk

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1 *See* Ashe v. Swenson, 397 U.S. 436 (1970) (applying collateral estoppel based on a previous acquittal in a criminal case); *see also* Montana v. United States, 440 U.S. 147 (1979) (enforcing collateral estoppel against the government).

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

3 At a minimum, an individual plaintiff—that is, a plaintiff in a non-class-action suit that is not suing in an associational capacity, *see* Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977) (explaining associational standing)—may obtain an injunction barring the defendant from enforcing the challenged legal provision against the plaintiff itself. Substantial dispute has arisen, however, over whether the plaintiff may instead seek a broader injunction completely barring the defendant from enforcing the challenged provision against third-party nonlitigants—other similarly situated rightholders—as well. *See* Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1, 9–10, 28–34 (2019) (explaining the concerns with nationwide or statewide defendant-oriented injunctions that completely bar a governmental defendant from enforcing a challenged legal provision against anyone, anywhere throughout the state or nation).

4 A person may seek a declaratory judgment in a preenforcement suit even if they cannot meet the equitable requirements for injunctive relief. *See* Steffel v. Thompson, 415 U.S. 452, 475 (1974).

5 The *Younger* doctrine, however, generally prohibits a state criminal defendant from seeking a federal injunction to prohibit an ongoing prosecution on constitutional grounds. *See* Younger v. Harris, 401 U.S. 37, 53–54 (1971).

6 *See infra* notes 74–78 and accompanying text (explaining how even successful litigation against government defendants does not completely protect rightholders when a statute may be enforced either by the government or through private rights of action).

of potentially substantial penalties or imprisonment. When plaintiffs seek such preenforcement relief against a statute or regulation that is enforceable by the government, they sue either the particular official or the head of the agency empowered to enforce that provision, in that person's official capacity.[7] The resulting injunction or declaratory judgment provides full ex ante protection to the rightholder, so long as government agencies or officials are the only ones authorized to enforce the challenged provision.[8]

Some statutes, however, create private rights of action, allowing private plaintiffs to sue alleged violators. Such laws may allow plaintiffs to recover not only actual compensatory damages, but presumed statutory damages regardless of the actual harm they have suffered, civil fines, punitive damages, injunctions, and attorneys' fees.[9] These potentially substantial remedies can exert a tremendous deterrent effect, chilling private conduct almost to the same extent as criminal sanctions. Yet because the statutes are enforced by private plaintiffs rather than a particular government official, there is usually no obvious defendant for a person to sue in a preenforcement action. People whose conduct is restricted by laws creating private rights of action therefore face a dilemma: they may either comply with the statute even though it may be unconstitutional, or violate the statute and raise their constitutional claims as defenses, thereby running the risk of incurring potentially substantial liability.

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7 *See* Papasan v. Allain, 478 U.S. 265, 277 (1986).

8 Of course, an injunction or declaratory judgment may be overturned on appeal or vacated after the case has concluded. And a preliminary injunction may be dissolved at the end of a case if the court determines that the plaintiff has not met its burden of proof. The Supreme Court has expressly left open the question of whether a plaintiff who violates a legal provision while its enforcement has been enjoined may be retroactively prosecuted for such conduct if the injunction is later reversed, vacated, or dissolved. *See* Edgar v. MITE Corp., 457 U.S. 624, 630 & n.5 (1982) (holding that a substantial dispute exists over whether a litigant is subject to "civil or criminal penalties" under such circumstances); *see also id.* at 665 (Rehnquist, C.J., dissenting) (recognizing the "possibility" that the plaintiff might be subject to an enforcement action for violating an Illinois statute after obtaining a preliminary injunction against that law if the injunction were later overturned on appeal, but declining to resolve the issue); Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 987 (2018) (defending such retroactive prosecutions). In other work, I have argued that plaintiffs should not be subject to sanctions with a punitive component for acts taken pursuant to an erroneous injunction. Michael T. Morley, *Erroneous Injunctions*, 71 EMORY L.J. (forthcoming 2022).

9 *See* Michael T. Morley, Spokeo*: The Quasi-Hohfeldian Plaintiff and the Nonfederal Federal Question*, 25 GEO. MASON L. REV. 583, 589 n.46 (2018) (providing examples of statutes creating private rights of action with substantial enforcement provisions).

States have periodically adopted restrictions on abortions,[10] such as bans on abortions for minors[11] and partial-birth abortions,[12] that are enforceable through private rights of action. The Texas Heartbeat Act, commonly referred to as S.B. 8, was specifically structured to exploit the difficulty in obtaining preenforcement rulings concerning the validity of laws enforceable solely through private rights of action.[13] The statute requires a physician to determine whether a fetus has a "detectable . . . heartbeat" prior to performing an abortion,[14] except in emergencies.[15] It goes on to prohibit a physician from "knowingly perform[ing] or induc[ing] an abortion on a pregnant woman if the physician detect[s] a fetal heartbeat,"[16] even though the U.S. Supreme Court held in *Planned Parenthood v. Casey* that states may not prohibit women from obtaining abortions prior to fetal viability.[17]

The Texas Heartbeat Act specifies that it "shall be enforced exclusively through . . . private civil actions."[18] It expressly prohibits the "state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision" from enforcing, or threatening to enforce, these restrictions.[19] Anyone other than a state or local entity, officer, or

10 *See, e.g.*, LA. STAT. ANN. § 9:2800.12(A) (1997) (allowing women who receive abortions to bring private civil actions against the physicians who perform them).

11 *See, e.g.*, OKLA. STAT. tit. 63, § 63-1-740 (2021) (providing a cause of action against a physician who performs an abortion on a minor for "the cost of any subsequent medical treatment such minor might require because of the abortion"), *conditionally repealed*, 2021 Okla. Sess. Laws, ch. 308, §§ 2, 18 (providing this provision is repealed if the U.S. Supreme Court overturns *Planned Parenthood of Southeast Pennsylvania v. Casey*'s restrictions on states' ability to ban abortion, or the U.S. Constitution is amended in that regard).

12 *See, e.g.*, WIS. STAT. § 895.038(2)(a), (3)(a) (2022) (providing a cause of action for the father of a fetus or the parents of a minor against a physician who performs a partial-birth abortion, and authorizing the recovery of damages for "personal injury and emotional and psychological distress"); ALA. CODE § 26-23-5 (1975) (allowing the husband of a woman or the parents of a minor who obtains a partial-birth abortion to sue for "monetary compensation for all injuries, psychological and physical," that resulted, as well as punitive damages); *see also* 720 ILL. COMP. STAT. § 513/15 (allowing the parents of a minor who obtains a partial-birth abortion to sue for monetary damages for "psychological and physical" injury to the minor "and statutory damages equal to 3 times the cost of the partial-birth abortion"), *repealed by* Reproductive Health Act, Pub. Act. No.101-13, 775 ILL. COMP. STAT. § 55/905-20 (2019).

13 Texas Heartbeat Act, S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021) (codified at TEX. HEALTH & SAFETY CODE, §§ 171.201–171.212 (West 2021)).

14 TEX. HEALTH & SAFETY CODE § 171.203(b) (West 2021).

15 *Id.* § 171.205(a).

16 *Id.* § 171.204(a).

17 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878–79 (1992).

18 TEX. HEALTH & SAFETY CODE § 171.207(a) (West 2021).

19 *Id.*

employee may sue any person who performs, induces, or aids and abets a woman in obtaining an abortion of a fetus with a detectable heartbeat.[20] The court may award injunctive relief, statutory damages of at least $10,000, and attorneys' fees.[21]

If the statute had been an ordinary criminal or even administrative restriction enforceable by the government, outside groups could have brought a preenforcement challenge and obtained a preliminary injunction barring its enforcement based on its direct conflict with *Casey*.[22] But because the statute's prohibitions are enforceable solely through a private right of action involving substantial statutory damages, there was no immediately apparent government official to sue for preenforcement relief.[23] Despite the law's apparent invalidity, it has had a substantial deterrent effect. Press accounts suggest that abortions in Texas have plummeted,[24] with many women driving hours to seek abortions in other states.[25] More broadly, several states have looked to the Texas law as a model, not only for their own anti-abortion statutes,[26] but anti-gun laws and other measures that raise serious constitutional questions[27] and would likely be quickly enjoined if they took the form of typical criminal or administrative prohibitions.

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20 *Id.* § 171.208(a)(1)–(3).

21 *Id.* § 171.208(b)(1)–(3).

22 Of course, if the case made its way to the U.S. Supreme Court, the Court could have taken the opportunity to overturn *Casey*, which would have affected the statute's constitutionality. Many commentators anticipate that the Court may revisit *Casey* this term in *Dobbs v. Jackson Women's Health Org.*, 141 S. Ct. 2619 (2021) (mem.) (granting certiorari). *See* Mary Ziegler, Opinion, *The End of* Roe *Is Coming, and It Is Coming Soon*, N.Y. TIMES (Dec. 1, 2021), https://www.nytimes.com/2021/12/01/opinion/supreme-court-abortion-mississippi-law.html [https://perma.cc/B7KQ-65GN].

23 *See infra* Part I.

24 *See* Julia Harte, *Texas Abortion Clinics Struggle to Survive Under Restrictive Law*, REUTERS (Sept. 30, 2021), https://www.reuters.com/world/us/texas-abortion-clinics-struggle-survive-under-restrictive-law-2021-09-30/ [https://perma.cc/8WM9-34EM].

25 *See* Sean Murphy, *Texas Women Drive Hours for Abortions After New Law*, AP NEWS (Oct. 14, 2021), https://apnews.com/article/abortion-texas-louisiana-0cc666fde471f0fe2ce8a5f28977ad28 [https://perma.cc/D8DT-X82Q].

26 Stephen Groves, *GOP-Led States See Texas Law as Model to Restrict Abortions*, AP NEWS (Sept. 2, 2021), https://apnews.com/article/health-religion-us-supreme-court-laws-23c373f3252d511f15ccc170887c30e2 [https://perma.cc/3HSQ-JAR7]; *see, e.g.*, Alison Durkee, *Ohio Bill Copies Texas' Abortion Ban—and Goes Further. Here's Which States Could Be Next*, FORBES (Nov. 3, 2021), https://www.forbes.com/sites/alisondurkee/2021/11/03/ohio-bill-copies-texas-abortion-ban-and-goes-further-heres-which-states-could-be-next/?sh=4ba8aca95b84 [https://perma.cc/MJ5F-YQHD].

27 *See* Maura Dolan, *Texas Abortion Law Spurs Copycat Measures, from Guns in California to Critical Race Theory in Florida*, L.A. TIMES (Dec. 22, 2021), https://www.latimes.com/california/story/2021-12-22/texas-abortion-law-spurs-copycat-proposals-from-guns-to-critical-race-theory [https://perma.cc/29EL-57LL]; *see, e.g.*, Shawn Hubler, *Newsom Calls*

Several scholars have recognized how statutes enforceable solely through private rights of action can deter the exercise of constitutional rights recognized by Supreme Court precedent.[28] Some have argued that, under current doctrine, lawsuits against a governor or attorney general to challenge the constitutionality of state laws creating private rights of action should be deemed justiciable.[29] Others contend that lawsuits against state court judges are the proper way to challenge such statutes.[30] Professor Maya Manian has suggested that "it is the legislators who enact such laws who should be subject to suit."[31]

This Article suggests a new approach. In precedent tracing back over a century, predating the Declaratory Judgment Act,[32] the U.S.

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for Gun Legislation Modeled on the Texas Abortion Law, N.Y. TIMES (Dec. 12, 2021), https://www.nytimes.com/2021/12/12/us/politics/newsom-texas-abortion-law-guns.html [https://perma.cc/C9PC-55PG].

28 *See, e.g.*, Susan Frelich Appleton, Response, *Gender, Abortion, and Travel After* Roe's *End*, 51 ST. LOUIS U. L.J. 655, 679–80 (2007) (discussing the possibility that states with strong restrictions on abortion may impose civil liability on women who travel to states with more permissive abortion laws to obtain abortions); Richard D. Rosen, *Deterring Pre-Viability Abortions in Texas Through Private Lawsuits*, 54 TEX. TECH. L. REV. 115, 163 (2021) ("[T]hose who provide abortion services must await a lawsuit in the Texas courts before having the opportunity to lodge constitutional challenges to the laws."); A.J. Stone, III, *Consti-Tortion: Tort Law as an End-Run Around Abortion Rights After* Planned Parenthood v. Casey, 8 AM. U. J. GENDER SOC. POL'Y & L. 471, 473 (2000) ("[T]ort law offers other approaches to restricting abortion through the tort system."); *cf.* Note, *Private Attorneys General and the Defendant Class Action*, 135 HARV. L. REV. 1419, 1419 (2022) (advocating defendant class actions against potential plaintiffs as a means of challenging laws establishing private rights of action).

29 *See, e.g.*, Caitlin E. Borgmann, *Legislative Arrogance and Constitutional Accountability*, 79 S. CAL. L. REV. 753, 778-80 (2006); 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, 875–76 (2004) ("The Fifth Circuit should have considered, or at least distinguished, Supreme Court precedent which relaxed standing principles in the name of giving plaintiffs a remedy. . . . A declaratory judgment in plaintiffs' favor would completely redress the plaintiffs' injuries.").

30 *See, e.g.*, Georgina Yeomans, *Ordering Conduct Yet Evading Review: A Simple Step Toward Preserving Federal Supremacy*, 131 YALE L. J.F. 513, 515 (2021) ("The Court should use the S.B. 8 debacle as an opportunity to hold that when legislation implicates the exercise of fundamental rights, but does not admit of a clear path to pre-enforcement review, litigants can sue state-court judges under *Ex parte Young* to enjoin the law's enforcement."); Stephen N. Scaife, Comment, *The Imperfect but Necessary Lawsuit: Why Suing State Judges is Necessary to Ensure that Statutes Creating a Private Cause of Action Are Constitutional*, 52 U. RICH. L. REV. 495, 496 (2018) ("[T]he pre-enforcement action should be brought against state judges who could potentially hear lawsuits brought under the private cause of action created by the state statute.").

31 Maya Manian, *Privatizing Bans on Abortion: Eviscerating Constitutional Rights Through Tort Remedies*, 80 TEMP. L. REV. 123, 128 (2007).

32 Declaratory Judgment Act, ch. 512, 48 Stat. 955 (1934) (codified as amended at 28 U.S.C. §§ 2201–02 (2018)).

Supreme Court recognized that the Due Process Clauses[33] grant people the right to obtain judicial rulings concerning the validity of legal provisions to which they are subject, without exposing themselves to potentially substantial liability for violating those provisions.[34] Subsequent developments, such as Congress's enactment of the Declaratory Judgment Act, have largely marginalized this line of authority. This Article argues that the Court should reaffirm and enforce this right, particularly in the context of statutes creating private rights of action.

One potentially viable way of implementing this right without substantially modifying both sovereign immunity and justiciability doctrine would be for the Supreme Court to expressly reaffirm the principle of "constitutional tolling." The constitutional tolling doctrine exempts civil defendants from significant liability where they had a substantial constitutional defense to a legal provision, and they were unable to raise that issue in preenforcement proceedings.[35] Alternatively, Congress may use its enforcement authority under Section Five of the Fourteenth Amendment to abrogate state sovereign immunity, allowing lawsuits against the state itself to challenge legal provisions creating private rights of action. Such legislation seems unlikely to pass in the current, partisanly divided environment, however.

Part I of this Article lays a foundation by examining the various doctrinal obstacles that generally preclude plaintiffs from bringing preenforcement challenges to laws creating private rights of action. This Part focuses in particular on the ways in which litigants have attempted to challenge S.B. 8, while also discussing similar suits against other laws establishing private rights of action. Such litigation is almost always unsuccessful in federal court.

Part II delves into *Ex parte Young*'s lesser-known aspects. The opinion is best known for limiting state sovereign immunity in constitutional suits against state officials. But *Young* did more than simply establish an exception to sovereign immunity. The opinion also held that putative rightholders should be able to obtain judicial determinations of the validity of legal provisions that restrict their conduct *without* incurring potentially substantial liability. *Ex parte Young* recognized that such preenforcement judicial guidance can be necessary to protect claimed rightholders from irreparable harm—extricating them from the dilemma of choosing between being chilled

33 U.S. CONST. amend. V; *id.* amend. XIV, § 1.

34 *See infra* Part II.

35 *See infra* notes 240–41 and accompanying text.

from exercising their rights by a potentially invalid legal provision and violating that provision to test its validity, thereby subjecting themselves to potentially substantial liability. Supreme Court cases over the decade that followed *Young* reaffirmed the due process right to have some mechanism for seeking preenforcement judicial guidance as to a legal provision's validity.

The Article goes on to assess potential methods of implementing this right in the context of apparently unconstitutional restrictions that are enforceable solely through private rights of action. Part III discusses the difficulties with expanding *Ex parte Young*'s exception to state sovereign immunity to allow preenforcement challenges to such laws. It begins by reviewing the justiciability obstacles to naming state court judges or clerks as proper defendants in preenforcement suits under *Ex parte Young*. It then turns to the possibility of expanding *Ex parte Young* to allow plaintiffs to challenge statutory private rights of action by suing a designated state executive official, such as the governor or attorney general, despite their lack of enforcement authority. Such a lawsuit would essentially use a state official as a stand-in for the state itself to obtain a judgment that effectively bars private parties from suing under the challenged statute. This would be the most direct approach. But it would require substantial changes not only to longstanding sovereign immunity precedent, but justiciability and res judicata doctrine as well. The current Court appears highly unlikely to adopt such significant reforms.

Part IV goes on to assess other potential approaches to alleviating the chilling effects of laws creating potentially unconstitutional private rights of action. Section A explores the "constitutional tolling" doctrine rooted in by *Ex parte Young*. As explained earlier, this doctrine protects a claimed rightholder from substantial civil liability under a legal provision to which the rightholder presented a colorable constitutional challenge that could not be asserted in preenforcement proceedings. After examining how some modern courts continue to apply the doctrine, this Section assesses both the drawbacks of this approach as well as ways in which the doctrine could be modified to address such concerns. Section B suggests that Congress enact a federal statute abrogating state sovereign immunity against preenforcement challenges to state laws creating private rights of action. Both of these alternatives raise theoretical and practical concerns. But implementing at least one of them would prevent states from hindering judicial review and chilling the exercise of fundamental rights through constitutionally dubious legal restrictions that are enforceable solely through private rights of action. The final Part briefly concludes.

I. BACKGROUND

A. Barriers to Preenforcement Litigation

When states enact legal restrictions that are solely enforceable through private rights of action, several barriers exist to seeking preenforcement relief, such as an injunction or declaratory judgment, from a federal court. Sovereign immunity bars potential plaintiffs from suing the state itself. The Eleventh Amendment's text only strips federal courts of jurisdiction over suits against a state by citizens of other states or foreign nations.[36] The Supreme Court has long held, however, that the Constitution preserves broader sovereign immunity for states,[37] protecting them from lawsuits by their own citizens, including federal question cases,[38] in both federal and state court.[39] This sovereign immunity extends to lawsuits against state agencies and other entities,[40] such as a legislature, as well as suits against officials sued in their official capacity[41] (subject to the important exception established in *Ex parte Young*[42]).

Both the individual legislators who vote to enact an unconstitutional law, as well as the leaders of those legislative chambers, have absolute immunity from suit, regardless of the relief sought.[43]

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36 U.S. CONST. amend. XI.

37 *See* Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991) ("[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms . . . .").

38 *See* Hans v. Louisiana, 134 U.S. 1, 15 (1890).

39 *See* Alden v. Maine, 527 U.S. 706, 754 (1999).

40 *See* FDIC v. Meyer, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." (first citing Loeffler v. Frank, 486 U.S. 549, 554 (1988); and then citing FHA v. Burr, 309 U.S. 242, 244 (1940))); *see, e.g.*, Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 769 (2002) (holding that sovereign immunity protects state agencies from proceedings before federal administrative agencies).

41 *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989) ("[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. . . . As such, it is no different from a suit against the State itself." (citing Brandon v. Holt, 469 U.S. 464, 471 (1985))).

42 209 U.S. 123, 159 (1908).

43 *See* Sup. Ct. of Va. v. Consumers Union of the U.S., 446 U.S. 719, 733–34 (1980) (holding that, had the legislature or its members been sued for enacting an unconstitutional statute, such defendants "could successfully have sought dismissal on the grounds of absolute legislative immunity"); Tenney v. Brandhove, 341 U.S. 367, 379 (1951) (holding that a plaintiff could not sue state legislators or a state legislative committee for damages under 8 U.S.C. § 43 (now 42 U.S.C. § 1983) for the committee's investigative activities); *see also* Bogan v. Scott-Harris, 523 U.S. 44, 54 (1998) (holding that legislative immunity extends to municipal legislators). This common-law immunity is in addition to

Rightholders subject to such a law would also likely lack standing to sue the legislators who adopted it,[44] on the (misguided) grounds that the cause of any chilling effect on their rights stems from the *enforcement* of that law, rather than its mere existence.[45] The Supreme Court held in *Ex parte Young* that sovereign immunity does not prevent rightholders from suing state officers in their official capacities for prospective relief to prevent future violations of the U.S. Constitution and federal laws.[46] Preenforcement constitutional challenges to state laws are often brought in the context of such *Young*-authorized suits. The *Young* doctrine, however, allows only suits against state officials charged with enforcing a particular statute.[47] The doctrine has generally been deemed inapplicable where state laws create only private rights of action because, by definition, there is no state official responsible for "enforcing" such laws.[48]

Courts have generally rejected plaintiffs' attempts to challenge statutes creating private rights of action by suing the governor as the head of the state's executive branch, or the attorney general as the state's chief law enforcement officer, because neither official plays a role in private lawsuits under such laws.[49] They have likewise held that

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the constitutional immunity that the Speech and Debate Clause, U.S. CONST. art. I, § 6, confers on Members of Congress for their legislative activities. *See* Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 503 (1975).

44 *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016) (setting forth the requirements for standing); Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

45 *See, e.g.*, Women's Health Clinic v. State of La., 825 So. 2d 1208, 1213 (La. Ct. App. 2002) (holding that "no justiciable controversy" exists between plaintiffs challenging a Louisiana law creating a private right of action "and the State of Louisiana").

46 209 U.S. 123, 159 (1908).

47 *Id.* at 157 ("In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party.").

48 *See, e.g.*, Okpalobi v. Foster, 244 F.3d 405, 429 (5th Cir. 2001) (en banc) (holding that the Eleventh Amendment barred a challenge to Louisiana's law allowing women to sue physicians who perform abortions on them); Summit Med. Assocs., P.C. v. Pryor, 180 F.3d 1326, 1342 (11th Cir. 1999) (holding that the Eleventh Amendment barred a challenge to an Alabama law creating a private right of action against physicians who perform partial-birth abortions).

49 *See, e.g.*, *Okpalobi*, 244 F.3d at 423–44 (holding that the governor and attorney general had "Eleventh Amendment immunity from . . . suit" because nothing "suggests that there is *any* enforcement connection between" them and the challenged law "that satisfies either of the requirements of *Ex parte Young*"); *Summit Med. Assocs.*, 180 F.3d at 1342 (holding that a "suit against the Governor, the Attorney General, and the District Attorney with respect to the private civil enforcement provision of the partial-birth abortion statute is barred by the Eleventh Amendment").

plaintiffs lack standing to sue such defendants.[50] When neither the governor nor attorney general is empowered to enforce a particular statute, a judgment against them cannot redress any harm to the plaintiffs that the statute causes. This is the main obstacle to preenforcement challenges to statutory private rights of action: because no state official is responsible for enforcing these laws, there is generally no obvious defendant against whom to bring a justiciable *Young*-type preenforcement action.[51]

Lawsuits against judges or court clerks to forbid them from accepting complaints, adjudicating cases, or entering judgments based on purportedly unconstitutional laws may initially seem like a more effective alternative, but they have fared no better. The Supreme Court has held that state judges are not immune to claims for prospective relief concerning their official judicial actions.[52] An amendment to 42 U.S.C. § 1983 specifies that such prospective relief for an "act or omission taken in such officer's judicial capacity" must initially take the form of a declaratory judgment, rather than an injunction, unless a declaratory judgment is "unavailable."[53] Moreover, the U.S. Supreme Court's ruling in *Mitchum v. Foster* holds that the federal Anti-Injunction Act, which generally prohibits federal courts from enjoining state court proceedings,[54] does not apply to § 1983 claims against state judges.[55]

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50 *See, e.g.*, Hope Clinic v. Ryan, 249 F.3d 603, 605 (7th Cir. 2001) ("[P]laintiffs lack standing to contest the statutes authorizing private rights of action, not only because the defendants cannot cause the plaintiffs injury by enforcing the private-action statutes, but also because any potential dispute plaintiffs may have with future private plaintiffs could not be redressed by an injunction running only against public prosecutors."); *Okpalobi*, 244 F.3d at 425–29.

51 *See Summit Med. Assocs.*, 180 F.3d at 1342 ("[F]ederal courts have refused to apply *Ex parte Young* where the officer who is charged has no authority to enforce the challenged statute.")

52 Pulliam v. Allen, 466 U.S. 522, 541–42 (1984). Nor are judges immune from criminal prosecution. *See Ex parte* Virginia, 100 U.S. 339, 348–49 (1880). In contrast, judges have absolute immunity from damages claims for judicial acts that are not taken in clear excess of their jurisdiction, regardless of the judge's subjective bad faith. Pierson v. Ray, 386 U.S. 547, 553–54 (1967); *see, e.g.*, Mireles v. Waco, 502 U.S. 9 (1991) (per curiam).

53 Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847, 3853 (codified as amended at 42 U.S.C. § 1983 (2018)).

54 *See* 28 U.S.C. § 2283 (2018) ("A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.").

55 *See* Mitchum v. Foster, 407 U.S. 225, 242–43 (1972) ("[F]ederal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights.").

Ex parte Young, however, suggests that suits to preemptively bar state judges from adjudicating certain kinds of cases within their jurisdiction can raise serious sovereign immunity concerns.[56] *Young* expressly distinguishes between "enjoin[ing] an individual, even though a state official, from commencing suits," which is permissible under certain circumstances, and "restrain[ing] a court from acting in any case brought before it . . . . [A]n injunction against a state court would be a violation of the whole scheme of our Government."[57] Moreover, though *Mitchum* held that the Anti-Injunction Act does not prohibit § 1983 claims to enjoin state judges, "principles of equity, comity, and federalism . . . must restrain a federal court when asked to enjoin a state court proceeding."[58]

Serious standing challenges also arise in trying to indirectly challenge a state law's validity by suing state court judges. For a state court judge to be deemed the source of irreparable injury to a plaintiff, the plaintiff would likely have to establish by a preponderance of the evidence that: (i) it will violate the underlying law; (ii) such violation will lead to a civil lawsuit; (iii) the defendant judge will be assigned to hear the lawsuit; and (iv) the judge will erroneously rule against the plaintiff in such a lawsuit, failing to enforce the plaintiff's constitutional rights. Steps (i) and (ii) may be reasonably certain. A defendant class[59] of all state court judges might be sufficient to satisfy step (iii), though the Court has rejected a comparable argument as applied to plaintiffs. *Summers v. Earth Island Institute* held that a plaintiff organization cannot claim standing to challenge a legal provision on the grounds that the provision at issue is statistically certain to injure one or more of its members, particularly where the organization cannot identify any particular members who actually are impacted.[60] Likewise, the fact that some state judge will eventually be assigned a case arising under a challenged legal provision might be insufficient to authorize a suit against all state judges (or even all state judges within a particular county or judicial trial district). Even putting aside such concerns, the current Court might not consider a state court judge to be the cause of any injury in fact that a rightholder suffers from an allegedly unconstitutional statute. Any chilling effect or other

56 *See Ex parte* Young, 209 U.S. 123, 163 (1908).

57 *Id.*

58 *Mitchum*, 407 U.S. at 243.

59 *See* FED. R. CIV. P. 23.

60 *See* Summers v. Earth Island Inst., 555 U.S. 488, 497 (2009) (rejecting the argument that an association can establish standing by showing that, based on its "description of the activities of its members, there is a statistical probability that some of those members are threatened with concrete injury").

such harm appears to stem primarily from the existence of the statutory cause of action and the decision of a private plaintiff to sue under it—not the general availability of a state forum in which to adjudicate and, if appropriate, dismiss such claims.

The difficulty of seeking prospective relief against state judges is further enhanced by considering the role of the state court judge as defendant. Ordinarily, a state judge acts as a neutral arbiter, interpreting the meaning of state laws and determining whether they violate the U.S. Constitution. Suing the judge puts that person in the position of taking a position—in advance of an actual lawsuit—on the validity of the challenged legal provision. Either the judge must defend its validity or agree with the plaintiff as to the law's invalidity in advance of any state court proceedings under the challenged provision.

In any event, a plaintiff who obtained relief against a state's judges would not be protected from diversity suits under the challenged legal provision in federal court.[61] Nor would such relief preclude the plaintiff from being sued in the courts of other states that acquire general personal jurisdiction over the plaintiff, should the plaintiff travel there.[62]

Rather than targeting government officials, a person wishing to bring a preenforcement challenge to a statutory private right of action might instead seek an injunction or declaratory judgment against potential plaintiffs. Such suits would similarly face a range of justiciability-related obstacles. For example, in *Nova Health Systems v. Gandy*, a state statute rendered doctors who performed an abortion on a minor without their parents' knowledge or consent "liable for the cost of any subsequent medical treatment" that was necessary as a result of the procedure.[63] Due to this law, an abortion provider stopped performing abortions on minors without parental consent.[64] It sued various state officials who oversaw public hospitals and other medical institutions, arguing that the statute was unconstitutional.[65] The provider alleged that it had changed its policies to avoid being

61 A federal district court ruling in favor of a plaintiff would have no stare decisis effect in a future federal case brought against that same party under the challenged legal provision. *See* Camreta v. Greene, 563 U.S. 692, 706 n.5 (2011). Of course, if the plaintiff's original case were appealed to the U.S. Court of Appeals for that circuit and the plaintiff prevailed, then that appellate ruling would preclude future federal claims against not only that party, but other rightholders throughout the circuit, as well, as a matter of stare decisis.

62 *See* Burnham v. Superior Ct. of Cal., 495 U.S. 604, 619 (1990) (affirming "jurisdiction based on physical presence alone").

63 Nova Health Sys. v. Gandy, 416 F.3d 1149, 1152 (10th Cir. 2005) (quoting OKLA. STAT. tit. 63, § 63-1-740).

64 *Id.* at 1153, 1155.

65 *See id.* at 1153–54.

sued by such medical facilities for the cost of treatment they provided to minors who had received abortions in violation of the statute. Neither the defendant officials, nor the institutions they oversaw, however, had either attempted to sue the abortion provider or threatened to do so.[66]

The Tenth Circuit held that the abortion provider lacked standing to maintain its suit because a live case or controversy did not exist between it and the defendants. The defendants, although state officials, were not responsible for enforcing the abortion restrictions.[67] The defendants had not caused the abortion provider to change its policies,[68] and a favorable ruling against them would not alleviate the legal risk to the provider.[69] "Even if these defendants were enjoined from seeking damages against [the abortion provider] . . . there would still be a multitude of other prospective litigants who could potentially sue [it]," including the parents of minors who received abortions in violation of the statute, as well as the physicians and nurses who treated those minors.[70]

The Tenth Circuit went on to explain:

> [N]othing 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. 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.[71]

Courts will not allow a regulated entity to bootstrap a lawsuit by preemptively suing a potential plaintiff that has not acted adversely to it or threatened it on the grounds that person may someday decide to sue. And the broader the universe of potential plaintiffs under a statute creating a private right of action, the less likely that a judgment

66 *See id.* at 1153, 1157.

67 *Id.* at 1158.

68 *Id.* at 1157.

69 *Id.* at 1159.

70 *Nova Health Sys.*, 416 F.3d 1149, 1159 (10th Cir. 2005); *cf.* K.P. v. LeBlanc, 729 F.3d 427, 437 (5th Cir. 2013) (rejecting constitutional challenge to a law creating a private right of action against abortion providers due to lack of redressability where the defendants were board members who managed the state's medical malpractice compensation fund, because "[t]he Board Parties are not charged under state law with enforcing this 'strict liability' provision . . . [a]nd enjoining the Board Parties from 'enforcing' the cause of action would not address their role in administering the [f]und" or "redress the [plaintiffs'] injury").

71 *Nova Health Sys.*, 416 F.3d at 1153; *see also id.* at 1157–58 ("Article III does not allow a plaintiff who wishes to challenge state legislation to do so simply by naming as a defendant anyone who, under appropriate circumstances, might conceivably have an occasion to file a suit for avid damages under the relevant state law at some future date.").

against any subset of those plaintiffs would provide meaningful relief. For consumer-protection statutes that regulate the operations of national businesses like telemarketers, debt collectors, and credit reporting agencies, there could be millions of potential plaintiffs.

One extreme way of attempting to address at least part of this problem would be through a Rule 23(b)(2) defendant class action. A party could seek an injunction barring anyone with a potential cause of action under a statute from suing it.[72] Such a suit still would likely not involve a justiciable case or controversy since hardly any, if any, of the defendant class' members will have threatened or sued that plaintiff. And finding a putative defendant class representative could be a challenge, as well. Perhaps most fundamentally, as the Seventh Circuit has explained in this context, "an injunction prohibiting *the world* from filing private suits would be a flagrant violation of both Article III and the due process clause (for putative private plaintiffs are entitled to be notified and heard before courts adjudicate their entitlements)."[73]

Even when a law is enforceable through both a private right of action and government enforcement, bringing a traditional *Young* suit in federal court against the officials responsible for enforcing that provision does not provide immediate comprehensive protection for rightholders. A ruling against the government does not have any res judicata effect against third parties, including potential private plaintiffs;[74] neither an injunction nor a declaratory judgment would extend to such third-party nonlitigants.[75] And the district court's ruling would lack stare decisis effect, even within the same district.[76] Thus, even after a litigant successfully challenged the constitutionality of a legal provision by suing a governmental defendant at the district court level, a private plaintiff could still sue that litigant under the provision at issue. Moreover, even if a litigant successfully defended against such a private lawsuit at the district court level, it would remain subject to subsequent suits by other, unrelated private plaintiffs, either in the same court or other jurisdictions.

Once a federal court of appeals holds the challenged statute unconstitutional, however, both the rightholder in that case, as well as other third-party nonlitigants, become protected from subsequent

72 *See* Morley, *supra* note 3, at 41–46 (discussing nationwide private enforcement injunctions); *see also* Note, *supra* note 28, at 1434–35.

73 Hope Clinic v. Ryan, 249 F.3d 603, 605 (7th Cir. 2001).

74 *See* Taylor v. Sturgell, 553 U.S. 880, 892–95 (2008) (discussing the scope of nonparty preclusion).

75 *See, e.g.*, Texas v. U.S. Dep't of Lab., 929 F.3d 205, 213 (5th Cir. 2019).

76 *See* Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011).

federal suits within that circuit as a matter of vertical stare decisis. That stare decisis effect would not extend either to lawsuits brought in other federal circuits or, perhaps more importantly, in state courts, which are generally free to ignore federal court of appeals precedents, even concerning federal issues.[77] Only rulings of the U.S. Supreme Court on federal issues have nationwide vertical stare decisis effect on both federal and state courts. If the Court held the challenged legal provision unconstitutional, that ruling would render subsequent claims under it legally frivolous and likely even sanctionable.[78] Short of that, a ruling from a state supreme court (or, depending on the state's rules governing stare decisis, a state intermediate appellate court) holding the challenged legal provision unconstitutional would typically appear to provide the most substantial protection to successful litigants. If there is no way to obtain such a ruling without risking the possibility of incurring substantial statutory damages, fines, or other penalties should the challenged legal provision be upheld, then it may remain in effect indefinitely, exerting a chilling effect on rightholders who fear courts may disagree with their prediction about the provision's invalidity.

B. Challenging S.B. 8

The litigation concerning S.B. 8 has been a case study in the difficulties rightholders face in seeking rulings concerning the validity of laws creating private rights of action. Litigants have employed a variety of approaches to attempt to challenge the measure's constitutionality.

1. Federal Interpleader

An abortion provider attempted to lay the foundation for a constitutional challenge to S.B. 8 by admitting in the *Washington Post* that he violated the statute on a single occasion, effectively instigating people to sue him.[79] This approach required him to incur potential liability under the statute, while then refraining from future violations until any resulting was litigation was resolved. After being sued by several people for his admitted violation, Braid filed a federal interpleader suit in an Illinois federal district court. He invited the

77 *See* Kevin M. Clermont, *Reverse*-Erie, 82 NOTRE DAME L. REV. 1, 20 (2006).

78 *See* FED. R. CIV. P. 11.

79 *See* Alan Braid, *Why I Violated Texas's Extreme Abortion Ban*, WASH. POST (Sept. 18, 2021), https://www.washingtonpost.com/opinions/2021/09/18/texas-abortion-provider-alan-braid/ [https://perma.cc/S34J-LFJE].

court to determine which, if any, of the plaintiffs who sued him were entitled to recover the statutory damages.[80] He also argued that no one is entitled to recover those damages from him since S.B. 8's substantive restrictions are unconstitutional.[81] This is basically an attempt to litigate enforcement actions in federal court rather than state court.

This strategy appears to be among the least viable means of challenging S.B. 8. Even if Braid were to prevail both before the district court and circuit court, the resulting ruling—which would be issued by the Seventh Circuit—would not have stare decisis effect in either Texas federal courts, where diversity-based S.B. 8 litigation is most likely to arise, or Texas state court. Indeed, a judgment in either the interpleader case or the original enforcement proceedings against these plaintiffs would not even protect Braid against lawsuits from other plaintiffs in the future for any subsequent violations. And finally, it appears at least reasonably debatable whether interpleader is available under these circumstances.[82]

2. Suit by the United States

The United States government sued the State of Texas for "a declaratory judgment that S.B. 8 is 'invalid under the Supremacy Clause and the Fourteenth Amendment, is preempted by federal law, and violates the doctrine of intergovernmental immunity.'"[83] The United States further sought a preliminary injunction barring the state or any of its officers from enforcing the measure.[84] The district court held that the government had standing in two respects. First, S.B. 8 interfered with the government's statutory obligation to provide abortion-related services under certain circumstances by subjecting its employees and contractors to potential liability.[85] The government

80 *See* Complaint for Interpleader and Declaratory Judgment, Braid v. Stilley, No. 21-cv-05283 (N.D. Ill. Oct. 5, 2021).

81 *See* Notice of Constitutional Question, Braid v. Stilley, No. 21-cv-05283 (N.D. Ill. Oct. 5, 2021).

82 *See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 535–36 (1967) (discussing limits of interpleader).

83 *See* United States v. Texas, No. 21-CV-796, 2021 WL 4593319, at *6 (W.D. Tex. Oct. 6, 2021) (quoting Complaint, *Texas*, 21-CV-796, 2021 WL 4593319, at *3), *administrative stay granted*, No. 21-50949, 2021 WL 4706452 (5th Cir. Oct. 8, 2021), *and stay granted*, No. 21-50949, 2021 WL 4786458 (5th Cir. Oct. 14, 2021), *cert. before judgment granted*, 142 S. Ct. 14 (2021) (mem.), *and certiorari dismissed as improvidently granted*, 142 S. Ct. 522 (2021) (mem.) (per curiam).

84 *Id.*

85 *Id.* at *13.

also had standing "to file suit in *parens patriae* for probable violations of its citizens' Constitutional rights."[86] It could invoke such standing to "protect[] the supremacy of the Constitution by opposing laws that shield violations of U.S. citizens' constitutional rights from federal judicial review."[87]

The court went on to hold that, because the government sought an equitable remedy, it did not need to identify a particular cause of action.[88] The court emphasized that state actors had "worked deliberately to craft a statutory scheme that would avoid review by the courts, and thereby circumvent any pronouncement of its unconstitutionality. . . . [E]quity allows the United States to sue when other remedies are deliberately withheld by the State."[89] It further ruled that the state was a proper defendant because "[t]he operation and enforcement of S.B. 8 requires the State and its employees to act, whether those acts are the maintenance of a lawsuit or carrying out a court order regarding the enforceability of S.B. 8."[90] It concluded by claiming authority to enjoin private individuals from suing under the law, as well, by declaring that plaintiffs under that provision "are in active concert with the State to enforce S.B. 8."[91]

Having cleared out the procedural underbrush, the district court held that S.B. 8 was likely unconstitutional and that the government otherwise met the requirements for injunctive relief.[92] It entered a preliminary injunction barring the State of Texas and its officers or employees from "enforcing [S.B. 8]," including "accepting or docketing, maintaining, hearing, resolving, awarding damages in, enforcing judgments in, enforcing any administrative penalties in, and administering any lawsuit brought pursuant to [S.B. 8]."[93] The court went on to specifically clarify that the order applies to "state court judges and state court clerks who have the power to enforce or administer [S.B. 8]."[94]

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86 *Id.* at *15.

87 *Id.* at *16. The district court went on to hold that the government also had standing under the Supreme Court's ruling in *In re* Debs, 158 U.S. 564, 584 (1895), in which the Court allowed the government to sue private parties for an injunction against a labor strike that impeded interstate commerce. *Texas*, 2021 WL 4593319, at *17–18.

88 *Texas*, 2021 WL 4593319, at *20. ("[T]he United States' cause of action is a creature of equity, a centuries-old vehicle which eschews categorical definition.").

89 *Id.* at *26.

90 *Id.* at *30.

91 *Id.* at *33–34 (citing Shelley v. Kraemer, 334 U.S. 1, 20 (1948)).

92 *Id.* at *35–51.

93 *Id.* at *51.

94 *Id.*

Based on the district court's thorough opinion, it appears that litigation by the United States could be an effective way of challenging statutes creating private rights of action that violate the U.S. Constitution. But such federal intervention is rare and governed at least in part by political considerations. Relegating rightholders to this approach would render them unable to seek preenforcement review of statutes in their own right. Moreover, the Fifth Circuit stayed the district court's injunction,[95] and the Supreme Court allowed the stay to remain in place,[96] potentially calling into question one or more links in the district court's chain of reasoning. The Court also granted certiorari before judgment on the issue of whether the United Sates could sue in federal court for injunctive or declaratory relief "against the State, state court judges, state court clerks, other state officials, or all private parties to prohibit S.B. 8 from being enforced."[97] Several weeks later, the Court went on to dismiss that writ of certiorari as improvidently granted without explanation[98] (perhaps because it allowed another case, *Whole Woman's Health v. Jackson*,[99] to proceed). As of the time of this writing, *United States v. Texas* remains pending in the Fifth Circuit.[100] Thus, relying on the government to sue is a solution that would be applied infrequently, leave people unable to enforce their own rights, and has been called into question as an available remedy by the Court.

3. Suing Licensing Authorities

In *Whole Woman's Health v. Jackson*, the U.S. Supreme Court considered federal preenforcement challenges to S.B. 8 that a group of abortion providers had filed against various defendants.[101] The Court began by holding that state sovereign immunity barred the plaintiffs from challenging S.B. 8 by suing a state court judge who could hear cases against them under that law.[102] It further declared that no justiciable controversy existed between the abortion providers

95 United States v. Texas, No. 21–50949, 2021 WL 4786458, at *1 (5th Cir. Oct. 14, 2021), *cert. before judgment granted*, 142 S. Ct. 14 (2021) (mem.), *and cert. dismissed as improvidently granted*, 142 S. Ct. 522 (2021) (mem.) (per curiam).

96 United States v. Texas, 142 S. Ct. 14, 14 (2021) (mem.), *cert. dismissed as improvidently granted*, 142 S. Ct. 522 (2021) (mem.) (per curiam).

97 *Id.*

98 United States v. Texas, 142 S. Ct. 522 (2021) (mem.) (per curiam).

99 142 S. Ct. 522 (2021).

100 United States v. Texas, No. 21-50949 (5th Cir. Jan. 21, 2022) (per curiam) (order directing additional briefing and oral argument).

101 Whole Woman's Health v. Jackson, 142 S. Ct. 522, 522 (2021).

102 *Id.* at 532.

and any state court clerks who would be responsible for docketing cases against them under S.B. 8.[103] It explained, "Clerks serve to file cases as they arrive, not to participate as adversaries in those disputes."[104] The Court went on to discuss the substantial logistical problems that would arise in attempting to enjoin clerks.[105] It also rejected the plaintiffs' attempt to sue the Texas attorney general, noting that he had no authority to enforce S.B. 8.[106]

A plurality of the Court allowed the plaintiffs' claims to proceed against the heads of four state licensing boards and agencies, however, because those defendants "may or must take enforcement actions" against the plaintiffs for any violations of S.B. 8.[107] Thus, the Court allowed *Whole Woman's Health* to proceed as a traditional preenforcement *Young* claim against governmental officials who had some authority to enforce the challenged legal provision. The Fifth Circuit, however, has called into question the viability of this approach. On remand, the Fifth Circuit certified to the Texas Supreme Court the question of whether state law actually authorizes those licensing boards and agencies to enforce S.B. 8.[108] The Texas Supreme Court held that "Texas law does not grant the state agency executives named as defendants in this case any authority to enforce the Act's requirements, either directly or indirectly."[109] This ruling creates a substantial risk that the constitutional challenges in *Whole Woman's Health* that the U.S. Supreme Court allowed to survive will be dismissed. And such "hooks" for litigation may be unavailable with other statutory causes of action.

4. Suing Potential Private Plaintiffs

In *Van Stean v. Texas Right to Life*, a Texas state trial court held that several procedural provisions of S.B. 8 violate the U.S. and Texas Constitutions.[110] Various abortion providers had filed a total of fourteen state court challenges to S.B. 8 against Texas Right to Life

103 *Id.*

104 *Id.*

105 *See id.* at 533.

106 *Id.* at 534.

107 *Id.* at 535 (plurality opinion).

108 *See* Whole Woman's Health v. Jackson, 23 F.4th 380, 389 (5th Cir. 2022), *mandamus denied*, *In re* Whole Woman's Health, 142 S. Ct. 701 (2022) (mem.).

109 Whole Woman's Health v. Jackson, No. 22-0033, 2022 WL 726990, at *9 (Tex. Mar. 11, 2022).

110 Order Declaring Certain Civil Procedures Unconstitutional and Issuing Declaratory Judgment at 2, Van Stean v. Tex. Right to Life, No. D-1-GN-21-004179 (Tex. 98th Jud. Dist. Dec. 9, 2021) [hereinafter *Van Stean* Order]. I am grateful to Professor Andrew Kull for bringing this case to my attention.

(TRL) and other defendants who were allegedly acting in concert with TRL to bring lawsuits under that statute.[111] The cases were consolidated before a single judge for pretrial purposes.[112] The plaintiffs alleged that TRL had "been encouraging persons to file SB 8 lawsuits" and "provid[ing] information to that end."[113] TRL's website allegedly "asked for tips about violators, solicited funds, and promised to 'sue the abortionists ourselves.'"[114] TRL's alleged actions, the court concluded, were sufficient to give the plaintiff abortion providers standing to pursue a preenforcement suit against it.[115]

Without reaching the substantive abortion-related issues, the court concluded that three procedural aspects of S.B. 8 are unconstitutional. First, the statute impermissibly allows "any person" to sue for statutory damages, regardless of whether that plaintiff suffered any harm as a result of the statutory violation alleged.[116] Permitting lawsuits by people who lack standing to challenge the legality of a particular abortion violates the Texas Constitution's "open courts" provision, which generally mirrors Article III's standing requirements.[117] Second, the statute's authorization of a minimum of $10,000 in statutory damages constituted "punishment by civil lawsuit, and deprivation of property, without due process of law as guaranteed by the Fourteenth Amendment."[118] Such awards of substantial amounts of money to complete strangers who were not harmed by a defendant's actions had "the effect of punishing a defendant rather than compensating a plaintiff."[119] Finally, in part because a person could sue under S.B. 8 without having suffered any personal harm, the court concluded that the statute was an invalid delegation of enforcement authority to private parties in violation of the state constitution's "separation of powers provision."[120] The court concluded by granting a declaratory judgment to the plaintiffs on those issues, but held that a trial would be needed on their request for a permanent injunction against TRL.[121]

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111 *See In re* Tex. Hearbeat [sic] Act Litig., No. 21-0782, at 1 (Multi-District Litig. Panel Tex. Oct. 14, 2021).

112 *Id.* at 2.

113 *Van Stean* Order, *supra* note 110, at 21.

114 *Id.* at 22.

115 *Id.* at 25.

116 *See id.* at 29.

117 *Id.* at 30, 36, 47.

118 *Id.* at 36.

119 *Id.* at 37 (emphasis omitted).

120 *Id.* at 43–47.

121 *Id.* at 47.

The plaintiffs in *Van Stean* circumvented sovereign immunity and other obstacles to preenforcement relief by suing a private entity that was overtly threatening to sue them and encouraging litigation against them. This route will seldom be available, however, unless an entity such as TRL engages in such behavior. Moreover, this suit was brought in state court, thereby depriving the plaintiffs of an opportunity to have their federal claims heard in a federal forum.[122] Finally, the trial court's ruling protects the plaintiffs from suits only by TRL and others acting in concert with it; they remain liable to suits by anyone else in the world. On the other hand, in the event TRL chooses to appeal this ruling to higher courts and loses, the resulting legal opinions may be able to block subsequent litigation—not only against the *Van Stean* plaintiffs, but all rightholders—as a matter of vertical stare decisis. Thus, this type of state court litigation may be effective under certain circumstances, but it does not appear to be a categorically adequate means of seeking preenforcement relief against apparently unconstitutional laws that are enforceable through private rights of action.

II. THE DUE PROCESS RIGHT TO PREENFORCEMENT JUDICIAL GUIDANCE

Periodically over the years, the U.S. Supreme Court has held that people whose conduct is regulated by a statute or regulation have the Due Process right to seek a judicial determination of that provision's validity without having to incur substantial liability by violating that provision.[123] The primary way in which courts typically enforce this right is by allowing rightholders, pursuant to *Ex parte Young*, to bring preenforcement challenges against the government officials responsible for enforcing the legal provisions at issue.[124] When such relief is unavailable, however, the Court has enforced this right in other ways.

122 Scholars strenuously disagree over whether state courts are less effective fora than federal courts for the protection of federal rights. *See* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

123 Justice Thomas, however, has stated "there is no freestanding constitutional right to pre-enforcement review in federal court" because "federal courts generally may not 'give advisory rulings on the potential success of an affirmative defense before a cause of action has even accrued.'" Whole Woman's Health v. Jackson, 142 S. Ct. 522, 539 (2021) (Thomas, J., concurring in part and dissenting in part) (quoting MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 142 (2007) (Thomas, J., dissenting)).

124 *Ex parte* Young, 209 U.S. 123 (1908).

A. Recognizing the Right

The roots of the Due Process right to preenforcement judicial guidance trace back to the Court's 1908 ruling in *Ex parte Young*.[125] In *Young*, the state of Minnesota passed a law establishing a railroad commission to adopt rates for railroad freight transportation within the state.[126] The law specified that any common carrier who violated the commission's orders was subject to a fine of up to $10,000 per offense.[127] The commission issued a rate schedule pursuant to this statute. In April 1907, the legislature subsequently adopted rates for the transportation of passengers and certain commodities, and specified that anyone who violated those provisions could be punished by up to ninety days in jail.[128] A group of railroad shareholders sought an order prohibiting their railroads from following these allegedly unconstitutional statutes and commission orders, and prohibiting the commission or state attorney general from enforcing them.[129]

The plaintiffs raised both substantive and procedural constitutional objections. Substantively, the plaintiffs argued that rates were so low as to be confiscatory, thereby unconstitutionally depriving their railroads of property without due process of law.[130] Procedurally, the plaintiffs claimed that the law also violated due process and equal protection by failing to provide a mechanism through which a railroad could seek judicial review of the rates' validity without exposing itself to substantial liability by violating the statute or a rate order.[131] The

125 *Id.* at 123.

126 *Id.* at 127.

127 *Id.*

128 *Id.* at 145.

129 *Id.* at 148.

130 *Id.* at 143–44. Substantive constitutional law at the time recognized that "[t]he sufficiency of rates with reference to the Federal Constitution is a judicial question . . . ." *Id.*; *see also* Miss. R.R. Comm'n v. Mobile & Ohio R.R. Co., 244 U.S. 388, 391 (1917) ("If this power of regulation is exercised in such an arbitrary or unreasonable manner as to prevent the company from obtaining a fair return upon the property invested in the public service it passes beyond lawful bounds, and such action is void, because repugnant to the due process of law provision of the Fourteenth Amendment . . . ."); R.R. Comm'n Cases, 116 U.S. 307, 331 (1886) ("Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law.").

131 *See Ex parte* Young, 209 U.S.123, 144–45 (1908); *see also* Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 289 (1920) ("[I]f the owner claims confiscation of his property will result [from an administrative order], the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause . . . .").

statute's "enormous penalties" prevented railroads and their employees "from resorting to the courts for the purpose of determining the [statute's] validity."[132] A railroad was accordingly left with the choice of either implementing the potentially unconstitutional rates, which (if they actually were invalid) would result in the unconstitutional confiscation of its property, or violating the statute to assert constitutional defenses "at the risk, if mistaken, of being subjected to such enormous penalties."[133]

The trial court entered a preliminary injunction barring the Northern Pacific Railway Company ("Northern Pacific") from complying with the rates set by the legislature in the April 1907 statute, and the attorney general from enforcing those rates against the railroad.[134] The next day, the attorney general obtained a writ of mandamus from state court ordering Northern Pacific to comply with the rates in the April 1907 statute.[135] He argued that the Eleventh Amendment deprived the federal district court of jurisdiction to enter its injunction against him since he was a state officer enforcing a state statute.[136] The federal district court held the attorney general in contempt for violating the injunction, and he appealed his contempt conviction directly to the U.S. Supreme Court.[137]

The Supreme Court began by holding that fundamental due process principles required that the railroad have some mechanism for obtaining a judicial determination of the rates' constitutionality without running the risk of violating them and facing potentially significant legal consequences. The Court declared that the railroad's "officers and employees could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid."[138] If the railroad had to violate the statute to raise its constitutional challenge, "[t]he 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 [the law's] validity. . . . The result would be a denial of any hearing to the company."[139] The Court held

132 *Young*, 209 U.S. at 144.

133 *Id.* at 144–45. The plaintiffs also raised a third constitutional argument which the Court did not address: the rates violated the Dormant Commerce Clause by interfering with interstate commerce. *Id.* at 145.

134 *Id.* at 132–33. The court did not enjoin the commission's earlier orders regarding freight transportation rates, however. *See id.*

135 *Id.* at 133.

136 *Id.* at 132.

137 *Id.*

138 *Id.* at 146.

139 *Id.* (emphasis added).

that a law which requires a person to risk incurring substantial penalties in order to test its validity is unconstitutional.[140] The threat of such substantial liability is equivalent to a complete—and unconstitutional[141]—denial of judicial review of the underlying restrictions.[142]

The Court concluded that the statutory provisions "imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates."[143] In other words, putting aside whether the statute's substantive restrictions were themselves unconstitutional, the law was independently unconstitutional due to the absence of any mechanism for preenforcement judicial review of the validity of its restrictions.

Later in the opinion, the Court added that subjecting a rightholder to the possibility of repeated litigation for multiple violations of an allegedly unconstitutional law would constitute irreparable harm which a federal court may enjoin.[144] The Court rejected the notion that the railroad had an adequate remedy at law by simply violating the statute on a single occasion and then raising its constitutional claims as a defense in any ensuing prosecution or other enforcement proceeding.[145] The Court noted that a prosecutor might

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140 *Id.* at 147 ("A law which . . . impos[es] such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered or may be obtained, is also unconstitutional.").

141 The Court had previously held that a law making "the decision of the legislature or of a commission conclusive as to the sufficiency of [railroad] rates" is "unconstitutional." *Id.* (citing Chi., Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418 (1890)); *see also* St. Louis & S.F. Ry. Co. v. Gill, 156 U.S. 649, 657–58 (1895); R.R. Comm'n Cases, 116 U.S. 307, 331 (1886).

142 *Young*, 209 U.S. at 147 ("[W]hen the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.").

143 *Id.* at 148; *see also* Cotting v. Kan. City Stock Yards Co., 183 U.S. 79, 102 (1901) ("[W]hen 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.").

144 *See Young*, 209 U.S. at 160 ("It would be an injury to complainant to harass it with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment, and to prevent it ought to be within the jurisdiction of a court of equity.").

145 *Id.* at 163 (rejecting the suggestion that "the proper way to test the constitutionality of the act is to disobey it, at least once, after which the company might obey the act pending

refrain from bringing charges after a single violation.[146] And even if the prosecutor decided to take immediate action, it could take several years for the railroad to obtain a final judgment concerning its rights; during that time, it would have been subject to potentially unconstitutional restrictions.[147] Moreover, the magnitude of the penalties might deter the company and its employees from being willing to violate the law, even on a single occasion, to bring a test case.[148] The Court declared:

> To await proceedings against the company in a state court grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, would place the company in peril of large loss and its agents in great risk of fines and imprisonment if it should be finally determined that the act was valid. *This risk the company ought not to be required to take.*[149]

The Court later added that a preenforcement suit for equitable relief was "undoubtedly the most convenient, the most comprehensive and the most orderly way in which the rights of all parties can be properly, fairly and adequately passed upon."[150]

Over the decade that followed, the Supreme Court repeatedly reaffirmed that, when the government regulates private parties' conduct, the Due Process Clause requires it to provide a mechanism through which such parties may seek judicial review of the validity of those regulations without subjecting themselves to the risk of substantial penalties. In 1913, for example, the Court held that "penal provisions operating to preclude" a "fair opportunity to test the constitutional validity" of a legal provision such as a "prescribed rate . . . would be invalid."[151] Two years later, the Court confirmed that

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subsequent proceedings to test its validity"); *see also id.* at 164–65 ("Suits for penalties, or indictment or other criminal proceedings for a violation of the act, would therefore furnish no reasonable or adequate opportunity for the presentation of a defense founded upon the assertion that the rates were too low and therefore the act invalid."); Miss. R.R. Comm'n v. Mobile & Ohio R.R. Co., 244 U.S. 388, 392 (1917) (holding that "the appropriate remedy" for determining whether a state law or a railroad commission order violated the Fourteenth Amendment "is a bill in equity such as was filed in this case [in federal court] to enjoin its enforcement").

146 *Young*, 209 U.S. at 163.

147 *Id.*

148 *Id.* at 163–64. The Court also pointed out that the type of evidence the railroad would have to introduce in a criminal trial to show that the rates were confiscatorily low was far removed from the central issue of its guilt in that case. *Id.* at 164.

149 *Id.* at 165 (emphasis added).

150 *Id.* at 166.

151 Chesapeake & Ohio Ry. Co. v. Conley, 230 U.S. 513, 521–22 (1913) (holding that the challenged statute accorded the plaintiff railroad due process because the state

a plaintiff "would be entitled to protection against the imposition of such penalties as would virtually deny access to the courts for the protection of rights guaranteed by the Federal Constitution."[152] This right to preenforcement judicial guidance is at its apex where the prospect of repeated enforcement actions for a course of conduct raises the specter of substantial cumulative liability.[153]

B. Enforcing the Right to Guidance in Young

The previous Section discussed the Supreme Court's recognition of the due process right to preenforcement judicial guidance concerning a legal provision's validity. *Young* enforced this right by allowing a regulated entity to bring a preenforcement federal suit against the state officers responsible for implementing an allegedly unconstitutional legal provision to allow the court to determine the

supreme court had construed the statute as protecting the railroad from the accumulation of penalties while it was challenging the statute's constitutionality); *see also* W. Union Tel. Co. v. City of Richmond, 224 U.S. 160, 172 (1912) (upholding ordinance imposing penalties of up to $500 per pole on a weekly basis for poles that a telegraph company fails to remove after local officials order it to do so, because "[i]t does not look as if the penalties in this ordinance were established with a view to prevent the appellant from resorting to the Federal courts . . . and if an oppressive application of them should be attempted it will be time enough then for the appellant to [challenge it]"); Pennsylvania v. West Virginia, 262 U.S. 553, 614–15 (1923) (Brandeis, J., dissenting) (urging that, because the state regulatory commission's orders did not go into effect for 30 days after issuance in order to allow time for judicial review, "there could never be occasion for invoking in respect to this statute the doctrine of *Ex parte Young*").

152 Wathen v. Jackson Oil & Refin. Co., 235 U.S. 635, 640 (1915) (holding that a shareholder lacked standing to seek an injunction barring a corporation from following an allegedly unconstitutional maximum-hours law, since the corporation would be protected from penalties if it violated the law in order to bring a constitutional challenge); *see also* United States *ex rel.* Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407, 431 n.1 (1921) (Brandeis, J., dissenting) ("[A] statute prescribing similar penalties for failure to observe its provisions or the order of a public service commission, although made after full hearing, is a deterrent so potent as to amount to a denial of the right to a judicial review, and operate as a taking of property without due process of law . . . .").

153 *See, e.g.*, Nat. Gas Pipeline Co. v. Slattery, 302 U.S. 300, 310 (1937) ("As the Act imposes penalties of from $500 to $2,000 a day for failure to comply with the order, any application of the statute subjecting appellant to the risk of the cumulative penalties pending an attempt to test the validity of the order in the courts and for a reasonable time after decision, would be a denial of due process."); *see also* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 381 (1992) (holding that regulated entities were entitled to seek preenforcement relief against state officers to enjoin state laws that were allegedly preempted by a federal law, in part because the state law "imposes additional liability (by way of civil penalties and consumer treble-damages actions) for multiple violations").

provision's constitutionality.[154] Such plaintiffs could seek both a temporary injunction granting "freedom from suits, civil or criminal" while the court was considering its claims, as well as a permanent injunction "restraining all such actions or proceedings" should it ultimately prevail.[155]

The Court rejected the argument that a suit to enjoin a state official from enforcing an allegedly unconstitutional state law is actually brought against the state itself and therefore prohibited by state sovereign immunity. Enforcement of an unconstitutional law, the Court explained, neither involves the exercise of state authority nor "affect[s] the State in its sovereign or governmental capacity."[156] Rather, attempts to enforce unconstitutional laws are simply "illegal act[s]" by state officials.[157] An official who implements an unconstitutional law is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."[158] Thus, state sovereign immunity does not bar preenforcement constitutional suits for injunctive relief against state officials.[159]

Morales v. Trans World Airlines, Inc. is a modern example of a typical preenforcement constitutional challenge under *Young*.[160] Texas had adopted consumer protection and other related statutes that could be enforced either by the state attorney general or private consumers.[161] Those laws allowed for "civil penalties and consumer treble-damages actions."[162] The Texas attorney general threatened to sue several airlines for violating those provisions because their advertisements did not disclose certain surcharges.[163] In response, the

154 *See also* Louisville & Nashville R.R. Co. v. Garrett, 231 U.S. 298, 311 (1913) ("If the Commission establishes rates that are so unreasonably low as to be confiscatory, an appropriate mode of obtaining relief is by bill in equity to restrain the enforcement of the order. . . . Presumably, the courts of the State, as well as the Federal courts, would be open to the carrier for this purpose . . . without express statutory provision to that effect." (first citing Chi., Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418, 459, 460 (1890); then citing St. Louis & S.F. Ry. Co. v. Gill, 156 U.S. 649, 659, 666 (1895); then citing *Ex parte* Young, 209 U.S. at 163; and then citing Home Tel. & Tel. Co. v. City of L.A., 211 U.S. 265, 278 (1908))).

155 *Ex parte* Young, 209 U.S. 123, 149 (1908).

156 *Id.* at 159.

157 *Id.*

158 *Id.* at 160.

159 *Id.* at 149, 155–56.

160 Morales v. Trans World Airlines, Inc., 504 U.S. 374, 380–81 (1992).

161 *Id.* at 381 (citing TEX. BUS. & COM. CODE ANN. §§ 17.47, 17.50 (1987 & Supp. 1991–92)).

162 *Id.*

163 *Id.* at 379–80.

airlines sued the Texas attorney general in federal court for an injunction barring him from enforcing those laws and a declaratory judgment that, as applied to airlines' advertisements, they are preempted by the federal Airline Deregulation Act of 1978.[164]

The U.S. Supreme Court held that the airlines' suit was valid and not barred by the Eleventh Amendment.[165] The Court explained that the attorney general "had made clear that [he] would seek to enforce" state law against the airlines for their advertisements.[166] The airlines faced potentially substantial liability "for multiple violations."[167] The Court explained that, as in *Young*, the airlines would otherwise be "faced with a Hobson's choice: continually violate the Texas law and expose themselves to potentially huge liability; or violate the law once as a test case and suffer the injury of obeying the law during the pendency of the proceedings and any further review."[168] The Court did not even mention the even more extreme alternative that the airlines could be completely chilled by the statute's penalties and refrain from violating it even to bring a test case.

Historically, one recurring obstacle to some *Young* suits was not the Eleventh Amendment or sovereign immunity, but rather the absence of irreparable harm to the plaintiff. A plaintiff must show that it faces imminent or ongoing irreparable injury to obtain injunctive relief.[169] Some early precedents hold that a plaintiff facing the possibility of limited and nonrecurring statutory damages may not be at risk of irreparable injury, and therefore might be unable to obtain an injunction. In *Spielman Motor Sales Co. v. Dodge*, for example, the Court affirmed the dismissal of a car dealership's petition for a preliminary injunction against enforcement of a state law regulating used car sales that allegedly violated the federal Due Process Clause.[170] The Court held that the dealership did not face irreparable harm from the threat of criminal prosecution under the law.[171] It explained that the dealership was a large business, the statute carried only a $500 fine, and the district attorney had promised not to pursue more than a single prosecution against the dealership until the law's validity were

164 *Id.* at 380 (citing 49 U.S.C. app. § 1305(a)(1)).

165 *Id.* at 381 ("We think *Young* establishes that injunctive relief was available here.").

166 *Id.*

167 *Id.*

168 *Id.*

169 *See* Winter v. Nat'l Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (preliminary injunctions); eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (permanent injunctions).

170 Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 91, 97 (1935).

171 *Id.* at 95–96.

established.[172] In general, however, a person who has not yet violated a statute may typically rely on the chilling effect to their constitutional rights to establish the irreparable injury needed for a preliminary or permanent injunction.[173]

Younger abstention sometimes impedes rightholders' access to federal courts. The Court's 1971 ruling in *Younger v. Harris* requires federal courts to generally abstain from adjudicating federal constitutional challenges to state legal provisions if a criminal prosecution has already commenced in state court.[174] *Younger* abstention applies regardless of whether a rightholder pursues injunctive or declaratory relief in federal court.[175] The Court later expanded the scope of this preemption, allowing it to be triggered by at least certain types of government-initiated civil litigation,[176] as well as state enforcement proceedings that commence shortly after a plaintiff seeks preenforcement relief in federal court.[177] Rightholders may overcome

172 *Id.* The *Spielman* Court emphasized that the dealership's allegations concerning its constitutional claim were terse and conclusory. *Id.*; *see also* Beal v. Mo. Pac. R.R. Corp., 312 U.S. 45, 48–50 (1941) (holding in a diversity case that the plaintiff railroad was not entitled to an injunction barring future state-law prosecutions on the grounds its conduct did not violate state law, in part because the state attorney general had agreed to pursue only "a single test suit . . . in the state courts" and the railroad accordingly did not face a "multiplicity of prosecutions and risk that the aggregate fines . . . would be very large").

173 *See* Mitchum v. Foster, 407 U.S. 225, 242 (1972) ("[F]ederal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights." (citing *Ex parte* Young, 209 U.S. 123 (1908))); *see also* Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); Dombrowski v. Pfister, 380 U.S. 479, 486 (1965) (stating that irreparable harm occurs when requiring rightholders to "await the state court's disposition and ultimate review in this Court of any adverse determination" would cause "a substantial loss or impairment of freedoms of expression").

174 Younger v. Harris 401 U.S. 37, 45–46 (1971) (holding that federal courts generally should not enjoin ongoing state criminal prosecutions, even if the underlying criminal statute is unconstitutional, because the rightholder has an adequate remedy at law by raising their constitutional defense in state court).

175 Samuels v. Mackell, 401 U.S. 66, 72 (1971) ("[O]rdinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid.").

176 Trainor v. Hernandez, 431 U.S. 434, 444 (1977) ("[T]he principles of *Younger* and *Huffman* are broad enough to apply to interference by a federal court with an ongoing civil enforcement action such as this, brought by the State in its sovereign capacity . . . ."); *see also* Moore v. Sims, 442 U.S. 415, 430–31, 434–35 (1979) (applying *Younger* abstention in federal challenge due to pending family-court proceedings arising under the allegedly unconstitutional state law); Juidice v. Vail, 430 U.S. 327, 333, 337 (1977) (applying *Younger* abstention based on pending state court contempt proceedings).

177 *See* Hicks v. Miranda, 422 U.S. 332, 349 (1975) ("[W]here state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but

Younger abstention by showing that they face the risk of a multiplicity of repetitive lawsuits, are suffering bad-faith harassment, or the legal provision they violated was clearly facially unconstitutional.[178]

In contrast, the Declaratory Judgment Act of 1934[179] made it easier for rightholders to seek preenforcement review of the constitutionality of legal provisions without violating them.[180] The Act offered relief to plaintiffs who could not satisfy the traditional equitable requirements for obtaining an injunction, including demonstrating irreparable harm.[181] A plaintiff may seek a declaratory judgment as to the constitutionality of a state law, regardless of whether injunctive relief is available, "when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement."[182] Thus, *Young* generally allows plaintiffs to seek injunctions or declaratory judgments against the government officials responsible for enforcing allegedly unconstitutional legal provisions without exposing themselves to potentially substantial liability. However, its exception to sovereign immunity, as traditionally applied, offers no protection against legal provisions enforced through private rights of action.[183]

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before any proceedings of substance on the merits have taken place in the federal court, the principles of *Younger v. Harris* should apply in full force.").

178 Huffman v. Pursue, Ltd., 420 U.S. 592, 611 (1975). The Court has explained that a rightholder faces irreparable injury from the threat of a multiplicity of suits only where there is a risk of "numerous suits between the same parties, involving the same issues of law or fact. [This doctrine] does not extend to cases where there are numerous parties plaintiff or defendant, and the issues between them and the adverse party are not necessarily identical." Matthews v. Rodgers, 284 U.S. 521, 529–30 (1932) (holding that businesses could not seek injunctive relief in federal court against collection of a state tax on the grounds it unconstitutionally burdened interstate commerce); *see, e.g.*, Wooley v. Maynard, 430 U.S. 705, 712 (1977) (finding irreparable injury where the plaintiff faced "three successive prosecutions . . . in the span of five weeks" under the challenged state law governing license plates).

179 Declaratory Judgment Act, Pub. L. No. 73-343, ch. 512, 48 Stat. 955 (1934) (codified as amended at 28 U.S.C. §§ 2201–02 (2018)).

180 *See* S. REP. NO. 73-1005, at 2–3 (1934) (explaining that declaratory judgments "[are] especially useful in avoiding the necessity, now so often present, of having to act at one's peril or to act on one's own interpretation of his rights, or abandon one's rights because of a fear of incurring damages"); *see also* Perez v. Ledesma, 401 U.S. 82, 111 (1971) (Brennan, J., concurring in part and dissenting in part) (stating that the Act did not "in any way diminish[] the continuing vitality of *Ex parte Young* with respect to federal injunctions").

181 *See Perez*, 401 U.S. at 121–23.

182 Steffel v. Thompson, 415 U.S. 452, 475 (1974); *see also Perez*, 401 U.S. at 115 ("The legislative history of the Federal Declaratory Judgment Act is overwhelming that declaratory judgments were to be fully available to test the constitutionality of state and federal criminal statutes.").

183 *See infra* notes 211–21 and accompanying text.

III. OVERCOMING THE LIMITS OF *EX PARTE YOUNG*

When a statute imposes an allegedly unconstitutional restriction that is enforceable solely through a private right of action, there is no government official to sue for preenforcement relief in a traditional suit under *Young*. Rightholders therefore need an alternate way to exercise their due process right to obtain a judicial ruling about the law's validity without incurring potentially substantial liability, which *Young* also recognized.[184] In *Whole Woman's Health*,[185] the Supreme Court appears to have shut the door on bringing preenforcement challenges by suing judicial personnel, including state judges and court clerks.[186] A more direct approach would be for the Court to instead expand *Young*'s exception to state sovereign immunity to allow preenforcement suits against statutory private rights of action to be brought against a designated state official, such as the governor or attorney general. This strategy would require substantial revision not only to sovereign immunity precedent, but justiciability and (likely) res judicata doctrine, as well. The current Court appears unlikely to adopt such major reforms.

A. Preenforcement Suits Against Judicial Personnel

The plaintiffs in *Whole Woman's Health* sought to apply *Ex parte Young* in a somewhat novel way.[187] Among their other claims, they challenged S.B. 8's constitutionality by seeking an injunction barring Texas state judges from adjudicating cases under the statute and Texas court clerks from docketing such cases.[188] It appears that none of the Justices were willing to go so far as to permit the claims against state court judges to proceed.[189]

Chief Justice Roberts and Justice Sotomayor, who each issued their own opinions concurring in part and dissenting in part, would have allowed the claims against state court clerks to proceed,

184 *See supra* notes 143–50 and accompanying text.

185 142 S. Ct. 522, 531–32 (2021) (majority opinion).

186 *See supra* notes 102–05 and accompanying text.

187 Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021).

188 *See id.* at 531–32.

189 *Id.* at 531–34; *see also id.* at 539 (Thomas, J., dissenting) (concluding that the plaintiffs could not sue any of the defendant government officials); *id.* at 544 (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("Judges are in no sense adverse to the parties subject to the burdens of S. B. 8."); *see also id.* at 548 (Sotomayor, J., concurring in the judgment in part and dissenting in part) (opining that state court clerks are proper defendants, without mentioning state court judges).

however.[190] Roberts reasoned that, because the threat of state court litigation under S.B. 8 chills the exercise of constitutional rights, "the court clerks who issue citations and docket S. B. 8 cases are unavoidably enlisted in the scheme to enforce [the statute] . . . and thus are sufficiently 'connect[ed]' to such enforcement to be proper defendants."[191] In other words, the clerks "'set[] in motion the machinery' that imposes these burdens on those sued under S. B. 8."[192] Justice Sotomayor reached a similar conclusion.[193]

The majority, in contrast, held that the same reasoning applied to both state court clerks and state court judges: neither was adverse to people who might be sued under allegedly unconstitutional state laws like S.B. 8.[194] It pointed out that *Young* itself had declared that "'an injunction against a state court' or its 'machinery' would be a violation of the whole scheme of our Government."[195] State court clerks generally are not permitted to refuse to file complaints based on defects in their merits.[196] And recognizing clerks as proper defendants could not only open them up to being sued across a range of constitutional cases, but require them to "assemble a blacklist of banned claims subject to immediate dismissal," which the majority implied was impracticable.[197] Thus, the Court rejected the opportunity to allow plaintiffs to seek preenforcement relief against statutory private rights of action by suing state court personnel.

B. The Barriers to Expanding Ex Parte Young

There is a more direct potential way to enable preenforcement judicial review of allegedly unconstitutional laws that are enforceable only through private litigation: the Court could expand the scope of *Young*'s limits on sovereign immunity.[198] Such a strategy would be very difficult, however. It not only raises serious questions concerning

190 Justices Kagan and Breyer joined in both Roberts' and Sotomayor's opinions. *See id.* at 543 (Roberts, C.J., concurring in the judgment in part and dissenting in part); *id.* at 545 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

191 *Id.* at 544 (Roberts, C.J., concurring in the judgment part and dissenting in part) (second alteration in original) (quoting *Ex parte* Young, 209 U.S. 123, 157 (1908)).

192 *Id.* (quoting Sniadach v. Fam. Fin. Corp. of Bay View, 395 U.S. 337, 338 (1969)).

193 *Id.* at 548 (Sotomayor, J., concurring in the judgment in part and dissenting in part) ("S. B. 8's formidable chilling effect, even before suit, would be nonexistent if not for the state-court officials who docket S. B. 8 cases with lopsided procedures and limited defenses.").

194 *Id.* at 532 (majority opinion).

195 *Id.* (quoting *Young*, 209 U.S. at 163).

196 *Id.*

197 *Id.* at 533.

198 *See supra* note 150 and accompanying text.

justiciability and res judicata, but would require overturning longstanding precedent governing sovereign immunity.

Young dealt with a particular type of statute—laws enforceable by government officials. The Court recognized an exception to state sovereign immunity, allowing plaintiffs to sue state officials in federal court to enjoin them from enforcing such measures.[199] As the Court explained, the enforcement of an unconstitutional law "is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity."[200] This principle may be broad enough to support a somewhat comparable exception to state sovereign immunity for lawsuits against an appropriate state official challenging allegedly unconstitutional laws that are enforceable through a private right of action.[201]

The most basic question is whether there is any appropriate potential defendant for such a lawsuit. Some possible defendants would be the governor, as the state's chief executive, or the attorney general, as the state's chief law enforcement officer.[202] This theory would be premised on the notion that private rights of action are simply one means of enforcing the law. The Court would treat the head of the executive branch or the chief law enforcement officer as an appropriate defendant in a constitutional challenge, even though those officials lack authority to directly implement the challenged measures.

Under this approach, if a rightholder obtained a declaratory judgment that a legal provision was unconstitutional, the challenged provision could not be enforced against that rightholder in any way, including by private parties. If the rightholder brought a Rule 23(b)(2) class action on behalf of similarly situated people or entities, that victory would benefit other rightholders, as well. And if an

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199 *Ex parte* Young, 209 U.S. 123, 148 (1908).

200 *Id.* at 159.

201 *See* Morley, *supra* note 3, at 41–46.

202 An alternative theory for suing the governor, in particular, would be that the governor's decision to either sign the bill, or refrain from vetoing the bill and allow it to enter into law without her signature, allowed the measure to take legal effect, thereby chilling the exercise of constitutional rights. This argument would provide a concrete way in which the governor played a role in causing the harm created by the statute. *Young*, however, identifies the threat of a statute's *enforcement*, rather than its *enactment*, as the source of irreparable harm to rightholders. And justiciability doctrine is framed primarily in terms of whether a person faces a risk of enforcement. *See* Poe v. Ullman, 367 U.S. 497 (1961). Shifting the focus of constitutional litigation to the enactment of allegedly unconstitutional legal provisions would likely be a much more substantial doctrinal change than is necessary to allow preenforcement suits against private rights of action if the Court were inclined to authorize such suits in the first place.

appellate court held the provision unconstitutional, its ruling would also have vertical stare decisis effect within that court system, protecting third-party nonlitigants.

Under this reasoning, when a statute creates a private right of action, a potential plaintiff derives its right to sue under that law from the state. The plaintiff's entitlement to sue depends on the state's power to authorize such lawsuits. If a court determines that the state lacks such authority, then the state's authorization to private plaintiffs is invalid. Because a statutory private right of action can fairly be seen as a delegation of enforcement power from the government to private plaintiffs, a ruling that the government lacks the authority to adopt the underlying restrictions in the first place can justly be applied against the purported delegates of that power (i.e., potential plaintiffs under that statute).

This approach has been unsuccessful in the modern circuit level cases in which it has been invoked.[203] It faces three main obstacles. First, under current doctrine, a plaintiff likely lacks standing to sue a governor or attorney general to prevent private enforcement of a law, since those officials are not responsible for any such enforcement. The plaintiff would be suing the governor or attorney general to protect against litigation by private third parties rather than by the defendants themselves. The Court would probably find that such an indirect approach to causation and redressability does not satisfy Article III's requirements.[204]

Second, relatedly, it is doubtful whether future potential plaintiffs would be bound as a matter of res judicata by a declaratory judgment against the state executive. In *Taylor v. Sturgell*, the Court enforced strict due process limits on the extent to which a case's res judicata effect extends to third-party nonlitigants.[205] In general, "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."[206] *Taylor* recognized that, "'in certain limited

203 *See supra* notes 49–51 and accompanying text.

204 *See, e.g.*, K.P. v. LeBlanc, 729 F.3d 427, 437 (5th Cir. 2013) (holding that plaintiffs lacked standing to sue state board members to enjoin a law establishing a private right of action due to lack of redressability, because "enjoining the Board Parties from 'enforcing' the cause of action would not address their role in administering the Fund"); Hope Clinic v. Ryan, 249 F.3d 603, 606 (7th Cir. 2001) ("Because the public officials named as defendants could not cause the plaintiffs any injury by enforcing the statutes' private-action provisions . . . the plaintiffs lack standing with respect to these provisions."); Okpalobi v. Foster, 244 F.3d 405, 421 (5th Cir. 2001) (en banc); Women's Health Clinic v. State, 825 So. 2d 1208, 1212 (La. Ct. App. 2002).

205 *See* Taylor v. Sturgell, 553 U.S. 880, 893 (2008).

206 Hansberry v. Lee, 311 U.S. 32, 40 (1940).

circumstances,' a nonparty may be bound by a judgment because she was 'adequately represented by someone with the same interests who was a party' to the suit.'"[207] It could be argued that the governor or attorney general who defend a law's validity share the same interest as a private plaintiff who wishes to sue under that provision. The Court has explained, however, that this "adequate representation" doctrine applies primarily to class representatives and "suits brought by trustees, guardians, and other fiduciaries."[208] Applying such "adequate representation" reasoning in this context would be a substantial extension of traditional preclusion principles.

Finally, with regard to state sovereign immunity, this approach would reflect not only a substantial expansion of *Young*, but a repudiation of a pre-*Young* case, *Fitts v. McGhee*,[209] which the *Young* Court distinguished.[210] In *Fitts*, Alabama had passed a law setting a maximum toll rate for the Florence Bridge, which crossed the Tennessee River. The statute provided that the bridge's owners would be liable for $20 to any travelers they charged more than the specified rate.[211]

The plaintiffs, the owners of the Florence Bridge, sued the attorney general and county solicitor in federal court.[212] They sought an injunction against the commencement of "any indictment or criminal proceeding" for violations of the act.[213] The Supreme Court held that the Eleventh Amendment barred the suit. It pointed out that neither the attorney general nor county solicitor was "expressly directed to see to [the statute's] enforcement" or "held any special relation to the particular statute alleged to be unconstitutional."[214] Rather, this was a "suit against officers of a State merely to test the constitutionality of a state statute."[215] The Court expressly rejected the notion that

> the constitutionality of every act passed by the legislature could be tested by a suit against the Governor and the Attorney General, based upon the theory that the former, as the executive of the State, was, in a general sense, charged with the execution of all its laws,

207 *Taylor*, 553 U.S. at 894 (alteration omitted) (quoting Richards v. Jefferson Cnty., 517 U.S. 793, 798 (1996)).

208 *Id.* at 894, 896.

209 172 U.S. 516 (1899).

210 *Ex parte* Young, 209 U.S. 123, 156–59 (1908).

211 *Fitts*, 172 U.S. at 517.

212 *Id.* at 524.

213 *Id.*

214 *Id.* at 530.

215 *Id.*

> and the latter, as Attorney General, might represent the State in litigation involving the enforcement of its statutes.[216]

The Court acknowledged that such lawsuits "would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law."[217] This "mode" of litigation, however, "cannot be applied to the States of the Union" because sovereign immunity protects them from "be[ing] brought into any court at the suit of private persons."[218]

Young reaffirmed *Fitts*' holding that state officers may not be sued to challenge the constitutionality of a state law that is enforceable solely by private plaintiffs.[219] The Court declared that a person may sue a state official to enjoin enforcement of an allegedly unconstitutional law only when that official has "some connection with the enforcement of the act."[220] Allowing a state official to be sued for injunctive relief against a statutory private right of action, in contrast, would render that official "a party as a representative of the State, . . . thereby attempting to make the State a party."[221] Such a maneuver, in the Court's view, would strike at the heart of state sovereign immunity.

On the other hand, it may be time for the Court to reexamine this aspect of sovereign immunity doctrine. More than a century has elapsed since the Court decided *Young* (and *Fitts*). The Court has recognized that, "[f]or Eleventh Amendment purposes, the line

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216 *Id.*

217 *Id.*

218 *Id.*

219 *Ex parte* Young, 209 U.S. 123, 156 (1908) (explaining that the federal claims against state officials in *Fitts* were inappropriate because "[t]he penalties for disobeying that act, by demanding and receiving higher tolls, were to be collected by the persons paying them. No officer of the State had any official connection with the recovery of such penalties.").

220 *Id.* at 157.

221 *Id.*; *see also* Mass. State Grange v. Benton, 272 U.S. 525, 527–29 (1926) (opinion of McReynolds, J.) (holding that the plaintiffs could not seek an injunction against a Massachusetts law establishing daylight savings time because "no penalty is prescribed for non-observance" and "no defendant was charged with the duty of enforcement"); *cf.* Terrace v. Thompson, 263 U.S. 197, 214 (1923) ("The unconstitutionality of a state law is not of itself ground for equitable relief in the courts of the United States."). Lower courts have held that sovereign immunity protects officials such as a governor or attorney general from suits challenging the constitutionality of statutory private rights of action. *See, e.g.*, Okpalobi v. Foster, 244 F.3d 405, 423 (5th Cir. 2001) (en banc) (holding that the Eleventh Amendment barred a lawsuit against the governor and attorney general to challenge the constitutionality of a statutory private right of action because there was no "enforcement connection" between them and the statute "that satisfies either of the requirements of *Ex Parte Young*"); Summit Med. Assocs., P.C. v. Pryor, 180 F.3d 1326, 1342 (11th Cir. 1999) ("Appellees' suit against the Governor, the Attorney General, and the District Attorney with respect to the private civil enforcement provision of the partial-birth abortion statute is barred by the Eleventh Amendment.").

between permitted and prohibited suits will often be indistinct."[222] To determine whether sovereign immunity prohibits a particular type of claim, the Court "look[s] to the substance rather than to the form of the relief sought . . . and will be guided by the policies underlying the decision in *Ex parte Young*."[223]

Allowing people to challenge the constitutionality of statutory private rights of action by suing a designated state executive official would further at least three of the major principles the *Young* Court identified. First, most basically, *Young* "rests on the need to promote the vindication of federal rights."[224] Suits to enjoin unconstitutional laws, by definition, seek to "directly end[] [a] violation of federal law," rather than merely "indirectly . . . encourag[ing] compliance with federal law through deterrence" or "meet[ing] third-party interests such as compensation."[225] The importance of the rights protected by the Fourteenth Amendment, in particular, "offer a powerful reason to provide a federal forum."[226]

In *Idaho v. Coeur d'Alene Tribe of Idaho*, the Court reiterated the importance of vindicating federal rights, even in the context of state sovereign immunity. It explained that *Young*'s exception to sovereign immunity applies "where there is no state forum available to vindicate federal interests, thereby placing upon Article III courts the special obligation to ensure the supremacy of federal statutory and constitutional law."[227] Critically, the Court pointed to the facts of *Young* as an example of where a state forum was insufficient to protect federal rights.

The railroad companies in *Young* could have "wait[ed] until a state enforcement proceeding was brought against the railroads and then test[ed] the [allegedly unconstitutional state] law's validity by raising constitutional defenses" in state proceedings.[228] Recounting *Young*, the *Coeur d'Alene Tribe* Court pointed out that "the penalties for violations were so severe a railroad official could not test the law

222 Papasan v. Allain, 478 U.S. 265, 278 (1986); *see also* Edelman v. Jordan, 415 U.S. 651, 667 (1974).

223 *Papasan*, 478 U.S. at 279 (citing *Edelman*, 415 U.S. at 668); *see also* Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 464 (1945) (assessing the "nature and effect of the proceeding" to determine whether sovereign immunity applies).

224 Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984).

225 *Papasan*, 478 U.S. at 278; *see also* Green v. Mansour, 474 U.S. 64, 68 (1985) ("[C]ompensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment.").

226 Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 279 (1997) (Kennedy, J., concurring).

227 *Id.* at 270.

228 *Id.* at 271.

without grave risk of heavy fines and imprisonment."[229] In other words, in the Court's view, the fact that a rightholder had to violate state law and risk heavy penalties in order to raise their constitutional claim in state court meant that "there [was] no available state forum" in which to litigate that issue.[230] Accordingly, rightholders had to be permitted to pursue their constitutional claim in federal court. "[P]roviding a federal forum" in such cases, the Court reasoned, is consistent with "the plan of the [Constitutional] Convention."[231] This same reasoning would allow a comparable exception to state sovereign immunity to provide for preenforcement review of state laws establishing private rights of action.

A second important principle underlying the Court's sovereign immunity doctrine is the preservation of "the dignity and respect afforded a State."[232] Sovereign immunity protects against "[t]he specific indignity" and "insult to a State of being haled into court without its consent."[233] To the extent being subject to suit constitutes an indignity, allowing litigation against a designated executive official to challenge a statute creating a private right of action may pose *less* of a threat to the state's dignity than a traditional *Young* suit. If a state officer loses a traditional *Young* suit, the state's officials and agents are barred from enforcing a state law. If a governor or attorney general loses in a challenge to a statute creating a private right of action, in contrast, the law is declared unconstitutional but that official's conduct is not impeded.

Moreover, as a practical matter, preenforcement challenges to statutory private rights of action differ from many other contexts where sovereign immunity may apply. In many cases, if sovereign immunity

229 *Id.*

230 *Id.*

231 *Id.* Justice O'Connor's concurrence argues that this standard is too demanding. *Id.* at 291–92 (O'Connor, J., concurring in part and concurring in the judgment). Her concurrence claims the absence of an adequate legal remedy in *Young* was not relevant to the sovereign immunity issue, but rather concerned the separate question of whether an equitable remedy was appropriate. *Id.* Her opinion also pointed out that pre-*Young* precedents had authorized "federal actions to proceed even though a state forum *was* open to hear the plaintiff's claims." *Id.* (first citing Reagan v. Farmers' Loan & Tr. Co., 154 U.S. 362 (1894); and then citing Smyth v. Ames, 169 U.S. 466 (1898)). Emphasizing the importance of having federal courts adjudicate federal rights, the concurrence advocated a bright-line, "straightforward" test under which sovereign immunity is inapplicable when "a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Id.* at 296.

232 *Id.* at 268 (majority opinion); *see also* P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (holding that state sovereign immunity "accords the States the respect owed them as members of the federation").

233 Va. Off. for Prot. & Advoc. v. Stewart, 563 U.S. 247, 258 (2011).

bars a litigant from pursuing a claim against the state or a state official, the state is protected from having to litigate that issue. In this context, however, even if sovereign immunity protects a state from having to defend against a preenforcement challenge to a statute, it has the opportunity to intervene in private litigation when the statute's constitutionality is challenged as a defense.[234] To the extent that states are likely to intervene in private enforcement actions to defend the constitutionality of their laws, requiring them to do so earlier, at the preenforcement stage, does not seem particularly disrespectful. As a practical matter, limiting sovereign immunity would generally wind up influencing *when* the state litigates the issue, not whether the state will do so at all. Of course, one might object that the absence of state consent makes all the difference. *Young*, however, already eliminates sovereign immunity for preenforcement lawsuits challenging the constitutionality of laws that are enforced by state officials. Extending *Young* to preenforcement lawsuits challenging laws enforced by private parties does not seem materially more disrespectful to states.

Finally, an important goal underlying state sovereign immunity—though not its central one—is protection of the public fisc.[235] Even when courts grant relief against state officials in their official capacities, "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, . . . and may not include a retroactive award which requires the payment of funds from the state treasury."[236] Expanding *Young* to challenges against laws creating private rights of action would not make states liable for monetary damages, though § 1988's provisions concerning attorneys' fees would apply.[237] The public fisc would remain relatively undisturbed.

Thus, expanding *Young* to authorize private litigation against a governor or attorney general as a representative of the state could be an effective way of allowing preenforcement challenges to statutory private rights of action. The current Court seems unlikely, however,

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234 *See* FED. R. CIV. P. 5.1(a)(1)(B), (a)(2) (requiring a party that challenges the constitutionality of a state law to notify the state attorney general).

235 *See* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 765 (2002) ("While state sovereign immunity serves the important function of shielding state treasuries and thus preserving the States' ability to govern in accordance with the will of their citizens, . . . the doctrine's central purpose is to accord the States the respect owed them as joint sovereigns." (quotation marks omitted)).

236 Edelman v. Jordan, 415 U.S. 651, 677 (1974) (first citing *Ex parte* Young 209 U.S. 123 (1908); and then citing Ford Motor Co. v. Dep't of Treasury 323 U.S. 459 (1945)).

237 42 U.S.C. § 1988(b) (2018); *see* Missouri v. Jenkins, 491 U.S. 274, 279 (1989) ("[A]n award of attorney's fees ancillary to prospective relief is not subject to the strictures of the Eleventh Amendment." (citing Hutto v. Finney, 437 U.S. 678, 696–97 (1978)).

to adopt the substantial doctrinal changes this approach would require. And allowing a plaintiff to sue a state official essentially as a stand-in for the state as an entity, for the purpose of challenging a law that the official does not enforce would raise substantial tension with the core notion that the states themselves are generally immune from suit.

IV. PRESERVING THE RIGHT TO GUIDANCE

The Supreme Court has recognized the due process right to obtain a judicial ruling concerning the constitutionality of a legal provision without incurring substantial potential liability by violating it.[238] This right applies most directly when a statute is enforced through substantial fines, penalties, or other sanctions—whether they are individually substantial, or instead may aggregate to substantial amounts based on repeated violations.[239] This Part introduces the constitutional tolling doctrine as a way of applying this right to preenforcement judicial guidance in the context of statutory private rights of action, then considers a federal statutory fix as a potential alternative.

A. Constitutional Tolling

Ex parte Young allows regulated entities to vindicate their right to preenforcement judicial guidance concerning a legal provision's validity by bringing a preenforcement suit against the executive officials charged with enforcing it. When a legal provision is enforceable only through a private right of action, however, relief under *Young* is not presently available because there is no official responsible for enforcing it. The Court has recognized that, in such cases, the due process right to preenforcement judicial guidance must be vindicated through different procedural means.

Where it is impossible to pursue preenforcement judicial review, the Court has sometimes enforced the right to preenforcement guidance through the doctrine of "constitutional tolling."[240] This doctrine provides that a regulated entity may violate a legal provision and raise its challenge to the measure's constitutionality as a defense in any ensuing enforcement proceedings. Critically, even if the court

238 *See supra* Section II.A.

239 *See supra* note 153 and accompanying text.

240 The term "constitutional tolling" comes from cases such as *United States v. Pacific Coast European Conference*, 451 F.2d 712, 717 (9th Cir. 1971), and *Nichiro Gyogyo Kaisha, Ltd. v. Baldrige*, 594 F. Supp. 80, 82 (D.D.C. 1984).

rejects the constitutional defense, the entity is immune from penalties for any violations that occurred before the first final judgment on the constitutional issue.[241] Under the constitutional tolling doctrine, the Court treats a statute's penalty provisions as severable from the rest of the measure, and unconstitutional as applied in the context of enforcement proceedings against a regulated party that lacked any prior opportunity to challenge the measure's validity.[242]

1. The Roots of Constitutional Tolling

The Court applied the constitutional tolling doctrine in the early Twentieth Century in cases involving state laws that established private rights of action with substantial penalties. Many of these cases also involved overlapping concerns about the magnitude of the penalties involved, laying a preliminary foundation for modern caselaw imposing due process limits on punitive damages.[243] Although this approach has come to be called the "constitutional tolling" doctrine, some early cases applied it not only in constitutional cases, but more broadly to situations in which a regulated entity did not have an

241 *See* St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63, 64–65 (1919) ("[T]he imposition of severe penalties as a means of enforcing a rate . . . is in contravention of due process of law, where no adequate opportunity is afforded the carrier for safely testing, in an appropriate judicial proceeding, the validity of the rate—that is, whether it is confiscatory or otherwise—before any liability for the penalties attaches.").

242 *See* Louisville & Nashville R.R. Co. v. Garrett, 231 U.S. 298, 311 (1913) ("[I]f it were assumed that these [statutory penalty provisions] would be open to objection as operating to deprive the carrier of a fair opportunity to contest the validity of the Commission's action, still, the penal provisions would be separable, and the force of the remaining portion of the statute would not be impaired."); Chesapeake & Ohio Ry. Co. v. Conley, 230 U.S. 513, 521 (1913) (holding that the challenged statute accorded claimed rightholders due process because the state supreme court had construed it as protecting them from the accumulation of penalties while they were challenging its constitutionality); *cf.* Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 291 (1920) (holding that a public service commission order imposing rates for a water company violated due process because there was no opportunity for the company to get an independent judicial determination as to whether the rates were confiscatorily low).

The Court would also assume that cumulative or other substantial penalty provisions were severable when such sanctions had not been imposed, including in preenforcement challenges, *see, e.g.*, Wilson v. New, 243 U.S. 332, 351–52 (1917); Phoenix Ry. Co. of Ariz. v. Geary, 239 U.S. 277, 282–83 (1915); Grand Trunk Ry. Co. v. Mich. R.R. Comm'n, 231 U.S. 457, 473 (1913), and enforcement actions where the government sought only a limited fine (typically for a single violation of the statute) or injunctive relief, *see, e.g.*, Indep. Warehouses, Inc. v. Scheele, 331 U.S. 70, 88–89 (1947); Grenada Lumber Co. v. Mississippi, 217 U.S. 433, 443 (1910).

243 *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996).

opportunity to obtain a preenforcement judicial determination of the legality of its intended actions under a statute.

In *Southwestern Telegraph & Telephone Co. v. Danaher*,[244] for example, a state law prohibited telephone companies within the state from imposing discriminatory restrictions on certain customers or refusing service to any person who offered to comply with its regulations.[245] The law provided penalties for violations of up to $100 daily.[246] A phone company had disconnected a patron's service for forty days and then denied her a fifty-cent early-payment discount over the following twenty-three days, because she had been two months in arrears in paying her phone bill.[247] The state supreme court affirmed that the company had violated the statute and must pay a $6,300 penalty to the customer.[248]

The U.S. Supreme Court reversed, pointing out that the company had not engaged in "intentional wrongdoing," especially since courts in other jurisdictions had affirmed the right of telephone companies to cut off service to nonpaying customers.[249] The Court further recognized that "[t]here was no mode of judicially testing the . . . reasonableness [of the phone company's actions] in advance of acting."[250] The Court concluded, "In these circumstances to inflict upon the company penalties aggregating $6,300 was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law."[251] Thus, the company could not be subject to substantial penalties in large part because there was no way for it to obtain a judicial determination of the legality of its actions—cutting off phone service to nonpaying customers—before it engaged in them. This case was a particularly expansive application of tolling principles and the due process right to preenforcement judicial guidance, since the central question concerned the legality of the company's actions rather than a constitutional challenge to the underlying statute's substantive restrictions.

Likewise, in *Missouri Pacific Railway Co. v. Nebraska*, a state law required railroads to either grant land on their rights-of-way for the construction of grain elevators, or instead build side tracks connecting

244 238 U.S. 482 (1915).
245 *Id.* at 485.
246 *Id.*
247 *Id.* at 486.
248 *Id.* at 487–88.
249 *Id.* at 490.
250 *Id.* at 490–91.
251 *Id.* at 491.

to grain elevators that were adjacent to their rights-of-way.[252] Railroads that failed to comply were liable for $500 in statutory damages.[253] A cooperative grain association sued a railroad for violating the statute, and the state supreme court affirmed a fine and injunction against the railroad.[254] The U.S. Supreme Court suggested that the statute could be construed as applying only to "reasonable" requests for track construction.[255] Even with that "strained construction," however, the statute subjected railroads that refused to comply with requests from grain elevator companies to "the peril of a fine, if they turn out wrong in their guess" as to whether those requests were reasonable.[256] The Court held that a railroad instead must be "allowed a hearing in advance to decide whether the demand is within the act."[257] Because there was no way at the time for a railroad to obtain a judicial ruling as to whether the statute applied to a particular request without potentially incurring a fine, the Court reversed the state court's judgment against the railroad.[258]

The Court applied similar reasoning to constitutional challenges to a legal provision in the 1913 case *Missouri Pacific Railway Co. v. Tucker*.[259] In *Tucker*, the Kansas legislature adopted maximum rates for transportation of oil and petroleum by railroad.[260] The law did not provide any opportunity for judicial review of the rates before they took effect to ensure they were not unconstitutionally confiscatory and did not otherwise violate the Fourteenth Amendment.[261] Under this rate schedule, the price for a particular shipment should have been $12, but the railroad charged $3.02 extra.[262] The shipper sued under the statute in state court and won a judgment of $500 in statutory damages.[263]

The Court declared that the railroad should not have been put to the choice of either applying the rates and thereby "sustaining a serious and irreparable loss" due to decreased income, or violating the rates and facing "the prescribed liabilities and penalties" if the courts

252 Mo. Pac. Ry. Co. v. Nebraska, 217 U.S. 196, 204 (1910).
253 *Id.* at 204–05.
254 *Id.* at 205.
255 *Id.* at 207.
256 *Id.*
257 *Id.* at 207–08.
258 *Id.* at 208.
259 230 U.S. 340 (1913).
260 *Id.* at 346.
261 *Id.* at 347.
262 *Id.* at 346–47.
263 *Id.*

ultimately deemed them valid.[264] The state court had rejected the railroad's due process claim, pointing out that it could contest the rates' validity during any enforcement proceedings.[265] Rejecting this notion, the U.S. Supreme Court held that "the controlling principle" of *Young* applied.[266] Quoting two lengthy paragraphs from *Young*, the Court explained that a rightholder cannot be required to subject itself to the possibility of "suffer[ing] imprisonment and pay[ing] fines" if its constitutional challenge to a legal provision is unsuccessful.[267] *Tucker* emphasized that *Young*'s reasoning was equally applicable where the legal provision at issue did not authorize imprisonment.[268] Thus, the *Tucker* Court concluded that the railroad could not be held liable for the substantial statutory fines that accrued while it was litigating its constitutional defense in a private suit to enforce the legislature's rate schedule. [269]

The Court also discussed the constitutional tolling doctrine at length in the 1915 case *Wadley Southern Railway Co. v. Georgia*.[270] In *Wadley*, the Georgia Railroad Commission issued an order forbidding the Wadley Southern Railroad from requiring a certain shipper to prepay its freight costs while the railroad authorized another shipper to pay upon delivery.[271] The commission fined the railroad $1000 for violating its order; the underlying statute "authoriz[ed] so enormous a penalty as $5,000 a day for violating lawful orders of the Commission."[272] The U.S. Supreme Court held that the commission's initial order barring discrimination among shippers was constitutionally valid.[273]

The railroad argued, however, that the fine was unconstitutional because it "operated to prevent an appeal to the courts . . . for the purpose of determining whether the order was lawful and, therefore, binding."[274] The Court agreed with the railroad's premise, holding

264 *Id.* at 348.
265 *Id.* at 349.
266 *Id.* at 350.
267 *Id.* at 349–50 (quoting *Ex parte* Young, 209 U.S. 123, 147–48 (1908)).
268 *Id.* at 350–51.
269 *Id.* at 351.
270 235 U.S. 651 (1915).
271 *Id.* at 653, 657.
272 *Id.* at 659.
273 *Id.* ("[T]here is, of course, nothing in the provisions of the Federal Constitution which prevents the States from prohibiting and punishing unjust discrimination of its patrons by a public carrier.").
274 *Id.*

that the railroad was entitled to judicial review of the validity of the commission's order without incurring substantial liability.[275] It held,

> [T]he right to a judicial review must be substantial, adequate, and safely available—but that right is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law.[276]

The Court went on to reiterate, "[U]nder the Constitution penalties cannot be collected if they operate to deter an interested party from testing the validity of legislative rates or orders legislative in their nature."[277]

Thus, if the railroad had sought timely judicial review of the Commission's order, and the order were deemed valid, the railroad would not have been subject to penalties for "violations prior to such adjudication."[278] Because the railroad did not file such a preenforcement challenge, but instead waited to raise its constitutional claims as a defense in an enforcement action, the Court held that it was subject to the statutory penalty.[279] Thus, *Wadley* was distinguishable from *Danaher*, *Missouri Pacific Railway Co.*, and *Tucker*. Those cases involved state laws that established private rights of action; there was no obvious route at the time through which the regulated entities could have sought preenforcement judicial review (such as through a suit for injunctive relief under *Young*).[280] *Wadley*, in contrast, involved fines sought by the state commission; the railroad could have brought a preenforcement *Young* claim against the commission's members.

As *Wadley* demonstrates, the main limitation on the constitutional tolling defense was that it was available only where a regulated entity lacked a mechanism through which to present its constitutional

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275 *See id.* at 660.

276 *Id.* at 661.

277 *Id.* at 662; *see also id.* at 662–63 ("If a statute could constitutionally impose heavy penalties for violation of commands of such disputable and uncertain legality the result inevitably would be that the carrier would yield to void orders, rather than risk the enormous cumulative or confiscatory punishment that might be imposed if they should thereafter be declared to be valid."); Nat. Gas Pipeline Co. v. Slattery, 302 U.S. 300, 310 (1937) ("As the Act imposes penalties of from $500 to $2,000 a day for failure to comply with the order, any application of the statute subjecting appellant to the risk of the cumulative penalties pending an attempt to test the validity of the order in the courts and for a reasonable time after decision, would be a denial of due process.").

278 *Wadley S. R.R.*, 235 U.S. at 669.

279 *Id.*

280 This Article argues that the Court should allow for such claims, but is unlikely to do so. *See supra* Section III.B.

arguments to a court, other than as a defense in an enforcement action. Most obviously, constitutional tolling was inapplicable where a statute provided for preenforcement judicial review in federal or state court, or otherwise expressly allowed a regulated entity to avoid fines and penalties while raising their constitutional defenses.[281] Other cases held that, even if the challenged legal provision did not expressly allow for some form of preenforcement judicial review, the possibility of bringing a federal constitutional challenge under *Ex parte Young* was enough to render the constitutional tolling doctrine inapplicable.[282] Later cases also required rightholders to exhaust administrative

281 *See, e.g.*, Interstate Com. Comm'n v. Atl. Coast Line R. Co., 383 U.S. 576, 603 (1966) (explaining that the Hepburn Act of 1906 expressly allowed for immediate judicial review of agency ratemaking orders "to afford an injunctive remedy for persons faced with the threat of irreparable injury through exposure to liability for mounting penalties without any other opportunity for judicial review until the Commission or some interested party should choose to commence enforcement proceedings"); Yakus v. United States, 321 U.S. 414, 437–38 (1944) ("The present statute is not open to the objection that . . . the only method by which [petitioners] can test the validity of the regulations . . . is by violating the statute and thus subjecting themselves to the possible imposition of severe and cumulative penalties. . . . [T]he statute itself provides an expeditious means of testing the validity of any price regulation, without necessarily incurring any of the penalties of the Act."); Chi. & Nw. Ry. Co. v. Ochs, 249 U.S. 416, 421–22 (1919) (upholding order under a state law that required a railroad to pay most of the cost for a side track to a manufacturing plant that was being expanded, because the law provided "for a full hearing before the commission and also in the district court of the county," rather than requiring the railroad to speculate about its legal obligations); Gulf, Colo. & Santa Fe Ry. Co. v. Texas, 246 U.S. 58, 62 (1918) (affirming a "somewhat extreme" judgment against the railroad because, although "the statutes of Texas provided for a suit to test the validity of the order [requiring the appellant's trains to stop in certain small towns], in a court either of the State or of the United States," the railroad "saw fit to await proceedings against it"); S. Pac. Co. v. Campbell, 230 U.S. 537, 552 (1913) ("The provision of the statute that suit might be brought in the state court to set aside orders of the commission upon the ground that the rates fixed were unlawful, or that the regulation or practice prescribed was unreasonable, did not infringe the rights of the complainants."); *cf.* Pac. Live Stock Co. v. Lewis, 241 U.S. 440, 455 (1916) (holding that an administrative order of a state water board could be implemented while judicial review in state court was pending, particularly since flowing water is lost if not immediately used and adversely affected parties could post bond to stay the order's implementation); Pac. Mail S.S. Co. v. Schmidt, 241 U.S. 245, 249–51 (1916) (holding, as a matter of statutory interpretation, that a statute requiring a ship owner to pay *per diem* penalties to an employee if the owner "neglects" to pay him "without sufficient cause" did not apply where the ship owner believed in good faith he had a claim for setoff against the employee).

282 *See, e.g.*, St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63, 65–66 (1919) (holding, in an appeal from an enforcement action in which a railroad was ordered to pay $100 in penalties in addition to attorneys' fees for overcharging two passengers sixty-six cents each, that where a "carrier fails to avail itself of the opportunity" to challenge a mandatory rate by bringing a "suit in equity," the state may enforce "substantial penalties for deviations from it").

remedies by asking agencies to postpone or stay their orders pending adjudication of constitutional claims.[283] A regulated entity who foregoes such opportunities and proceeds with violating the legal provision is subject to the statutory penalties, regardless of how substantial they are.[284]

Some Supreme Court authority suggests that a penalty may be too small to trigger the constitutional tolling doctrine. That is, the amount of the fine or other sanction would not deter the reasonable person from performing acts that violate, or reasonably could be determined to violate, a statute if they believed their conduct to actually be legal or constitutionally protected. For example, in the 1934 case *Life & Casualty Insurance Co. v. McCray*, the Court upheld a state law requiring an insurance company to pay a 12% penalty and the plaintiffs' attorneys fees if it contested coverage and the insured prevailed in litigation against it, even if the insurance company's arguments were made "in good faith and upon reasonable grounds."[285] The Court explained:

> The price of error may be so heavy as to erect an unfair barrier against the endeavor of an honest litigant to obtain the judgment of a court. In that event, the Constitution intervenes and keeps the court room open. . . . On the other hand, the penalty may be no more than the fair price of the adventure. . . . In that event, the litigant must pay for his experience, like others who have tried and lost.[286]

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283 *Nat. Gas Pipeline Co.*, 302 U.S. at 310 ("[N]o reason appears why appellant could not have asked the commission to postpone the date of operation of the order pending application to the commission for modification. Refusal of postponement would have been the occasion for recourse to the courts."); *Yakus*, 321 U.S. at 438 ("[W]hile courts have no power to suspend or ameliorate the operation of a regulation during the pendency of proceedings to determine its validity, we cannot say that the Administrator has no such power or assume that he would not exercise it in an appropriate case.").

284 *See* Louisville & Nashville R.R. Co. v. Garrett, 231 U.S. 298, 311 (1913) (rejecting due process challenge to a statute empowering a state commission to establish maximum railroad rates because "there is no showing here of an attempt to preclude such [preenforcement] resort to the courts, or to deny to the carrier the assertion of its rights, unless it can be found in the severity of the penalties attached to disobedience of the order").

285 Life & Cas. Ins. Co. v. McCray, 291 U.S. 566, 568–69 (1934).

286 *Id.* at 574–75 (first citing *Ex parte* Young, 209 U.S. 123 (1908); then citing Wadley S. Ry. Co. v. Georgia, 235 U.S. 651, 661, 662 (1915); and then citing St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63 (1919)); *see also* Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 583–84 (1942) (upholding validity of a Fair Labor Standards Act provision allowing successful plaintiffs to recover twice their claimed overtime pay as well as attorneys' fees because the statute did not involve "a threat of criminal proceedings or prohibitive fines"), *superseded by statute*, 29 U.S.C. § 260, *as recognized in* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 128 n.22 (1985).

The Court may have been especially willing to uphold this provision precisely because of the importance of inducing insurance companies to fulfill their obligations—typically to especially vulnerable or needy insureds—in a timely manner.[287]

2. Constitutional Tolling in the Modern Era

Over the past few decades, the Court itself has seldom discussed the constitutional tolling doctrine. Its primary recognition of the doctrine in recent years came indirectly in *Thunder Basin Coal Co. v. Reich*.[288] The plaintiff coal company in that case brought a preenforcement challenge to the Federal Mine Safety and Health Amendments Act of 1977.[289] The company argued that the statute did not require it to recognize its nonunion miners' designation of two nonemployees as their representatives.[290] The company also maintained that the statutory scheme forced an impermissible choice upon it. On the one hand, the company could recognize the miners' allegedly invalid designations, which would purportedly cause the company irreparable injury.[291] On the other hand, the company could potentially violate the act by rejecting those designations in order to raise its defense in an enforcement proceeding, leading to "possible escalating daily penalties" if the company lost.[292]

The Supreme Court held that the district court lacked subject-matter jurisdiction over the company's preenforcement challenge.[293] It noted that the act provides for judicial review of the Federal Mine Safety and Health Review Commission's orders, including orders to designate certain representatives, directly in the court of appeals.[294] "The structure of the Mine Act," the Court concluded, "demonstrates that Congress intended to preclude challenges such as the present one."[295]

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287 *See Life & Cas. Ins. Co.*, 291 U.S. at 569–70.

288 510 U.S. 200 (1994); *see also* St. Regis Paper Co. v. United States, 368 U.S. 208, 226 (1961) ("'[W]e are not prepared to say that courts would be powerless' to act where such orders appear suspect and ruinous penalties would be sustained pending a good faith test of their validity." (quoting United States v. Morton Salt Co., 338 U.S. 632, 654 (1950))).

289 *Thunder Basin*, 510 U.S. at 202 (citing Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290 (codified as amended at 30 U.S.C. § 801 (1988))).

290 *Id.* at 204–05.

291 *Id.* at 205.

292 *Id.*

293 *Id.* at 207.

294 *Id.*

295 *Id.* at 208; *see also id.* at 216 ("Nothing in the language and structure of the Act or its legislative history suggests that Congress intended to allow mine operators to evade the

The Court went on to reject the coal company's due process claim on the merits, ruling that accepting the miners' designation of nonemployee representatives would not cause any irreparable harm to the company given the limited scope of representatives' prerogatives.[296] Moreover, even if the company chose to violate the statute, it could seek "temporary relief" from both the commission and the court of appeals.[297] The Court reasoned:

> Thus, this case does not present the situation confronted in *Ex parte* Young, . . . in which the practical effect of coercive penalties for noncompliance was to foreclose all access to the courts. Nor does this approach a situation in which compliance is sufficiently onerous and coercive penalties sufficiently potent that a constitutionally intolerable choice might be presented.[298]

Although the *Thunder Basin Coal Co.* Court found the constitutional tolling doctrine inapplicable, its reasoning appears to recognize the doctrine's continuing validity.[299]

In the modern era, the doctrine has been applied primarily within the Ninth Circuit, and to a lesser extent in a few other circuits, as well.[300] In the Ninth Circuit's 1971 case *United States v. Pacific Coast*

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statutory-review process by enjoining the Secretary from commencing enforcement proceedings, as petitioner sought to do here.").

296 *Id.* at 217.

297 *Id.* at 217–18.

298 *Id.* at 218 (citing *Ex parte* Young, 209 U.S. 123, 148 (1908)).

299 *See also* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 490–91 (2010) ("We normally do not require plaintiffs to 'bet the farm . . . by taking the violative action' before 'testing the validity of the law,' . . . and we do not consider this a 'meaningful' avenue of relief." (first ellipses in original) (first quoting MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 129 (2007); then citing *Ex parte* Young, 209 U.S. 123 (1908); and then quoting *Thunder Basin*, 510 U.S., at 212)).

300 A few federal and state courts have somewhat dated cases alluding to the doctrine. *See, e.g.*, Brown & Williamson Tobacco Corp. v. Engman, 527 F.2d 1115, 1119 (2d Cir. 1975) ("[O]ne has a due process right to contest the *validity* of a legislative or administrative order affecting his affairs without necessarily having to face ruinous penalties if the suit is lost."); United States v. Rsrv. Mining Co., 412 F. Supp. 705, 708 (D. Minn. 1976) ("Because [the defendant] mounted substantial, continuous legal challenges to [the legal provision it violated], the law does not authorize imposition of penalties . . . ."); *see also* Union Elec. Co. v. EPA, 593 F.2d 299, 306 (8th Cir. 1979) (rejecting constitutional tolling argument because the power company "ha[d] an opportunity to test the validity of the Missouri Implementation Plan" under the Clean Air Act "without *necessarily* incurring confiscatory fines and penalties"); VECO Int'l, Inc. v. Alaska Pub. Offs. Comm'n, 753 P.2d 703, 718 (Alaska 1988) (declining to consider the constitutional tolling issue because administrative regulations precluded the accumulation of penalties while a challenge was pending); Danish Health Club, Inc. v. Kittery, 562 A.2d 663, 666–67 (Me. 1989) (holding that the constitutional tolling doctrine was inapplicable where an ordinance had a 90-day grace period before taking effect and regulated entities could have sought a preliminary

European Conference, the Federal Maritime Commission implemented amendments to the Shipping Act by changing the form contract that shipping conferences were required to use when transporting goods internationally by steamship.[301] Three conferences challenged the commission's order mandating the new form contract in federal court and continued using their existing contract templates rather than adopting the new form.[302] The court ultimately rejected both the conferences' constitutional challenge to the Shipping Act amendments as well as their objections to the form contract the commission mandated.[303]

When these judicial challenges were over, the government sought to recover fines from each conference for its failure to use the Commission's form contract while their judicial challenges had been pending.[304] Citing *Wadley*, the Ninth Circuit held that the constitutional tolling doctrine precluded the government from enforcing the fines against the conferences.[305] It explained, "Defendants ought not to have to pay a statutory penalty for non-compliance with the 1961 Act during the time they were judicially testing the validity of that Act, and enjoying the benefits of any additional agency procedures secured to

injunction against its enforcement); *cf.* United States v. Charles George Trucking Co., 823 F.2d 685, 691 (1st Cir. 1987) (noting in a CERCLA case, without ruling on the issue, that "[s]ome cases intimate that a good faith defense, timely asserted and earnestly pursued, may be enough to stay the accumulation of punitive sanctions even if the defense ultimately proves inadequate to pass an objective test of reasonableness"); United States v. W. Penn Power Co., 460 F. Supp. 1305, 1320 (W.D. Pa. 1978) (declining to consider constitutional tolling argument until the court reached a final decision establishing the amount of penalties owed); United States v. Gulf Oil Corp., 408 F. Supp. 450, 461–62 (W.D. Pa. 1975) (holding, in the context of a criminal prosecution, that the constitutional tolling doctrine had to be raised as a defense at trial and could not be invoked to dismiss an indictment); Commonwealth Edison Co. v. U.S. Nuclear Regul. Comm'n, 830 F.2d 610, 621 n.7 (7th Cir. 1987) (declining to consider the issue due to waiver).

Some courts have considered the doctrine in the course of statutory interpretation as a basis for concluding that potentially substantial fines or penalties could not accumulate under a legal provision while a litigant was bringing a good-faith challenge to it. *See, e.g.*, Aminoil, Inc. v. United States, 646 F. Supp. 294, 299 (C.D. Cal. 1986); Ford Motor Co. v. Coleman, 402 F. Supp. 475, 485–86 (D.D.C. 1975); *In re* Kimber Petroleum Corp., 539 A.2d 1181, 1186–88 (N.J. 1988). They have refused to apply the doctrine in the context of alleged violations of consent decrees, however, on the grounds that the regulated entity voluntarily entered into the decree in the first place. *See, e.g.*, United States v. La.-Pac. Corp., 967 F.2d 1372, 1378 (9th Cir. 1992); *Engman*, 527 F.2d at 1119.

301 United States v. Pac. Coast Eur. Conf., 451 F.2d 712, 714–15 (9th Cir. 1971).

302 *Id.* at 714.

303 *Id.* at 715.

304 *Id.*

305 *Id.* at 717–18 (citing Wadley S. Ry. Co. v. Georgia, 235 U.S. 651, 662–63 (1915)).

them in that litigation."[306] The court also noted that, under the statutory scheme at issue, there was no way for the plaintiffs to otherwise ask either the agency or the court to stay or enjoin the accumulation of penalties.[307] It rejected the government's argument that the defendants should have simply discontinued the use of their preferred contracts while challenging the validity of the commission's new form contract.[308]

The court added that the defendants were entitled to constitutional tolling even though their attack on the validity of the form contract failed. A party's right to raise constitutional and legal challenges "free from the risk of statutory penalties must be judged, not by this court's after-the-fact determination, but by whether [it] mounted a substantial attack upon the validity of the [challenged provisions]."[309] In late 2021, an Alaska district court applied this precedent to find that a defendant shipping company was entitled to constitutional tolling while challenging penalties in an enforcement proceeding.[310]

The Supreme Court could facilitate constitutional review of statutes creating private rights of action such as S.B. 8 by expressly readopting, clarifying, and enforcing the constitutional tolling doctrine. The doctrine most clearly applies to statutory private rights of action that are enforceable through substantial fines, statutory damages, or other forms of presumed damages; penalties that can accumulate based on the party's course of action over time; punitive damages; or attorneys' fees. When a statute creates a private right of action, there is no governmental defendant against whom a regulated entity can seek relief through a suit for preliminary relief under *Ex parte Young*.[311] Nor is there generally an agency that can stay or agree to waive enforcement of the legal provisions at issue pending

306 *Id.* at 717; *see also id.* at 718 ("[T]he defendants promptly and vigorously challenged the validity of the Commission order of March 27, 1964, and the 1961 statute on which it was based. . . . [T]his is the precise sort of case of which the Supreme Court spoke in *Wadley*.").

307 *Id.* at 719 ("[T]he Government explains to us that a stay of, or injunction against, the Commission order would have been totally ineffective to stop the statutory penalties from accruing.").

308 *Id.* at 718–19.

309 *Id.* at 719.

310 Kloosterboer Int'l Forwarding LLC v. United States, No. 21-cv-198, 2021 WL 4729303, at *6 (D. Alaska Oct. 10, 2021) ("[T]he Court finds that constitutional tolling applies to preclude the imposition of additional penalties . . . until entry of final judgment by this Court.").

311 *Cf. supra* notes 46–48 and accompanying text.

adjudication of a constitutional challenge.[312] The constitutional tolling doctrine would allow rightholders to raise nonfrivolous challenges to statutory private rights of action without risking substantial penalties.

One of the main drawbacks of this approach is that it effectively treats every case as if the party raising the constitutional issue has obtained a preliminary injunction barring enforcement of the challenged legal provision. A court typically must weigh practical factors, including the balance of hardships and public interest, before granting such extraordinary relief.[313] Any person regulated by a legal provision would effectively have a free pass for violations until the provision's validity were upheld, and potentially until the end of any appellate proceedings. Categorically (or even presumptively) allowing for such broad exceptions to statutes without either an assessment of the rightholder's likelihood of success or consideration of the practical consequences could seriously undermine the public interest and interfere with the goals of the underlying regulatory scheme.

The Court might consider reshaping the doctrine into a more discretionary principle. That is, it could require trial courts to take into account the balance of hardships and public interest in deciding whether to exempt a person who unsuccessfully asserts constitutional defenses in an enforcement action from penalties. If courts made such case-by-case determinations of whether constitutional tolling is available for particular statutes, however, rightholders would have to predict whether the court would apply the doctrine in their case. Yet the whole point of the doctrine is to protect rightholders from having to gamble and predict how a court will rule. Incorporating such equitable considerations may strike the right balance between broadening opportunities for judicial review and protecting important public interests, but it is a difficult question.

Alternatively, the constitutional tolling doctrine might perhaps be justified instead as a form of penalty default. Its existence and application may induce legislators to establish a route for bringing preenforcement challenges to legal provisions establishing private rights of action. Alternatively, as a matter of statutory interpretation, constitutional tolling could be adopted as a default rule that applies unless Congress or a legislature expressly disclaims it. For measures such as S.B. 8 that are drafted specifically to impede preenforcement

312 *Cf. supra* notes 283–84 and accompanying text.

313 *See* Winter v. Nat. Res. Def. Council, 555 U.S. 7, 32 (2008).

review,[314] however, legislators would likely suspend constitutional tolling, thereby defeating the goal of the doctrine.

Thus, constitutional tolling is one way that modern courts can, and occasionally do, allow rightholders to seek judicial guidance concerning a legal provision's validity without exposing themselves to substantial liability. It is a potentially effective response to the rise of laws burdening constitutional rights that are enforceable only through private rights of action. Though the doctrine has potential drawbacks, there are different variations the Court could consider to help mitigate them.

B. Abrogating Sovereign Immunity

Another alternative would be for Congress to exercise its authority under Section Five of the Fourteenth Amendment to abrogate state sovereign immunity against private suits challenging private rights of action under the U.S. Constitution (at least in circumstances where the challenged restrictions are not also enforceable by governmental officials). Congress has authority to abrogate state sovereign immunity under Section Five,[315] which empowers it to "enforce, by appropriate legislation," the rights created by that Amendment.[316] The Fourteenth Amendment not only protects critical due process and equal protection rights but, through the incorporation doctrine, prohibits states and their political subdivisions from violating most provisions in the Bill of Rights, as well.[317] Allowing preenforcement suits in federal or state court to challenge the constitutionality of statutes that appear to violate the Fourteenth Amendment appears to be an appropriate way of enforcing those rights.

If Congress were to abrogate state sovereign immunity against such claims, a rightholder could sue the State as an entity, as the government did in *United States v. Texas*,[318] thereby alleviating the problem of being unable to sue a proper defendant under *Young*. Such a plaintiff could seek an injunction barring the state, as well as any state officials, state employees, and anyone else acting in concert with the state,[319] from taking any steps to enforce S.B. 8 against it. The plaintiff could also seek a declaratory judgment that the challenged

314 *See supra* notes 13–27 and accompanying text.

315 Alden v. Maine, 527 U.S. 706, 756 (1999).

316 U.S. CONST. amend. XIV, § 5.

317 McDonald v. City of Chicago, 561 U.S. 742, 764 & n.12 (2010); *see also* Timbs v. Indiana, 139 S. Ct. 682, 687 (2019).

318 *See supra* notes 83–100 and accompanying text.

319 FED. R. CIV. P. 65(d)(2).

legal provision is unconstitutional and use that judgment to bar any future litigation against it.[320] The lynchpin of these arguments is that state action plays an unavoidable role in the enforcement of an unconstitutional statute—particularly in state court—even if private plaintiffs are the only ones authorized to invoke it.[321]

Apart from the direct effects of an injunction or declaratory judgment, if a case against the state as an entity were appealed, the appellate court's opinion would likely have vertical stare decisis effect. Its ruling could protect both the plaintiff in that case, as well as other rightholders, from suit in any trial court bound by the appellate court's precedents. In this respect, a lawsuit in state court might have greater effect than a federal lawsuit (insofar as most claims under a state law are likely to be brought in state court).

This approach faces several obstacles, however. First, it is questionable whether Congress, as a political matter, would be willing to enact such legislation. A bipartisan consensus might emerge if various states enacted laws creating private rights of action targeting a range of constitutional rights favored by each of the major political parties. At present, however, the prospect of such a federal statute seems remote. Second, the Supreme Court's grant of certiorari before judgment in *United States v. Texas*—a case which, to be sure, involved additional complications—suggests that the Court may disagree with at least some of the reasoning underlying this strategy.[322]

Finally, there may be some question as to such a law's constitutionality under *City of Boerne v. Flores*.[323] *Boerne* held that, for legislation to fall within the scope of Congress's Section Five authority, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[324] The "appropriateness of remedial measures" under Section Five "must be considered in light of the evil presented."[325] Broadly speaking, to

320 *But see* Women's Health Clinic v. State, 825 So. 2d 1208, 1210, 1213 (La. Ct. App. 2002) (holding that the plaintiff lacked standing to sue the state to challenge the constitutionality of a law establishing a private right of action).

321 *See* Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (holding that state court enforcement of a racially restrictive covenant in a civil suit between private parties is state action that violates the Fourteenth Amendment); *see also* Barrows v. Jackson, 346 U.S. 249, 254 (1953) (applying *Shelley* to damages claims).

322 United States v. Texas, 142 S. Ct. 14, 14 (2021) (mem.) (granting certiorari on the question of whether the United States may "bring suit in federal court and obtain injunctive or declaratory relief against the State, state court judges, state court clerks, other state officials, or all private parties to prohibit S.B. 8 from being enforced").

323 521 U.S. 507 (1997).

324 *Id.* at 520.

325 *Id.* at 530 (citing South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966)).

fall within Section Five, a statute must be reasonably tailored[326] to preventing actual (not merely hypothetical) violations of constitutional rights as those rights have been defined by the Supreme Court,[327] as demonstrated by evidence in the legislative record.[328] Applying this demanding standard, the Court has invalidated several federal laws as exceeding Congress's authority under Section Five of the Fourteenth Amendment due to the lack of sufficient evidence that a substantial threat to constitutional rights existed.[329]

Objections under Section Five are unlikely to prevail, however. A federal statute allowing rightholders to sue a state on the grounds that a private right of action established by state law violates their rights under the U.S. Constitution appears to fit comfortably within the Court's ruling in *United States v. Georgia*.[330] In that case, the Court unanimously held that Title II of the Americans with Disabilities Act validly abrogated state sovereign immunity insofar as a plaintiff wished to sue for an actual constitutional violation.[331] The Court declared, "[N]o one doubts that § 5 grants Congress the power to 'enforce . . .

326 *Id.* at 532 ("Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional." (citing City of Rome v. United States, 446 U.S. 156, 177 (1980))).

327 *Id.* at 527–28 (rejecting the notion that Congress may "enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment").

328 *Id.* at 530 (invalidating the Religious Freedom Restoration Act as it applied to state and local legal provisions, in part because its "legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry").

329 *See, e.g.*, Coleman v. Ct. of Appeals of Md., 566 U.S. 30, 37–38 (2012) (plurality opinion) (invalidating provision of the Family Medical Leave Act because the Court concluded there was no "evidence of a pattern of state constitutional violations," such as "sex discrimination or sex stereotyping in the administration of sick leave"); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368, 374 (2001) ("The legislative record of the ADA, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled."); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 89 (2000) ("Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation."); United States v. Morrison, 529 U.S. 598, 625–27 (2000) (invalidating provision of the Violence Against Woman Act because "Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States"); Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 640, 645–47 (1999) ("[T]he record at best offers scant support for Congress' conclusion that States were depriving patent owners of property without due process of law by pleading sovereign immunity in federal-court patent actions.").

330 546 U.S. 151 (2006). I am grateful to Professor William Baude for making this point.

331 *Id.* at 159 ("[I]nsofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.").

the provisions' of the [Fourteenth] Amendment by creating private remedies against the States for actual violations of those provisions."[332] Thus, if Congress wished to enact such a law, the measure would likely be within its Section Five enforcement power.

CONCLUSION

A line of Supreme Court authority tracing back to *Ex parte Young* recognizes that litigants have a due process right to obtain a judicial ruling on the constitutionality of a legal provision without running the risk of incurring potentially substantial liability by violating it. Litigants can typically exercise this right by invoking *Ex parte Young*'s exception to sovereign immunity to bring a preenforcement lawsuit to enjoin the government officials responsible for enforcing the allegedly unconstitutional legal provision.

Justiciability restrictions, sovereign immunity, and related procedural constraints have long posed substantial barriers, however, to bringing such preenforcement constitutional challenges to legal provisions creating private rights of action. S.B. 8 attempts to exploit those difficulties to chill the exercise of constitutional rights as recognized by the U.S. Supreme Court. When government officials lack enforcement authority over a statute, a traditional *Young* suit is unavailable.

The *Whole Woman's Health* Court considered the possibility of allowing a *Young*-type cause of action against state court clerks, but concluded that their ministerial functions in impartially accepting court filings and docketing cases did not make them proper defendants.[333] An even more direct way to enforce the right to preenforcement judicial guidance in the context of private rights of action would be to expand *Ex parte Young*'s exception to sovereign immunity. The Court could allow rightholders to challenge allegedly unconstitutional state laws that are only enforceable through private litigation by suing the state governor or attorney general. This approach would raise serious justiciability and res judicata problems, however, and directly conflict with the Court's ruling in *Fitts v. McGhee* that sovereign immunity bars such suits because they directly target the state as an entity.[334]

A less effective, though more readily available alternative would be for the Court to expressly reaffirm and apply the doctrine of

332 *Id.* at 158 (quoting U.S. CONST. amend. XIV, § 5).

333 *See supra* notes 101–05 and accompanying text.

334 Fitts v. McGhee, 172 U.S. 516, 530 (1899).

constitutional tolling.[335] This doctrine applies when a person has no preenforcement means of obtaining a judicial ruling concerning the constitutionality of a legal provision that regulates their conduct. If that person is sued for violating the provision, they may raise their constitutional defense in the ensuing proceedings. The doctrine provides that, even if the court ultimately upholds the challenged measure as valid, that person is not liable for statutory damages, fines, or other penalties that would otherwise apply (so long as their constitutional challenge was substantial). The doctrine arises from the due process principle that a state may not force a person to choose between foregoing the exercise of their constitutional rights in order to avoid the risk of substantial penalties, and engaging in conduct that would trigger substantial liability if the court winds up rejecting their constitutional claim.[336] The Court applied the doctrine in several *Young*-era cases where regulated entities faced either substantial penalties or small penalties that threatened to accumulate, and some modern courts continue to recognize it.

A main drawback to this approach is that it essentially treats the underlying legal provision as if a court has granted a preliminary injunction against it, without expressly taking into account traditional equitable considerations such as the balance of hardships and public interest. Moreover, some people may attempt to exploit the doctrine through insubstantial constitutional claims. To the extent a court determines the doctrine's applicability on a case-by-case basis, however, even an entity attempting to invoke it in good faith could find itself unexpectedly subject to substantial liability. Nevertheless, by adopting a modified version of the doctrine which expressly takes into account practical considerations such as the balance of hardships and public interest, a modern court can limit adverse consequences while protecting rightholders from unconstitutional laws that are enforceable only by private plaintiffs.

335 *See supra* Section IV.A.

336 *See supra* notes 149, 241, and accompanying text.