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PRIVATIZING BANS ON ABORTION: EVISCERATING CONSTITUTIONAL RIGHTS THROUGH TORT REMEDIES

*Maya Manian**

State governments have devised a new means to evade the Constitution. Their new means is to enact tort statutes that, in effect, ban constitutionally protected conduct. In particular, some states have made the provision of an abortion a tort for which there can be no defense and no cap on the amount of liability. These states have made performing an abortion essentially illegal. Yet, because tort statutes are enforced through private litigation, rather than public prosecution, a number of courts have held that they lack jurisdiction to review these laws. Federal courts have concluded that standing doctrine and state sovereign immunity bar judicial review of any privately enforced tort legislation. These courts have refused to recognize that this new breed of tort statute attempts to “privatize” the government’s restriction of constitutional rights. States have taken a law that would clearly be unconstitutional were it properly treated as “public” law and immunized it as “private” tort law. Courts have refused to disallow this manipulation of the public/private distinction embedded in our system of law. This Article proposes a novel method for analyzing tort legislation that violates fundamental rights. It provides a framework for understanding how state legislatures are attempting to privatize governmental regulation. It then proposes a new solution that satisfies the requirements for federal court jurisdiction but also ensures that state legislatures do not cloak deprivations of fundamental rights under the veil of private rights of action.

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I. INTRODUCTION

The battle for abortion rights has been at fever pitch in recent months. In June 2006, the Louisiana legislature enacted a law criminalizing the provision of abortions¹ that will take effect in the event that the Supreme Court overturns *Roe v. Wade*.² South Dakota passed a similar criminal ban on abortion in 2006.³ Most recently, the Supreme Court, in a striking reversal of course, upheld a federal "partial-birth abortion" ban despite its broad wording and lack of a health exception.⁴ While all of these laws look forward to banning abortion or particular abortion methods through outright criminal penalties, state legislatures have already developed a less well-known but potentially far more dangerous method of restricting access to abortion. A number of states have crafted tort legislation that so severely chills the provision of abortion services that, in effect, they have eviscerated the right. This new breed of state tort statute threatens not only abortion rights, but also threatens fundamental constitutional rights across the board.

1. Act of June 17, 2006, No. 467, 2006 La. Sess. Law Serv. Act 467 (S.B. 33) (West, Westlaw through 2006 Reg. Sess.) (codified at LA. REV. STAT. ANN. §§ 14:87, 40:1299.30 (2006)).

2. The contingent effectiveness of Act 467 is set out at LA. REV. STAT. ANN. § 40:1299.30(A). *Roe v. Wade*, 410 U.S. 113 (1973), was the landmark Supreme Court decision declaring unconstitutional state bans on elective termination of pregnancy prior to the third trimester.

3. Women's Health and Human Life Protection Act, 2006 S.D. Laws, ch. 119 (H.B. 1215) (West, Westlaw through 2006 Reg. Sess.) (repealed 2006). The Governor signed this act into law on March 6, 2006 and South Dakota voters repealed it by referendum on November 7, 2006. As of February 2007, the South Dakota legislature is pushing a revised ban on abortion. See S.D. H.B. 1293 (2007 Session) (reflecting the version as of that date).

4. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1619 (2007). The Court had previously struck down a state "partial-birth abortion" ban for its similarly broad language and for lack of a health exception. *Stenberg v. Carhart*, 530 U.S. 914, 929-30 (2000). Although *Gonzales v. Carhart* weakened protections for the abortion right, the Court reiterated that the right to choose abortion is still constitutionally protected. *Gonzales*, 127 S. Ct. at 1626-27.

The leading case to hear a challenge to this new kind of tort statute, *Okpalobi v. Foster*,⁵ utterly failed to vindicate constitutional rights. *Okpalobi* dealt with a Louisiana tort law that gives women who obtain abortions a civil cause of action against their abortion providers simply for having performed an abortion. The Louisiana law provides that: "Any person who performs an abortion is liable to the mother of the unborn child for any damage occasioned or precipitated by the abortion"⁶ Damages are defined as any damages to the mother or unborn child⁷—thus the abortion itself can constitute remediable harm. The law also removes a claim under the statute from Louisiana's medical malpractice scheme, which limits medical liability to situations where a doctor violated standards of care.⁸ Most egregiously, the law refuses to recognize consent to the abortion as a defense that would eliminate damages.⁹ In essence, the law makes physicians who provide legal, consensual, and medically proper abortions strictly liable to the woman who had the abortion for potentially catastrophic damages. The law restricts access to abortions by making doctors unwilling to provide abortion services due to this unmitigated threat of liability.¹⁰

As soon as the Louisiana legislature enacted this tort law, abortion providers immediately brought a challenge in federal court. The doctors and their patients filed suit against the Attorney General and Governor of Louisiana as the officials who, under state law, have a duty to defend state legislation.¹¹ The providers argued that the law was both unconstitutionally vague and violative of a woman's right to choose abortion because they could no longer provide abortions in Louisiana given this threat of uncapped liability.¹²

Although the providers prevailed in district court and that decision was affirmed by a two-member panel of the Fifth Circuit, the Fifth Circuit sitting en banc found that it lacked jurisdiction to hear the challenge to Louisiana's tort statute. The court held that the doctors and their patients failed to establish Article III standing to sue any state officials because no state official could enforce this tort law.¹³ Based on similar reasoning, a plurality of the court found that the doctrine of *Ex parte Young*,¹⁴ which permits individuals to sue state

5. 244 F.3d 405 (5th Cir. 2001) (en banc).

6. LA. REV. STAT. ANN. § 9:2800.12 (1999) (emphasis added).

7. *Id.* § 9:2800.12(B)(2).

8. *Id.* § 9:2800.12(C)(2); *id.* § 40:1299.41-49.

9. *See id.* § 9:2800.12(C)(1) (providing that signed consent form may reduce, but not eliminate, damages).

10. *See Okpalobi v. Foster*, 981 F. Supp. 977, 984 (E.D. La. 1998) (describing affidavits from physicians stating they could not provide abortions under threat of liability in Louisiana statute), *rev'd en banc*, 244 F.3d 405 (5th Cir. 2001).

11. *Id.* at 977. Although one abortion provider originally brought the suit, additional providers intervened on behalf of themselves and their patients. *Id.* at 980.

12. *Id.* at 982-84.

13. *Okpalobi*, 244 F.3d at 427, 429.

14. 209 U.S. 123 (1908).

officials in order to challenge unconstitutional state legislation, did not apply.¹⁵ When the doctors and patients then attempted to challenge the law in Louisiana state court, the state court held that its standing requirements similarly prevented a preenforcement challenge to "private" tort laws.¹⁶

In contrast, if the State of Louisiana had legislated an immediate criminal or regulatory penalty on abortion services (without a Supreme Court "trigger" provision), the doctors and their patients whose constitutional rights would be violated would not have to wait for state prosecutors to impose sanctions before they could challenge the state law. Rather, as soon as such a law was enacted, the injured parties could obtain a preenforcement declaration that the law was unconstitutional and an injunction against the state officials who could enforce the law. Congress and the Supreme Court have established that individuals can obtain preenforcement injunctive and declaratory relief against individual state officials who could enforce unconstitutional state legislation.¹⁷

That the plaintiffs in Louisiana could not challenge in *any* court an unconstitutional state statute clearly has dire implications for the protection of constitutional rights against state encroachment. The Fifth Circuit and other courts have regarded these laws as merely "private" tort statutes that are more properly subject to review in the state courts, if and when a civil action is actually filed. They find no constitutional infirmity to denying preenforcement review because they reason that a constitutional claim may be raised eventually. These courts opine that challenging this type of tort law is simply a question of timing—for example that the doctors in Louisiana can wait until they are sued in state court and bring up as a defense the claim that this tort statute is unconstitutional. Thus, the Fifth Circuit and other courts addressing this issue have held that there is no need to test the constitutionality of a privately enforced tort law in federal court before "enforcement" of that law in the state courts.

Courts addressing this novel type of tort law have refused to recognize that these anti-abortion tort statutes cause constitutional injury whether or not they are ever invoked in court. For example, under the tort scheme challenged in *Okpalobi*, no one need ever file a civil suit in state court in order to restrict the provision of abortion services. Like a Sword of Damocles, the threat of a catastrophic lawsuit alone will chill abortion providers. These tort statutes are crafted to be "self-enforcing." A self-enforcing tort statute is a tort law that imposes such a high risk of a severe penalty on constitutionally protected conduct that it freezes that conduct as effectively as a criminal or regulatory ban. A self-enforcing tort statute blurs the line between traditionally "public" law

15. *Okpalobi*, 244 F.3d at 416-19; see also *Ex parte Young*, 209 U.S. at 157 (holding that state officers may be sued in federal court so long as they have "some connection with the enforcement of the act").

16. *Women's Health Clinic v. State*, 825 So. 2d 1208, 1212-13 (La. Ct. App. 2002).

17. See 28 U.S.C. § 2201(a) (2000) (authorizing federal courts to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought"); *Ex parte Young*, 209 U.S. at 148 (establishing availability of preenforcement injunctive relief where penalty for violation of allegedly unconstitutional state law is so high as to thoroughly discourage court challenges from ever arising).

(criminal or regulatory) and “private” law (tort or contract).¹⁸ Although it appears in the guise of privately enforced tort legislation, a self-enforcing tort statute operates as direct government prohibition of the targeted conduct. State legislators are using ostensibly “private” rights of action to make an end-run around public values and to disguise “public” governmental regulation. For example, assuming the Louisiana statute achieves its goal of restricting the provision of abortions merely by its existence, and no abortions are provided in Louisiana, no possible claims under the tort law will arise. If that happens, the statute will remain forever unreviewed. The Louisiana legislature will have denied a woman’s constitutional right with no accountability for its actions. The Fifth Circuit’s decision in *Okpalobi*, and other cases that have followed it, sets a dangerous precedent for abortion rights in particular and for constitutional rights in general. Under these courts’ approach, state legislators would be free to “privatize” all kinds of criminal and regulatory laws in ways that infringe on constitutional rights yet evade judicial review. For example, pro-choice legislators could draft tort laws granting abortion clinic employees and patients a cause of action for unrestricted damages for emotional distress against abortion protestors outside those clinics, which could chill the protestors’ exercise of their First Amendment rights.¹⁹ A state could grant a civil cause of action against a white person who sells a home to a person of color, in favor of any other person living in the neighborhood;²⁰ or against organizers of a parade, in favor of anyone offended by the theme of the parade.²¹ If tort statutes are categorically unreviewable in federal court, there is no logical limit to states’ ability to violate constitutional rights through the use of self-enforcing tort legislation.²²

Although a number of scholars have criticized the increasing use of “privatization” as a means of avoiding government accountability to the Constitution,²³ few have addressed the privatization of public law through the

18. I use the terms “public” and “private” with some caution here. The lack of a clear divide between “public” and “private” action has long been discussed by many scholars, yet the divide between public and private action remains embedded in our law, and particularly in constitutional law. As explained further *infra*, my analysis in this Article accepts the principle of a public/private divide in constitutional law and in the structure of our legal system in general and focuses instead on critiquing state legislators’ use of “private” tort remedies to deny constitutional rights.

19. *Cf. Schenck v. Pro-Choice Network of N.Y.*, 519 U.S. 357, 377-82 (1997) (holding First Amendment limits courts’ power to enjoin pro-life protests outside clinics providing abortion services).

20. *Cf. Barrows v. Jackson*, 346 U.S. 249, 251, 260 (1953) (holding Equal Protection Clause of Fourteenth Amendment bars use of state court to enforce racially restrictive covenant). The risk of chillingly high damages being awarded in a tort action for, say, emotional distress might be sufficiently higher than the risk of suffering high damages in an action in contract for breach of the covenant to prevent homeowners from attempting to sell to any buyer whose nature might upset the neighbors.

21. *Cf. Nat’l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 43-44 (1977) (holding injunction against wearing or displaying swastika must be stayed pending adjudication of First Amendment rights). The risk of becoming liable for substantial damages in tort for upsetting a private actor may significantly discourage exercise of the right.

22. These examples are discussed in more detail *infra* Part IV.A.

23. See generally, e.g., Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003) (arguing that privatization of government programs may impermissibly delegate government

use of tort remedies. Furthermore, courts and commentators have struggled to solve the difficult problems posed by the Article III standing and *Ex parte Young* hurdles to preenforcement judicial review of tort statutes. Instead of recognizing that state legislatures are hiding behind these doctrines in order to attack fundamental rights, courts refusing to address these unconstitutional tort statutes have employed a formalistic mode of analysis that rejects any federal court review of legislation styled as a "private" tort law.

This Article proposes a novel method for analyzing self-enforcing tort legislation. This new method satisfies the requirements for federal court jurisdiction, but also ensures that state legislators do not disguise governmental deprivations of fundamental rights as "mere" private rights of action. This Article argues that, because a self-enforcing tort statute causes an immediate, ongoing violation of a constitutional right upon its enactment, judicial review should be permitted in a preenforcement challenge as it would be were the law subject to criminal or regulatory enforcement by government officials—that is if it were openly a public law rather than being disguised as a private law. Self-enforcing tort legislation is a new and dangerous attempt at privatization of government regulation for the purpose of avoiding governmental accountability to the Constitution. Understood in the framework of privatization, self-enforcing tort legislation can be more readily addressed by the federal courts. In the case of self-enforcing tort laws, the use of "private" tort remedies is in fact an expansion of "public" enforcement power. Once courts recognize that self-enforcing tort legislation is in fact an exercise of governmental enforcement power, both logic and precedent dictate preenforcement judicial review. This Article argues that with respect to self-enforcing tort laws, instead of enforcement by executive officers (as with criminal or regulatory laws) or enforcement by private parties (as with tort laws), individual legislators are acting as enforcers of the law. Therefore, it is the legislators who enact such laws who should be subject to suit.

This Article proposes a method to test the constitutionality of a self-enforcing tort statute prior to "enforcement" by private parties without compromising the principles served by standing doctrine or by *Ex parte Young*. The underlying concern of the courts addressing self-enforcing tort laws, buried in these two federal courts doctrines, is a floodgate problem. Courts fear that allowing preenforcement judicial review of tort statutes will allow for essentially unlimited federal judicial review of state tort legislation, which raises concerns both about the balance of power between the judicial and legislative branches and about federal encroachment on state prerogatives. Rather than open this floodgate, federal courts have gone to the opposite extreme and categorically

powers to private entities that are not subject to same constitutional limitations as government actors); Symposium, *Public Values in an Era of Privatization*, 116 HARV. L. REV. 1212 (2003) (publishing six articles concerning potential difficulties with use of religiously affiliated private actors to carry out public policies that are required to be religiously neutral). In the context of analyzing government action, "privatization" refers generally to shifting responsibilities from governmental actors to nongovernmental actors. In this way, privatization can be used as a mechanism to expand government power beyond limitations that would otherwise obtain. Metzger, *supra*, at 1395-96.

denied preenforcement challenges to all tort statutes. To solve the difficulties posed by self-enforcing tort statutes, this Article proposes two solutions. First, it offers a new method for assuring courts that only this unique type of tort statute will be subject to preenforcement judicial review. Second, it develops a novel doctrinal solution to overcome the hurdles to testing tort statutes presented by federal courts' jurisdictional rules.

Part II of this Article takes a close look at the recent rise of self-enforcing tort legislation aimed at the provision of abortion services. This Part discusses in detail the Fifth Circuit's decision in *Okpalobi v. Foster*. It reviews the progression of the case through the federal and state courts, all of which refused to hear a preenforcement challenge to the tort statute at issue. Part II also reviews other cases where federal courts refused to review state legislation creating civil damages actions that chill the exercise of abortion rights. These cases demonstrate the widespread use of self-enforcing tort laws to attack abortion rights and show how courts have struggled with the doctrinal puzzles presented by this type of tort legislation.

Part III argues that tort legislation that violates fundamental rights ought to be amenable to preenforcement judicial review. By enacting self-enforcing tort statutes, state legislators are attempting to prevent judicial review of laws that operate as a prohibition on constitutionally protected conduct. State legislators have been able to accomplish this by essentially arrogating to themselves the enforcement powers traditionally left to the executive, while disguising this power as "private" enforcement. This Part criticizes the courts' approach to self-enforcing tort laws because it ignores how state legislators are manipulating the legal distinctions made between publicly enforced and privately enforced laws. The courts' flawed analysis obfuscates the real purpose and effect of self-enforcing tort statutes, which is to allow state legislators to eviscerate fundamental rights. Courts have therefore also ignored the larger potential problem of state legislatures using privatization through tort remedies as a means of infringing constitutional rights across the board. Finally, Part III will argue that the courts' approach to self-enforcing tort laws also ignores the underlying principle of *Ex parte Young*, which establishes that federal courts must assert jurisdiction for preenforcement review in order to prevent state legislators from chilling the exercise of constitutional rights.

Part IV resolves the conceptual and doctrinal puzzles presented by self-enforcing tort statutes. Part IV proposes a new method for testing the constitutionality of state tort legislation. Under this new test, federal courts could pierce the veil of private rights of action when used to attack fundamental constitutional rights without opening the feared floodgates to challenges to all types of tort laws. Part IV also solves the Article III standing and *Ex parte Young* hurdles to jurisdiction. As will be discussed in this Part, the primary hurdle to judicial review of self-enforcing tort legislation has been finding the appropriate party to sue. This Part argues that the appropriate defendants are the state legislators and governors who enact these laws.

Self-enforcing tort legislation presents a serious threat to constitutional rights. This Article offers a novel approach to prevent state legislators from utilizing private tort remedies to undermine and erode the Constitution.

II. SELF-ENFORCING TORT LEGISLATION AND ABORTION RIGHTS

Although there have been many types of criminal and regulatory statutes passed by states to restrict access to abortion, the use of civil damages statutes to, in effect, restrict the provision of abortion services is relatively new. These abortion cases provide examples of how self-enforcing tort legislation operates like a criminal ban on constitutional rights, yet has evaded judicial review.

Two strands of doctrine are at play in this question of preenforcement judicial review of state tort laws, both of which look to whether the named defendants will enforce the challenged law. First, the doctrine of standing, which is primarily concerned with the separation of powers, requires that plaintiffs sue only those who will cause their injury, such as by enforcing the law at issue. Second, the doctrine of *Ex parte Young*,²⁴ which is primarily concerned with federalism, looks to enforcement to determine whether suit may proceed against a state official or whether the suit is barred by the Eleventh Amendment. Both doctrines are examined in the abortion cases discussed below. These cases show how courts have struggled with, and have as of yet been unable to resolve, the doctrinal complexities raised by self-enforcing tort statutes.

A. A Case Study: Louisiana's Self-Enforcing Tort Legislation

*Okpalobi v. Foster*²⁵ is the leading case to consider the availability of a federal forum to hear claims that a tort statute violates constitutional rights. The Fifth Circuit, in an en banc opinion, ultimately concluded that it lacked jurisdiction to review a preenforcement challenge to Louisiana's abortion-specific tort law because the plaintiffs lacked standing to sue any state officials.²⁶ A plurality of the Fifth Circuit viewed *Ex parte Young* as a limit on judicial review of the statute as well,²⁷ a line of argument that other courts have followed.²⁸ Although the en banc court ultimately dismissed the preenforcement challenge, the analyses undertaken by the district court and the initial appellate panel explain the effect of the law and possible approaches to exercising jurisdiction to strike down the law. Therefore, the following sections begin by analyzing the district and panel opinions, before discussing the en banc ruling.

24. 209 U.S. 123 (1908).

25. 244 F.3d 405 (5th Cir. 2001) (en banc).

26. *Okpalobi*, 244 F.3d at 429. The majority opinion was joined in this decision by two separate concurrences drafted by Circuit Judges Higgenbotham and Benavides. *Id.* at 429 (Higginbotham, J., concurring); *id.* at 432 (Benavides, J., concurring in part and dissenting in part).

27. *Id.* at 415-24, 429 (majority opinion).

28. *Id.* at 415-16 (collecting cases).

1. District Court Opinion

The Louisiana statute at issue in *Okpalobi*, known in short form as “Act 825,” provides women who obtain abortions a civil cause of action against their abortion providers. Act 825 provides in pertinent part: “Any person who performs an abortion is liable *to the mother of the unborn child* for any damage occasioned or precipitated by the abortion, which action survives for a period of three years from the date of discovery of the damage with a peremptive period of ten years from the date of abortion.”²⁹ The statute also provides that the signing of a consent form by the mother prior to the abortion does not negate the cause of action³⁰ and that the laws governing medical malpractice, which limit physician liability, are not applicable to Act 825.³¹ Furthermore, the statute defines damages as any “injuries suffered or damages occasioned *by the unborn child* or mother.”³² In other words, the abortion itself gives rise to a claim of damages. In essence, the statute imposes strict liability on abortion providers for legal, consensual, and medically proper abortions.

Plaintiffs, physicians and health care clinics in Louisiana, filed suit on behalf of their patients against the Governor and Attorney General of the state, seeking declaratory and injunctive relief from enforcement of the statute.³³ The physicians challenged Act 825, arguing that: (1) the statute places an undue burden on a woman’s right to choose an abortion in violation of the Fourteenth Amendment, and (2) the statute is unconstitutionally vague.³⁴ They contended that the statute creates an undue burden because it exposes a physician to catastrophic civil damages for the performance of a consensual and legal abortion even when she meets all standards of due care.³⁵ Exposure to such a high risk of a draconian penalty would force abortion providers in Louisiana out

29. LA. REV. STAT. ANN. § 9:2800.12(A) (1999) (emphasis added).

30. *Id.* § 9:2800.12(C)(1).

31. *Id.* § 9:2800.12(C)(2); *see also* *Filogene v. Brown*, 871 So. 2d 1206, 1208 (La. Ct. App. 2004) (holding that Act 825 does not apply retroactively and explaining that Louisiana medical malpractice laws require any claim first be brought before expert medical review panel and that medical malpractice tort only occurs if there is violation of physician’s duty of care).

32. LA. REV. STAT. ANN. § 9:2800.12(B)(2) (emphasis added).

33. *Okpalobi v. Foster*, 981 F. Supp. 977, 977-78 (E.D. La. 1998), *rev’d en banc*, 244 F.3d 405 (5th Cir. 2001).

34. *Id.* at 981-82. There is an ongoing dispute among the courts regarding the correct standard of review for a facial challenge to an abortion statute. *See id.* (discussing standards set forth in *United States v. Salerno*, 481 U.S. 739 (1987), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)). The *Okpalobi* court held that under either the *Casey* or *Salerno* standard, the statute would fail. *Id.* The *Salerno* standard requires that a “plaintiff asserting a facial challenge to a statute imposing restrictions on abortion must establish that no set of circumstances exists under which the Act would be valid.” *Id.* at 981. The *Casey* standard was more relaxed, requiring only that “in a large fraction of cases [the statute] will operate as a substantial obstacle to a woman’s choice to undergo an abortion.” *Okpalobi*, 981 F. Supp. at 981 n.4 (citing *Casey*, 505 U.S. at 895). The Supreme Court still has not resolved the dispute over the proper standard of review for facial challenges. *See Gonzales v. Carhart*, 127 S. Ct. 1610, 1639 (2007) (stating that Court need not resolve debate between “no set of circumstances” and “large fraction of the cases” tests for facial challenges).

35. *Okpalobi*, 981 F. Supp. at 980.

of business.³⁶ For example, two doctors submitted affidavits stating that, because they would constantly be susceptible to significant financial liability, they could not continue to provide abortions to their patients under those circumstances.³⁷

In a related argument, the doctors also pointed out that the statute imposes an “invisible duty of care” on abortion providers.³⁸ The statute is entirely unclear on what physicians can do to protect themselves from liability.³⁹ A physician who informs the patient in good faith of all known risks associated with the abortion procedure and who performs the procedure with all due care is still at risk for liability ten years following the performance of the abortion, including for “damages occasioned by the unborn child.”⁴⁰ Obviously, a woman suing on behalf of her unborn child “need only prove the unborn child was aborted” to establish a claim for damages.⁴¹ Therefore, the doctors also argued that Act 825 was unconstitutionally vague.

The district court agreed with the doctors’ claims. It noted that:

[T]he instant statute presents a new and unprecedented issue of law concerning abortion—that is, whether a state statute which purports to provide a woman with a cause of action in tort against her doctor for damages associated with having an abortion, has the purpose and effect of unduly burdening a woman’s right to choose to have her pregnancy terminated before viability.⁴²

In analyzing the merits of plaintiffs’ claims, the court emphasized that plaintiffs were “correct in their assertion that ‘this statute sets a standard no physician can meet and creates a climate in which no provider can possibly operate.’”⁴³ For example, a physician could be held to unlimited liability even where there is no physical harm to the woman and the physician has fully complied with professional standards of care.⁴⁴ The district court concluded that the vague standard of care essentially provides for strict liability, which in the context of fundamental rights is especially dangerous.⁴⁵ Furthermore, the district court also stated that it was “disturbed” by the removal of the cause of action from the state’s medical malpractice scheme, which caps damages at \$500,000 and limits physician liability in other respects.⁴⁶ The district court concluded that “Act 825 is unconstitutionally vague because it fails to provide the abortion provider with fair warning of what legal standard will be applied and of what conduct will incur

36. *Id.*

37. *Id.* at 984.

38. *Id.* at 982 (stating that “defendants are unable to articulate what new standard of care Act 825 imposes upon abortion providers”).

39. *Id.* at 982-83.

40. *Okpalobi*, 981 F. Supp. at 983, 985.

41. *Id.* at 986.

42. *Id.* at 980-81.

43. *Id.* at 983-84 (citation omitted).

44. *Id.* at 984.

45. *Okpalobi*, 981 F. Supp. at 986.

46. *Id.* at 983.

civil liability.”⁴⁷ The court also held that, because the statute was so vague it would essentially make it financially infeasible to provide abortions, Act 825 on its face created an undue burden on a woman’s right to seek an abortion.⁴⁸

The defendant state officials argued that the statute was merely another mechanism to help enforce Louisiana’s informed consent statute related to abortion but failed to articulate any basis to support this claim.⁴⁹ The district court rejected this argument, finding instead that the statute “presents a new battlefield—that is unconstitutional regulation of abortion providers so as to directly strike at a woman’s right of choice.”⁵⁰ The district court declared that the statute “has the purpose and effect of infringing and chilling the exercise of constitutionally protected rights of abortion providers and women seeking abortions. Such backhanded and subtle attempts that chip away at a vital component of a person’s liberty will not be tolerated.”⁵¹

Because the district court found that the possibility of civil litigation under Act 825 “is enough to chill the willingness of physicians to perform abortions,” the court granted a preliminary injunction against enforcement of Act 825.⁵² The court did not discuss Article III standing or *Ex parte Young*.

2. Panel Opinion

On appeal, a panel of the Fifth Circuit affirmed the district court’s conclusions and addressed for the first time Article III standing and *Ex parte Young*.⁵³ The panel stated that, although the parties had not raised or briefed standing or Eleventh Amendment issues, a court must examine the basis for its jurisdiction *sua sponte*.⁵⁴

The panel began by addressing its Eleventh Amendment concerns, rather than beginning with standing.⁵⁵ The Eleventh Amendment prohibits federal courts from adjudicating “any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State.”⁵⁶ In *Ex parte Young*, however, the Supreme

47. *Id.* at 982-83.

48. *Id.* at 986.

49. *Id.* at 982.

50. *Okpalobi*, 981 F. Supp. at 986.

51. *Id.*

52. *Id.*

53. *Okpalobi v. Foster*, 190 F.3d 337 (5th Cir. 1999), *rev’d en banc*, 244 F.3d 405 (5th Cir. 2001). Pursuant to agreement of the parties, the district court converted the preliminary injunction into a permanent injunction. Furthermore, the court of appeals construed the language in the permanent injunction as granting plaintiffs’ requests for both declaratory and injunctive relief. *Id.* at 341.

54. *Id.* at 343.

55. There is some debate about whether standing requirements should be determined first as a matter of jurisdiction. See, e.g., *Scott v. Taylor*, 405 F.3d 1251, 1258-59 (11th Cir. 2005) (arguing that standing should be determined first as jurisdictional matter, prior to determining claims of immunity).

56. U.S. CONST. amend. XI. Adopted in 1798, the Amendment was enacted in direct response to the Supreme Court’s decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 420 (1793), in which the Court held that the State of Georgia was amenable to suit in federal court by a citizen of another state.

Court established that, although the Eleventh Amendment precludes suits against "states," it permits suits for injunctive and declaratory relief against individual state officials in order to prevent enforcement of unconstitutional state statutes.⁵⁷ Clearly, the *Ex parte Young* exception to state sovereign immunity applies to laws that will be enforced by government officials, such as laws imposing criminal or regulatory penalties.

The decision in *Ex parte Young* is considered to be "a bedrock principle of American law,"⁵⁸ and its basic outlines are important to understanding the arguments in the *Okpalobi* opinions and why courts have struggled with *Ex parte Young* in the context of self-enforcing tort laws. The principal question in *Ex parte Young* was whether the plaintiffs could invoke federal court jurisdiction to enjoin enforcement of a state statute.⁵⁹ The Supreme Court, based on the premise that states are incapable of authorizing unconstitutional conduct, created the "fiction" that any officer of a state engaging in unconstitutional conduct is no longer acting as an agent of the state and, therefore, is not entitled to sovereign immunity pursuant to the Eleventh Amendment.⁶⁰ In creating this "fictional" distinction between the official and the state for purposes of injunctive relief, the Court has at the same time characterized a state official's conduct as "state action" for purposes of the Fourteenth Amendment. Thus, a suit against a state official is not a suit against a "state" for purposes of the Eleventh Amendment, but is state action for purposes of establishing a constitutional violation. This reasoning allows for the Fourteenth Amendment to be used "as a sword as well as a shield against unconstitutional conduct of state

The Supreme Court has read the Eleventh Amendment far more broadly than its literal text would suggest. For example, the Supreme Court has extended the Eleventh Amendment prohibition to suits against states brought by their own citizens, and to suits to vindicate federal rights in state court. See *Alden v. Maine*, 527 U.S. 706, 732 (1999) (extending states' sovereign immunity to suits based on federal law); *Hans v. Louisiana*, 134 U.S. 1, 11 (1890) (holding Eleventh Amendment immunizes states from suits by its own citizens); Roger C. Hartley, *Alden Trilogy: Praise and Protest*, 23 HARV. J. L. & PUB. POL'Y 323, 406-07 (2000) (criticizing Supreme Court's Eleventh Amendment jurisprudence).

57. *Ex parte Young*, 209 U.S. 123, 159-60 (1908).

58. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 564 (3d ed. 2000); see also *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1265 (1978) (describing *Ex parte Young* as "one of the cornerstones of our legal system"); 17A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 4231 (3d ed. 2007) (describing *Ex parte Young* as "one of the three most important decisions the Supreme Court of the United States has ever handed down").

59. *Ex parte Young*, 209 U.S. at 149.

60. *Id.* at 159-60; see also *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 114 n.25 (1984) (noting that *Ex parte Young* rests on "fictional" distinction between official and state); *Home Tel. & Tel. Co. v. City of L.A.*, 227 U.S. 278, 282 (1913) (holding that although official is not "the state" for purposes of *Ex parte Young*, challenged action is state action for purposes of Fourteenth Amendment claim). Furthermore, *Ex parte Young* only applies to actions seeking prospective relief, i.e., injunctive and declaratory relief, but not retrospective relief, i.e., money damages. *Edelman v. Jordan*, 415 U.S. 651, 677 (1974). Individuals can sue for money damages for violations of federal rights pursuant to 42 U.S.C. § 1983 (2000) by naming state officers in their personal or individual capacities. *Hafer v. Melo*, 502 U.S. 21, 30-31 (1991); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). In sum, the Eleventh Amendment does not bar (1) suits for prospective relief against state officials named in their official capacities; and (2) suits for retrospective relief, i.e., money damages, against state officials named in their personal capacities.

officers.”⁶¹ Through these doctrinal contortions, *Ex parte Young* ensures that constitutional rights are protected against state infringements, while paying lip service to the limits the Eleventh Amendment sets on federal court encroachment of state powers.

In order to balance the requirements of the Supremacy Clause with the requirements of the Eleventh Amendment, *Ex parte Young* established:

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.⁶²

Therefore, the connection requirement, at least theoretically, respects the federalism principles of the Eleventh Amendment (protecting state sovereignty) without sacrificing constitutional rights. Arguably, if any state official can be named in a suit challenging any state statute, the “fictional” line in the sand between officials and their states that *Ex parte Young* draws dissolves completely.

Nevertheless, *Ex parte Young* emphasized that the requisite “connection” to enforcement of the challenged law can be derived from general state law describing the duties of the office:

It has not, however, been held that it was necessary that such duty should be declared in the same act which is to be enforced. In some cases, it is true, the duty of enforcement has been so imposed . . . but that may possibly make the duty more clear The fact that the state officer *by virtue of his office has some connection with the enforcement of the act* is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists.⁶³

Thus, the official’s enforcement obligation can flow from “a general duty imposed upon him, which includes the right and the power to enforce the statutes of the State.”⁶⁴

The *Okpalobi* panel carefully reviewed this “famous fiction” created by *Ex parte Young*.⁶⁵ Quoting language from *Ex parte Young* regarding the requirement of “some connection” between the state official and the challenged act,⁶⁶ the panel noted that “[n]either the Supreme Court nor the Fifth Circuit has defined the exact nature of the ‘connection’ between a defendant state officer

61. *Juidice v. Vail*, 430 U.S. 327, 335 (1977).

62. *Ex parte Young*, 209 U.S. at 157 (emphasis added).

63. *Id.* (emphasis added).

64. *Id.* at 161. In *Ex parte Young*, the Court held that the plaintiffs had properly sued the Attorney General of Minnesota based on his *general duty* to uphold a statute that regulated railroads and imposed criminal penalties on individuals who did not comply with its terms. *Id.*

65. *Okpalobi v. Foster*, 190 F.3d 337, 343-44 (5th Cir. 1999), *rev’d en banc*, 244 F.3d 405 (5th Cir. 2001).

66. *Ex parte Young*, 209 U.S. at 157.

and the enforcement of the statute required by *Ex parte Young*.⁶⁷ The panel analyzed decisions of a number of courts that have wrestled with *Ex parte Young*'s "some connection" requirement.⁶⁸

Relying largely on *Allied Artists Pictures Corp. v. Rhodes*,⁶⁹ the panel opined that the Governor may be joined as a defendant in cases concerning "the enforcement of programs, civil or criminal, dealing with the relations between the state and the individual."⁷⁰ *Allied* involved a federal challenge to a state statute that affected the trade practices of distributors and exhibitors in the movie industry. The challenged law prohibited "blind bidding," a usual movie industry practice by which distributors solicit bids for their films from exhibitors before the exhibitors have had the chance to preview the film.⁷¹ No state official enforced the law, however; the prohibition was effected only by allowing exhibitors to file private lawsuits against distributors who required blind bidding.⁷² The *Allied* court found that the law was "drafted to be self-enforcing; thus the alleged impact upon plaintiffs is immediate and occurs without the active participation of or enforcement by state officers."⁷³

In determining whether suit could proceed against the Governor despite his lack of specific enforcement power, the *Allied* court held that the proper balance between *Ex parte Young* and the Eleventh Amendment "can be struck only on a case-by-case basis, after a review of the relationship between the Act, the defendant state officials, and the plaintiffs."⁷⁴ *Allied* held that, although plaintiffs could have awaited a private civil suit to test the constitutionality of the trade practices law at issue, the Governor of Ohio had a sufficient public interest in the enforcement of the statute to invoke the *Ex parte Young* fiction.⁷⁵ The Sixth Circuit, affirming the decision, held that "[e]ven in the absence of specific state enforcement provisions, the substantial public interest in enforcing the trade

67. *Okpalobi*, 190 F.3d at 344.

68. See *id.* at 344-45 (reviewing *Federal National Mortgage Ass'n v. Lefkowitz*, 383 F. Supp. 1294 (S.D.N.Y. 1974), which held that Governor's general duty to "take care" that state laws are faithfully executed and the Attorney General's power to seek injunctions against persons engaging in illegal acts under New York law was sufficient to challenge act's constitutionality, and *Mendez v. Heller*, 530 F.2d 457 (2d Cir. 1976), which held that New York Attorney General's duty to support constitutionality of state statutes and to defend actions in which state is "interested" was insufficient connection).

69. 473 F. Supp. 560 (S.D. Ohio 1979), *aff'd*, 679 F.2d 656 (6th Cir. 1982).

70. *Okpalobi*, 190 F.3d at 345 (internal quotation marks and citation omitted).

71. *Allied*, 473 F. Supp. at 561-62.

72. *Id.*

73. *Id.* at 570.

74. *Id.* at 568. *Allied* rejected a previous decision, *Gras v. Stevens*, 415 F. Supp. 1148 (S.D.N.Y. 1976), one of the few other cases to address constitutional challenges to purely "private" tort statutes. In *Gras*, the court stated that "we know of no case in which the general duty of a governor to enforce state laws has been held sufficient to make him a proper party defendant in a civil rights action attacking the constitutionality of a state statute concerning matrimonial or other private civil actions." *Gras*, 415 F. Supp. at 1152 (emphasis added).

75. *Allied*, 473 F. Supp. at 569. The *Allied* court also considered the state officials' failure to challenge the suit on Eleventh Amendment grounds relevant to the inquiry, although not controlling. *Id.* The *Okpalobi* panel also relied to some extent on the fact that the Governor and Attorney General did not raise or argue the Eleventh Amendment defense. *Okpalobi*, 190 F.3d at 346-47.

practices legislation involved here places a significant obligation upon the Governor to use his general authority to see that state laws are enforced.”⁷⁶ *Allied* emphasized:

Were this action unavailable to the plaintiffs, they would be unable to vindicate the alleged infringement of their constitutional rights without first violating an Ohio statute requiring a significant change in their business conduct. Such a result is clearly what the doctrine in *Ex parte Young* was in part designed to avoid.⁷⁷

Finding the analysis in *Allied* persuasive, the *Okpalobi* panel formulated a two-part test for resolving the question of when there is a sufficient “connection” between the named defendants and the challenged state act as required by *Ex parte Young*: (1) the court must first determine “what powers the defendants wield [under state law] to enforce the law in question,” and (2) the court must then “discern the nature of the law and its place on the continuum between public regulation and private action.”⁷⁸ The first step of the *Okpalobi* test ensures that the state official does in fact have some general enforcement powers to satisfy the *Ex parte Young* connection requirement. As for the second step of the test, both the *Allied* and *Okpalobi* courts felt the need to rely on a public/private analysis in order to avoid opening a floodgate of challenges to “private” civil legislation. If the general power to defend state law granted to most governors and attorneys general was a sufficient enforcement “connection” in every case, the *Allied* and *Okpalobi* courts feared that plaintiffs would “merely attempt[] to survey the statute books . . . in order to receive a premature constitutional adjudication of the challenged Act.”⁷⁹ Based on this floodgate concern, the second step of the *Okpalobi* panel’s test tries to limit such suits to regulations of truly “public” concern. This is the vexing problem caused by self-enforcing tort laws. Both of these courts recognized the need to protect injured parties’ rights but struggled with finding a coherent method for limiting suits challenging private legislation to “self-enforcing” laws.

Applying their new two-step test to Act 825, the *Okpalobi* panel first found that Louisiana state law grants both the Governor and the Attorney General sufficient powers and duties to meet the first prong of their test.⁸⁰ Specifically, the Attorney General has the power and duty to “institute, prosecute, or intervene in any civil action or proceeding” to assert or protect the interest of the state; if the Attorney General neglects this duty, “the Governor has the right and duty to do so.”⁸¹ Second, the panel concluded that Act 825 falls on the “public” end of the continuum.⁸² The panel stated: “[T]he purpose and effect of the Act is to prevent women from obtaining legal abortions in Louisiana: The Act is a

76. *Allied Artists Pictures Corp. v. Rhodes*, 679 F.2d 656, 665 n.5 (6th Cir. 1982).

77. *Id.*

78. *Okpalobi*, 190 F.3d at 346.

79. *Allied*, 473 F. Supp. at 571 (internal quotation marks omitted); *see also Okpalobi*, 190 F.3d at 346 (agreeing implicitly with *Allied*’s result).

80. *Okpalobi*, 190 F.3d at 346.

81. *Id.*

82. *Id.* at 347.

thinly-veiled attempt to regulate and interfere with a right protected by the United States constitution.”⁸³ Therefore, the panel held that the Governor and Attorney General of Louisiana were proper defendants under *Ex parte Young*.⁸⁴

After deciding the Eleventh Amendment question, the court considered whether the plaintiffs’ challenge met Article III standing requirements. The panel viewed the standing question as a “closely related—indeed, overlapping—inquiry” to the *Fx parte Young* question.⁸⁵ Not surprisingly, the panel reached the same conclusion as it had with respect to Eleventh Amendment immunity.⁸⁶

Understanding the basic outlines of standing is also crucial to analyzing the *Okpalobi* opinions and to recognizing that the courts face a truly difficult problem in trying to address self-enforcing tort laws. Under Article III, Section 2 of the United States Constitution, the federal courts have judicial power only to decide “cases” and “controversies.”⁸⁷ It has long been established that the case-or-controversy requirement of Article III prohibits federal courts from issuing advisory opinions. This core prohibition based on the Constitution’s case-or-controversy limit on federal judicial authority is implemented through the doctrine of standing.⁸⁸

Plaintiffs have standing under Article III where they demonstrate: (1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct of the defendant, and (3) a likelihood that the injury will be redressed by a favorable court decision.⁸⁹ Although it appears to be a clear three-part test, often “each of the three standing elements blends into the others.”⁹⁰ As the Supreme Court has explained:

The essence of the standing inquiry is whether the parties seeking to invoke the court’s jurisdiction have “alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness

83. *Id.*

84. *Id.*

85. *Okpalobi*, 190 F.3d at 347. The panel noted that parties may invoke federal jurisdiction in a suit seeking declaratory relief as well as injunctive relief. *Id.* at 347-48. For additional information on declaratory relief, see The Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (2000). The purpose of the Declaratory Judgment Act is to provide a remedy to persons who are uncertain of their rights under a particular statute and require an early adjudication of the statute without having to act at their peril in the interim. *McGraw-Edison Co. v. Preformed Line Prods. Co.*, 362 F.2d 339, 342 (9th Cir. 1996) (quoting *Shell Oil Co. v. Frusetta*, 290 F.2d 689, 691-92 (9th Cir. 1961)). A claim for declaratory relief can stand on its own for purposes of the case-or-controversy jurisdictional requirement. See *Super Tire Eng’g Co. v. McCorkle*, 416 U.S. 115, 122 (1974) (holding that case-or-controversy requirement was met by claim for declaratory relief even though claim for injunctive relief was settled).

86. *Okpalobi*, 190 F.3d at 349.

87. U.S. CONST. art. III, § 2.

88. See, e.g., *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (noting standing to be among justiciability inquiries grounded in Article III case-or-controversy requirement). Considerations of mootness and ripeness also may limit jurisdiction. *Id.* at 189-94.

89. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000); *United States v. Hays*, 515 U.S. 737, 743 (1995); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

90. *Ash Creek Mining Co. v. Lujan*, 969 F.2d 868, 875 (10th Cir. 1992).

which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.”⁹¹

The Supreme Court has characterized the “injury-in-fact” requirement as meaning that the plaintiff “has suffered an [injury] that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.”⁹² The Court has made it clear, however, that a plaintiff need not already have suffered an injury.⁹³ Nor is it even necessary that the plaintiff have been threatened with injury.⁹⁴ For example, federal courts have repeatedly permitted abortion providers to bring preenforcement challenges to statutes that impose penalties on their actions.⁹⁵ In addition, the Declaratory Judgment Act provides another mechanism for seeking preenforcement review of a statute, although it does not alter the constitutional requirements of standing.⁹⁶ Moreover, standing is not defeated because it is not certain that the plaintiff will be injured by the defendant.⁹⁷ Rather, it is enough that there be some likelihood that the challenged law would be used to injure the plaintiff’s interests.⁹⁸

91. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 72 (1979) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

92. *Friends of the Earth*, 528 U.S. at 180.

93. *See, e.g., Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 327-33 (1999) (standing found for injunctive relief where plaintiff’s state was likely to lose Representative if U.S. Census Bureau used challenged statistical sampling techniques in conducting next census).

94. *See, e.g., Doe v. Bolton*, 410 U.S. 179, 188 (1973) (finding physicians had standing to challenge abortion statute although they had not yet been prosecuted or threatened with prosecution); *United States v. Colo. Supreme Court*, 87 F.3d 1161, 1164-66 (10th Cir. 1996) (finding it sufficient to allege that challenged rules required federal prosecutors to alter their conduct, despite absence of allegations that disciplinary or grievance proceedings were threatened).

95. *See, e.g., Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845 (1992) (allowing preenforcement challenge to abortion law even before defendants threatened prosecution); *Planned Parenthood Ass’n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1395-96 (6th Cir. 1987) (finding that abortion clinic had standing to bring injunctive action against fetal tissue disposal ordinance because clinic’s “fear of prosecution is reasonably founded in fact”).

96. *See, e.g., MedImmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764, 771 (2007) (noting that Court has long held that actions for declaratory relief must satisfy, and can satisfy, requirements of Article III standing); *Steffel v. Thompson*, 415 U.S. 452, 478 (1974) (Rehnquist, J., concurring) (“[M]y reading of the legislative history of the Declaratory Judgment Act of 1934 suggests that its primary purpose was to enable persons to obtain a definition of their rights before an actual injury had occurred”); *Nat’l Rifle Ass’n of Am. v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997) (“[D]eclaratory judgments are typically sought before a completed ‘injury-in-fact’ has occurred.”).

97. *See, e.g., Wabash Valley Power Ass’n v. Rural Electrification Admin.*, 903 F.2d 445, 451-52 (7th Cir. 1990) (concluding that, although sequence of events leading to alleged injury was “speculative,” Article III requirements were met); *see also Daniel A. Farber, Uncertainty as a Basis for Standing*, 33 HOFSTRA L. REV. 1123, 1123 (2005) (arguing that under certain circumstances, extreme uncertainty of injury ought to satisfy injury-in-fact requirement).

98. *See Pennell v. City of San Jose*, 485 U.S. 1, 7-8 (1988) (granting landlord association standing to challenge ordinance providing hardship rent relief, although no relief hearings had yet been held and without need to show any particular tenants of association members were likely to seek such relief, because ordinance presented “sufficient threat of actual injury”).

As to redressability, it is sufficient for plaintiff to show that there is a substantial likelihood that the relief requested will redress the claimed injury.⁹⁹ The relief sought need not, however, eliminate all injury to the plaintiff from all possible parties. The Supreme Court has held that "a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. [A plaintiff] need not show that a favorable decision will relieve his *every* injury."¹⁰⁰

It is the causation element that has presented a bar to judicial review of self-enforcing tort legislation because, like *Ex parte Young*, it requires that a state official defendant have some enforcement connection to the challenged statute. To satisfy the causation requirement, a plaintiff must show that the injury is "fairly traceable" to the defendant, which means that the plaintiff needs to establish a "chain of causation between the challenged Government conduct and the asserted injury" that is not too speculative.¹⁰¹ Thus, plaintiffs must trace their injury to the powers of the named defendants to enforce that law or to use the

99. See, e.g., *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 75 n.20 (1978) (reviewing U.S. Supreme Court cases to establish plaintiffs satisfied second prong of standing test by showing "substantial likelihood" that requested relief would redress claimed injury).

100. *Larson v. Valente*, 456 U.S. 228, 244 n.15 (1982).

101. *Allen v. Wright*, 468 U.S. 737, 751, 759 (1984). In *Allen*, the Supreme Court made clear that lack of causation alone can be a bar to federal court review. *Id.* at 751. The plaintiffs in *Allen*, parents of African American public school children, brought a class action alleging that the Internal Revenue Service's failure to deny tax-exempt status to racially discriminatory private schools violated their right to have their children in desegregated schools. *Id.* at 739-40. Plaintiffs sought to change the regulatory scheme by which the IRS granted tax exemptions to private schools. The Supreme Court recognized that plaintiffs' claim stated an injury and that the relief requested from the Court could redress that injury. *Id.* at 756-57. The Court held, however, that plaintiffs lacked standing solely because of lack of causation. *Id.* at 759. The Court found that the injury was not "fairly traceable" to the government conduct being challenged because the "chain of causation" was too weak. *Allen*, 468 U.S. at 759. Notably, the Court argued that there was an independent private actor that broke the chain of causation—the private schools who engaged in the discriminatory action. *Id.* at 759. Interestingly, this public/private distinction noted in *Allen* echoes in the private/public dichotomy the courts have relied on in analyzing self-enforcing tort legislation, as discussed *infra* Part IV.

In *Allen*, the Supreme Court emphasized that the elements of standing serve separation of powers concerns. The Court explicitly stated that "the law of Article III standing is built on a single basic idea—the idea of separation of powers." *Id.* at 752. For example, the *Allen* Court reasoned that separation of powers principles explained why the injury to plaintiffs was not fairly traceable to or "caused" by the IRS:

[A contrary] conclusion would pave the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations. Such suits, even when premised on allegations of several instances of violations of law, are rarely if ever appropriate for federal-court adjudication.

Id. at 759-60. In other words, the causation requirement prevented too much judicial interference with executive branch apparatus. Causation, like the other elements of standing, serves separation of powers by ensuring that the courts only step in as a necessity and only when the dispute is one "traditionally thought to be capable of resolution through the judicial process." *Id.* at 790 (Stevens, J., dissenting). For more recent articulations of causation and redressability as distinct obstacles to standing, see *United States v. Hays*, 515 U.S. 737, 743 (1995), *Northeastern Florida Chapter of the Associate General Contractors of America v. Jacksonville*, 508 U.S. 656, 663 (1993), and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

law to injure the plaintiff's interests.¹⁰² In the case of criminal or regulatory laws, causation would be met by filing suit against whichever state official would prosecute a case under the challenged law.

As in the Eleventh Amendment context, the *Okpalobi* panel concluded that a preenforcement remedy was necessary to address the constitutional injury caused by Act 825. The doctrinal problem presented by standing was the same as with *Ex parte Young*—who to sue? The plaintiff doctors had no way of knowing which, if any, of their patients would eventually enforce Act 825. Furthermore, since by its terms Act 825 limited claims to women who had abortions, no state official has any specific enforcement power under the law. To address standing, the panel again faced the question “whether the State of Louisiana and its Governor are the proper defendants in plaintiffs’ claims.”¹⁰³ The panel ultimately concluded that “Article III [did] not require a plaintiff to plead or prove that a defendant state official has enforced or threatened to enforce a statute in order to meet the case or controversy requirement” in this particular case.¹⁰⁴

Although the panel was able to support its claims that the mere existence of the statute injured plaintiffs and that declaratory relief could redress this injury, it did not sufficiently explain how any actions of the Governor and Attorney General satisfied the causation element of standing given that neither could sue under the law. Instead, the panel emphasized that the key question is simply whether the challenged statute has a “self-enforcing nature.”¹⁰⁵ If a statute has an immediate impact on plaintiffs’ exercise of constitutional rights that occurs without the active participation or enforcement of state officials, the panel reasoned that a concrete case or controversy exists “even absent overt adverse action by the named defendants.”¹⁰⁶ The panel found that plaintiffs had a case or controversy with the Governor and Attorney General of Louisiana because Act 825 is “immediately and coercively self-enforcing.”¹⁰⁷ Finally, as to the merits, the panel agreed with the district court that the statute was both unconstitutionally vague and an undue burden on a woman’s Fourteenth

102. In addition, the rule against allowing “collusive” lawsuits would prevent the doctors from arranging for a “friendly” plaintiff to bring suit under Act 825 in order challenge its constitutionality. See *United States v. Johnson*, 319 U.S. 302, 305 (1943) (describing collusive suits as “not in any real sense adversarial]. . . [and lacking] the honest and actual antagonistic assertion of rights to be adjudicated—a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to adjudication of constitutional questions” (internal quotation marks and citations omitted)).

103. *Okpalobi v. Foster*, 190 F.3d 337, 348 (5th Cir. 1999), *rev’d en banc*, 244 F.3d 405 (5th Cir. 2001).

104. *Id.* at 349.

105. *Id.* at 348.

106. *Id.*

107. *Id.* at 349. Noting that the law was well-established in this area, the court also held that plaintiffs were entitled to assert third-party standing of their patients’ constitutional rights. *Okpalobi*, 190 F.3d at 351-53.

Amendment right to seek an abortion.¹⁰⁸ Based on the foregoing, the panel affirmed the permanent injunction and declared Act 825 unconstitutional.¹⁰⁹

3. En Banc Opinion

In a fractured opinion, the Fifth Circuit sitting en banc reversed the panel's opinion and dismissed the case.¹¹⁰ Judge Jolly, who had dissented from the panel's opinion, wrote the majority opinion for the en banc court on the issue of standing. Only a plurality of the court agreed with Judge Jolly's conclusion that the Eleventh Amendment also barred the suit, although other federal appeals courts have followed this line of reasoning.

A majority of the court agreed that the doctors failed to meet Article III standing requirements in their suit against the Attorney General and the Governor.¹¹¹ The court concluded that, although the doctors and their patients did suffer constitutional injury based on the challenged act, they could not establish the causation and redressability prongs of the standing test against the named defendants.¹¹² The court emphasized that, although it does not "challenge that the plaintiffs are suffering a threatened injury," the injury alleged

is not, and cannot possibly be, *caused* by the defendants . . . and . . . their injury cannot be *redressed* by these defendants—that is, these defendants cannot prevent purely private litigants from filing and prosecuting a cause of action under Act 825 and cannot prevent the courts of Louisiana from processing and hearing these private tort cases.¹¹³

The court did not explain why declaratory relief against the challenged law would not provide sufficient redressability for the plaintiffs, since a declaration that the law was unconstitutional could largely assure the doctors that they would not face liability under the law for a medically proper and consensual abortion procedure.¹¹⁴

108. *Id.* at 357, 359. Similarly to the district court, the panel found that "Act 825's structure and language put the lie to the State's insistence that the legislation is designed merely to enhance the information furnished to women seeking abortions." *Id.* at 356.

109. *Id.* at 361. Judge Jolly dissented from the panel's opinion, stating that the majority disregarded the limits of federal judicial power set forth in Article III and the Eleventh Amendment and "simply . . . issue[d] an advisory opinion." *Id.* at 362 (Jolly, J., dissenting).

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

111. *Id.* at 429.

112. *Id.* at 428; *see also id.* at 431 (Higginbotham, J., concurring) ("The requirements of causation and redressability are not met here. Lack of standing disposes of this case regardless of the relief sought—injunctive or declaratory.").

113. *Id.* at 427 (majority opinion).

114. Judge Benavides addressed this point. *Okpalobi*, 244 F.3d at 432-441 (Benavides, J., concurring in part and dissenting in part). With respect to the standing issue, Judge Benavides claimed that, although plaintiffs were not entitled to injunctive relief under the Supreme Court's standing doctrine, he believed that under the Declaratory Judgment Act plaintiffs did present a sufficient controversy to satisfy Article III. *Id.* at 433-36. Judge Benavides asserted that declaratory relief would redress plaintiffs' injury because the declaration of unconstitutionality would in practice serve to bar private parties from invoking Act 825. *Id.* at 435. Judge Benavides pointed out that redressability

With respect to the Eleventh Amendment analysis, Judge Jolly and the plurality focused on the meaning of the “some connection” requirement articulated in *Ex parte Young*.¹¹⁵ Judge Jolly concluded that to fit within the *Ex parte Young* exception to state sovereign immunity, plaintiffs must show a “special relation” between the challenged act and the defendants.¹¹⁶ As to the statute at issue in *Okpalobi*, Judge Jolly proceeded to find that no state actors had the power under Act 825 to invoke its provisions.¹¹⁷ He emphasized that the court “should not be diverted from the crucial and determinative consideration under *Ex parte Young* and its progeny: These defendants have no ability to enforce Act 825, a purely private tort statute, which can be invoked only by private litigants.”¹¹⁸

In rejecting a preenforcement challenge, the Fifth Circuit claimed that the plaintiffs could simply wait until a tort action was filed pursuant to Act 825 and raise their constitutional challenge as a defense in that action.¹¹⁹ Unwilling to take such a risk, the plaintiffs then filed their preenforcement challenge in Louisiana state court.

4. No Preenforcement Review in Louisiana State Courts

Following the Fifth Circuit’s en banc opinion, the same doctors filed suit for declaratory relief in Louisiana state court.¹²⁰ After the doctors successfully obtained a preliminary injunction in trial court, the Louisiana appellate court

concerns the court’s power to redress the injury, not the named defendants’ power to redress plaintiffs’ injury. *Id.* at 436. Judge Benavides failed to address the causation requirement of standing doctrine, however. The argument that declaratory relief would provide sufficient redressability is also discussed further in the text and notes accompanying Part II.B.

115. *Id.* at 411-12 (majority opinion).

116. *Okpalobi*, 244 F.3d at 412-13 (Jolly, J., dissenting). Judge Jolly’s opinion describes *Ex parte Young* as creating a “precise exception” to the Eleventh Amendment and requiring “(1) the ability of the official to enforce the statute at issue under his statutory or constitutional powers, and (2) the demonstrated willingness of the official to enforce the statute.” *Id.* at 416-17. Judge Jolly emphasizes that “*Young* requires that the defendant state official . . . at least have the ability to act [to enforce the statute]. . . . It is this unconstitutional conduct, or at least the ability to engage in the unconstitutional conduct, that makes him no longer a representative of the sovereign.” *Id.* at 421.

117. *Id.* (noting that defendant Louisiana officials have no power to enforce Act 825); *see also id.* at 409 n.2 (majority opinion) (citing Louisiana statute in issue, which grants cause of action only to “the mother of the unborn child for any damage occasioned or precipitated by the abortion”).

118. *Okpalobi*, 244 F.3d at 422 (emphasis added). Seven of the fourteen en banc judges stated that Judge Jolly’s opinion erroneously narrowed the *Ex parte Young* exception to Eleventh Amendment immunity. *Id.* at 408 n.*; *see also id.* at 436 n.6 (Benavides, J., concurring in part and dissenting in part) (noting that Judge Jolly’s opinion on the Eleventh Amendment issue is not controlling authority).

119. *Id.* at 428 (majority opinion).

120. The Louisiana trial court granted a temporary restraining order and granted the plaintiffs’ request for a preliminary injunction based on its finding that Act 825 is unconstitutional. *See Women’s Health Clinic v. State*, 804 So. 2d 625, 626 (La. 2001) (discussing ruling of trial court). The state then appealed directly to the Louisiana Supreme Court, which vacated the portion of the trial court’s judgment declaring Act 825 unconstitutional and remanded to the court of appeals for expedited review of the grant of the preliminary injunction. *Id.* at 626.

concluded that it lacked jurisdiction to hear the case based on a lack of standing.¹²¹ Although state courts are not faced with the same Federal Article III limitations, the Louisiana appellate court relied in large part on the *Okpalobi* en banc opinion's reasoning to conclude that "no justiciable controversy exists between plaintiffs and the [named defendant, the] State of Louisiana."¹²² The court therefore reversed the trial court's decision and remanded the case for dismissal.¹²³

In sum, plaintiffs were unable to mount a preenforcement challenge to Act 825 even in Louisiana state courts, despite the lack of an Article III "case-or-controversy" requirement in the Louisiana Constitution.¹²⁴ Furthermore, by refusing to hear the case on state law standing grounds, the state courts prevented plaintiffs from bringing a challenge on the merits of Act 825 directly to the United States Supreme Court through an appeal from the state court of last resort.¹²⁵ If the statute achieves its goal of restricting the provision of abortions merely by its existence, and no abortions are provided in Louisiana, no possible claims under the Act will arise. Or even if a few risk-taking doctors continue to provide abortions in Louisiana and no one brings suit under the Act, the law will never be subjected to judicial review and continue to operate as a Sword of Damocles deterring the provision of abortion services.¹²⁶ In either case, the Louisiana legislature will have denied or largely eviscerated a woman's right to choose abortion and will never be held accountable for its actions. Such a result is contrary to the precedent set by *Ex parte Young*, which holds that state actors cannot violate fundamental constitutional rights and yet evade judicial review.

121. *Women's Health Clinic v. State*, 825 So. 2d 1208, 1213 (La. Ct. App. 2002).

122. *Id.* The court stated that the requirement of "justiciability" was found in Louisiana case law. *Id.* at 1211. *But see* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1834, 1941 (2001) (reviewing state court justiciability doctrines and arguing that state courts should not follow Article III court justiciability requirements).

123. *Women's Health Clinic*, 825 So. 2d at 1213. The plaintiffs appealed the decision to the Louisiana Supreme Court, which denied review. *Women's Health Clinic v. State*, 828 So. 2d 586 (La. 2002).

124. *See Women's Health Clinic*, 825 So. 2d at 1211 (stating that "[t]here is no comparable limitation [to Article III's case-and-controversy requirement] found in the Louisiana Constitution"); Jennifer L. Achilles, *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, 855-57 (2004) (describing Louisiana's repeated legislative attempts to circumvent Supreme Court's decision in *Roe v. Wade* and critiquing state court's justiciability decision in *Women's Health Clinic v. State*).

125. If a state court refuses to hear a case on state law grounds that decision is not amenable to review by the United States Supreme Court. ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 667 (4th ed. 2003).

126. This is what appears to be currently happening in Louisiana. Since the law was enacted in 1997, only one case has been filed under Act 825, and that case did not reach the merits. *See Filogene v. Brown*, 871 So. 2d 1206, 1208 (La. Ct. App. 2004) (holding that Act 825 does not apply retroactively and therefore plaintiff could not invoke it for incident that occurred prior to Act 825's enactment).

B. Judicial Refusal to Review Other States' Self-Enforcing Tort Legislation

A number of other federal appellate courts have refused to review self-enforcing tort legislation. These courts have set a dangerous precedent by allowing state legislators to use extreme tort remedies to chill the exercise of fundamental rights.

In *Nova Health Systems v. Gandy*,¹²⁷ the Tenth Circuit rejected a challenge to a tort statute that violated abortion rights, largely relying on the reasoning in *Okpalobi*. The Tenth Circuit refused to allow preenforcement review of a self-enforcing tort statute even though the defendant state officials could have “enforced” the challenged law as tort plaintiffs.

Oklahoma passed a statute authorizing civil damages lawsuits against abortion providers who failed to obtain parental consent before providing minors’ abortions. The statute states: “Any person who performs an abortion on a minor without parental consent or knowledge shall be liable for the cost of any subsequent medical treatment such minor might require because of the abortion.”¹²⁸ The statute does not provide any limit to who can file suit pursuant to its provisions, so doctors could be liable to the minor herself, the minor’s parents, other doctors or medical clinics, or to government entities that provide medical services.¹²⁹ Furthermore, a doctor who performs an abortion on a minor without parental consent is subject to strict liability if the minor later requires additional medical treatment that can be tied to the abortion procedure. Doctors are usually only liable for medical malpractice, for the obvious reason that strict liability allows for no defense and would make it financially infeasible to provide medical services subject to such liability.

Plaintiff Nova Health Systems, a medical facility that provides abortion services to minors, filed suit on behalf of itself and its patients and sought injunctive and declaratory relief against state officials overseeing health care facilities.¹³⁰ The named defendants were four state officials who oversaw state institutions providing medical treatment and oversaw the state Medicaid program.¹³¹

Nova argued that the statute was unconstitutional because it essentially mandated parental consent without any exception, despite Supreme Court doctrine that requires parental consent statutes to provide both an exception for medical emergencies and a judicial bypass mechanism.¹³² Not only did the tort

127. 416 F.3d 1149 (10th Cir. 2005).

128. OKLA. STAT. ANN. tit. 63, § 1-740 (West 2004).

129. *Nova*, 416 F.3d at 1159.

130. *Id.* at 1152-53. As in *Okpalobi*, doctors are permitted to assert their patients’ constitutional rights under established rules of third-party standing.

131. *Id.* The district court had dismissed other named defendants who had no authority to seek reimbursement for medical treatment. *Nova Health Sys. v. Fogarty*, No. 01-CV-0419-EA, 2002 WL 32595281, at *1 (N.D. Okla. June 14, 2002).

132. *Nova*, 2002 WL 32595281, at *6-10 (discussing constitutional requirements with respect to parental involvement laws in abortion context); see also *Ayotte v. Planned Parenthood of N. New*

law create liability against abortion providers without proof of malpractice, but the meaning of the phrase “any subsequent medical treatment such minor might require because of the abortion” is extremely unclear. Nova feared that it could be held liable for the cost of virtually any type of medical treatment that could in some way relate to the abortion.¹³³ Furthermore, Nova feared that harassing lawsuits would be filed by pro-life protestors who had already used a variety of means to intimidate its staff and patients.¹³⁴ Because of the high risk of potentially catastrophic costs created by the statute, Nova felt compelled to require *all* minor patients to establish parental consent.¹³⁵

Unlike the *Okpalobi* statute, which prescribes that only the mother of the unborn child can file suit, this statute’s broad grant of a strict liability civil cause of action against abortion providers at least allowed for the possibility that the defendant state medical officials would “enforce” this tort statute against Nova. The Oklahoma statute does not limit who can bring suit against the abortion provider (for example, it does not limit tort claims to the minor who had the abortion or her parents). The four defendant state officials oversaw state medical institutions and medical programs that could provide postabortion care to minors. By the terms of the statute, these state officials could file a tort suit against abortion providers for the costs of any arguably related treatment the state medical institutions provided to a minor who had an abortion without parental consent. It is the threat of such a strict liability tort suit that causes the constitutional injury because it essentially forces abortion providers to obtain parental consent from all minors seeking abortions (without constitutionally mandated exceptions) in order to avoid the potentially catastrophic costs of litigation. Furthermore, declaratory relief against the defendant state medical officials could redress the constitutional injury. A declaration that the statute is unconstitutional would ensure that neither the defendant state medical officials nor other private individuals would invoke the statute in court, which would remove the chilling effect of strict civil liability.¹³⁶

England, 126 S. Ct. 961, 965-66 (2006) (reviewing previously established constitutional requirements for parental notice requirements for minors seeking abortion).

133. Declaration of Linda Meek in Support of Plaintiff’s Motion for Summary Judgment ¶¶ 14-16, *Nova Health Sys. v. Fogarty*, 2002 WL 32595281 (No. 84).

134. *Id.* ¶¶ 17-20.

135. *Id.* ¶ 21.

136. This point is discussed further *infra*. The Tenth Circuit also held that Nova failed to establish redressability, opining that an injunction against these four defendants would not prevent others from filing suit. *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1158-59 (10th Cir. 2005). The court rejected the argument that favorable declaratory relief would deter other potential litigants from relying on § 1-740. *Id.* at 1159. It is well-established, however, that a plaintiff need not show that the particular lawsuit at issue will redress *every possible future injury* in order to satisfy the redressability prong of standing. *Larson v. Valente*, 456 U.S. 228, 244 n.15 (1982). The dissent in *Nova* stated with respect to declaratory relief: “If we declare § 1-740 unconstitutional, there is a substantial likelihood that the precedential value of our opinion will prevent future parties from attempting to recover under § 1-740.” *Nova*, 416 F.3d at 1164 (Briscoe, J., dissenting). It should be noted that one of the state defendants, Mike Fogarty, did not appeal the judgment against him; the Tenth Circuit notes twice that it does not disturb that judgment. *Id.* at 1153 n.2, 1154 n.4 (majority opinion). Given that the district

The Tenth Circuit rejected this argument and instead relied on the standing analysis of *Okpalobi*. Notably, the court characterized the relevant injury for standing purposes not as the constitutional injury suffered by underage patients, but as an injury to Nova based on the decrease in underage patients that would result from its new, statutorily driven policy of obtaining parental consent in all cases. The court did not address the violation of the minor patients' constitutional rights based on the statute's creation of strict liability (the doctors had third party standing to raise their minor patients' constitutional claims) because it found "mere possible future exposure to civil liability under § 1-740 too remote to constitute an actual or imminent injury in fact."¹³⁷ This reasoning is fundamentally flawed. The doctors submitted affidavits stating that the threat of strict liability under the challenged tort law was the reason they began requiring parental consent in all cases; therefore, a minor's constitutional right to a judicial bypass procedure and emergency health exception is violated at least in part because of the threat of enforcement of the civil liability statute by the defendant state medical officials.¹³⁸ The court ignored this direct causal link between the state medical officials' ability to enforce the challenged tort statute and the injury to minor patients' constitutional rights. The court attempted to skirt this point by claiming that it was the enactment of the statute that caused the change in Nova's behavior, not any potential actions by the state defendants.¹³⁹ This logic simply misses the point—as with any criminal or regulatory statute, it is the *threat of enforcement* of a statute (by the state medical officials as well as other potential tort plaintiffs) that causes the constitutional injury.

Although the statute at issue in *Nova* was distinguishable from the statute in *Okpalobi*, the court rejected Nova's argument:

It may be true that these defendants potentially have the power to sue Nova under § 1-740 In this respect, § 1-740 is not unlike a multitude of other state tort laws under which these defendants might someday have a cause of action. Yet if these defendants' latent power to litigate were enough to support standing, *anyone* who might someday have a claim under § 1-740 could be summoned preemptively before the federal courts to defend the constitutionality of that statute.¹⁴⁰

Like the *Okpalobi* court, the court reasoned that allowing preenforcement review of this tort law would open a floodgate of challenges to state tort laws in which state officials might be future litigants.¹⁴¹ The court did not pause to

court's declaratory relief against Fogarty still stands, the precedential value of that opinion may provide sufficient assurance against liability to doctors in Oklahoma.

137. *Nova*, 416 F.3d at 1156 n.6.

138. *Id.* at 1153.

139. *Id.* at 1157.

140. *Id.*

141. *Id.* at 1158 (opining that Nova's approach would erroneously vest "all public officials with standing to litigate the constitutionality of any state legislation that *might be* the basis of a future lawsuit in which the state agency might be a civil litigant"); see also *Summit Med. Ctr. of Ala., Inc. v.*

consider how it could limit judicial review to the narrow case of self-enforcing tort statutes.

In sum, according to the reasoning of the courts, as long as a state legislature styles a statute as a tort law, a federal court cannot exercise jurisdiction for preenforcement review. The lesson state legislatures learn from *Okpalobi* and *Nova* is that a state may deny the fundamental right to choose abortion (or other fundamental rights) by empowering individual citizens to claim enormous damages when those rights are exercised. In other words, the state can "privatize" what are in fact governmental restrictions of fundamental rights. This possibility poses a grave and growing threat to constitutional rights across the board.

Several other courts have reached similar conclusions with respect to preenforcement review of state tort statutes, even when their mere enactment chills the exercise of constitutionally protected activity. These cases provide further examples of state legislators using tort remedies to eviscerate constitutional rights, and in particular show how self-enforcing tort laws have been widely used to attack abortion rights. In the cases discussed below, the courts again struggled with the vexing doctrinal puzzles presented by self-enforcing tort laws. Since the tort enforcement provisions in these cases were tied to criminal enforcement provisions, however, the chilling effect of the laws were significantly limited, as explained further below.

In *Hope Clinic v. Ryan*,¹⁴² plaintiffs brought suit against a number of public officials in a challenge to Illinois and Wisconsin "partial-birth abortion" statutes, which provided private rights of action.¹⁴³ As in *Okpalobi*, the Seventh Circuit held that "plaintiffs 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."¹⁴⁴ As the court noted, however, its ruling on the private damages portion of the statute "is of little moment after *Stenberg* [the Supreme Court case declaring 'partial-birth abortion' bans unconstitutional], which knocks out the substantive rules that either public or private plaintiffs would seek to enforce."¹⁴⁵

Riley, 274 F. Supp. 2d 1262, 1281-83 (M.D. Ala. 2003) (holding that Eleventh Amendment barred challenge to anti-abortion tort statute even though statute did not limit enforcement actions to private individuals, relying mainly on *Ex parte Young*). But see *Corporate Health Ins., Inc. v. Tex. Dep't of Ins.*, 215 F.3d 526, 532 (5th Cir. 2000) ("Aetna replies that it has standing because the liability provisions expose it not only to private suits but also to the regulatory reach of the Attorney General. We agree. *This is not a case in which private suits are the only means of enforcing a challenged statutory standard.*" (emphasis added)).

142. 249 F.3d 603 (7th Cir. 2001).

143. 720 ILL. COMP. STAT. 513/5, 513/10, 513/15 (1998); WIS. STAT. § 895.038 (1997).

144. *Hope Clinic*, 249 F.3d at 605. The court emphasized that "[b]oth causation and redressability are essential to an Article III controversy." *Id.* The court did not discuss whether declaratory relief could provide the requisite redressability.

145. *Id.* at 606 (discussing *Stenberg v. Carhart*, 530 U.S. 914 (2000)). *Hope Clinic* also cited *Muskrat v. United States*, 219 U.S. 346 (1911), for the proposition that "Article III does not permit the

Until recently, *Stenberg v. Carhart*¹⁴⁶ rendered unconstitutional the definitional clauses on which both a criminal prosecution or a private tort suit would depend. Therefore, doctors could rely on *Stenberg* as precedent to defend themselves against tort liability.¹⁴⁷ Although one could argue that doctors might still have to bear the cost and inconvenience of defending a tort suit since the Seventh Circuit refused to declare the private damages provision unconstitutional, *Hope Clinic*'s explicit statement that "after *Stenberg* any private suit based on these state laws would lack a legal foundation"¹⁴⁸ made it highly unlikely that any such suits would be filed, particularly given that lawyers may face sanctions for filing frivolous law suits. At the least, declaratory relief granted pursuant to the criminal enforcement provisions provided doctors some assurance that a tort suit could be dismissed based on federal precedent. Even though a federal circuit court ruling is not binding on state courts, it is persuasive authority.¹⁴⁹ Thus, in contrast to *Okpalobi* and *Nova*, the private damages portions of unconstitutional criminal anti-abortion statutes were, practically speaking, a low-risk factor, because the federal courts determined that the substance of the statutes were unconstitutional anyway. The declaration that the substantive portion of the statute in *Hope Clinic* was unconstitutional reduced the chilling effect of the tort provisions.¹⁵⁰

federal judiciary to determine the constitutionality of a statute providing for private litigation, when the federal government (or its agents) are the only adverse parties to the suit." *Hope Clinic*, 249 F.3d at 605. *Muskra*t is discussed further *infra* Part IV.

146. 530 U.S. 914 (2000).

147. Of course, *Stenberg* has now been overruled by the Supreme Court's decision in *Gonzales v. Carhart*. See *supra* note 4 and accompanying text for more on *Gonzales*. Interestingly, the federal "partial-birth abortion" statute upheld by the Supreme Court in *Gonzales* also contains a civil remedy provision (in addition to criminal remedies), which allows for the husband of the woman who undergoes the procedure or the parents of a minor who undergoes the procedure to file a civil suit against physicians who allegedly violate the federal ban. 18 U.S.C. § 1531(c)(1). The woman's consent to the procedure, even to protect her own health, is irrelevant under the federal law. See Susan Frelich Appleton, *Gender, Abortion, and Travel After Roe's End*, 51 ST. LOUIS U. L.J. 655, 677-80 (2007) (discussing chilling effects of civil remedy in federal "partial-birth abortion" ban and other tort statutes targeting abortion).

148. *Hope Clinic*, 249 F.3d at 606.

149. A declaration by a federal court that a statute is unconstitutional could be used by an individual to defend him or herself against a private damages suit based on the challenged statute. A state court hearing such a suit would treat a federal court ruling on the statute's constitutionality as persuasive precedent. See, e.g., *Phillips v. Williams*, 608 P.2d 1131, 1135 (Okla. 1980) ("[T]he pronouncement on a federal-law question by an inferior federal court is . . . indeed highly persuasive."). Not only will the threat of successful claims be vastly reduced, but even the risk of meritless, harassing claims will be dramatically reduced by a court's ruling on the substance of the statute, as any attorney will have an obligation to refrain from asserting a claim that is based on a law found unconstitutional. See Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1341 n.109 (2000) ("[A] federal court's ruling that a state statute is facially unconstitutional may not only have a persuasive effect, but typically will also signal a willingness to hold the statute unenforceable in cases involving other parties. As a result, such rulings may discourage enforcement efforts by state authorities.").

150. See *Hope Clinic*, 249 F.3d at 606 (stating that with regard to private damages suits, "plaintiffs must rely on the value of *Stenberg* and this decision as precedent, rather than on an injunction against state officers").

Similarly, in *Summit Medical Associates, P.C. v. Pryor*,¹⁵¹ the Eleventh Circuit held that, while it could permit plaintiffs' challenge to the criminal liability provision of a "partial-birth abortion" statute, it could not permit a suit against the statute's provision for a tort remedy when only private litigants could seek damages.¹⁵² Similar to Judge Jolly's plurality opinion in *Okpalobi*, the court found that the Eleventh Amendment barred plaintiffs' challenge to the civil liability provision because none of the state official defendants "has any connection to the enforcement of the challenged law at issue."¹⁵³ Because the statute allowed only a husband or maternal grandparent to invoke the civil damages provision, the court concluded that sovereign immunity protected the state defendants.¹⁵⁴ Yet, as in *Hope Clinic*, the court's declaration that the criminal portion of the statute is unconstitutional provided relief from the chilling effect of the civil portion.¹⁵⁵

151. 180 F.3d 1326 (11th Cir. 1999).

152. *Summit*, 180 F.3d at 1329 (invalidating criminal penalties of both Alabama Partial-Birth Abortion Ban Act of 1997, ALA. CODE §§ 26-23-1 to -6 (LexisNexis Supp. 1998) and Abortion of Viable Unborn Child Act, ALA. CODE §§ 26-22-1 to -5 (LexisNexis Supp. 1998), but finding no jurisdiction to review private civil penalties provided by former). The civil damages portion of the statute provided that the physician performing the "partial-birth abortion" is liable in a civil suit to the "father" of the fetus, if he is married to the woman who underwent the abortion, or to the "maternal grandparents" of the fetus, if the woman is a minor at the time of the procedure. ALA. CODE § 26-23-5 (LexisNexis 2006).

153. *Summit*, 180 F.3d at 1341. Due to the unique procedural posture of the case, the court focused on Eleventh Amendment immunity rather than standing. *See id.* at 1334 (noting that only immunity question was reviewable on interlocutory appeal under collateral order doctrine; court would not exercise discretionary pendent appellate jurisdiction to review determination of standing).

154. *Id.* at 1342.

155. Interestingly, a few courts have struck down civil damages provisions attached to criminal and regulatory provisions of unconstitutional abortion statutes without separately analyzing standing as to the civil damages remedy. *See* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 898 (1992) (striking down spousal notification law containing provision for civil damages to husband); *Colautti v. Franklin*, 439 U.S. 379, 397-401 (1979) (striking down for vagueness portion of anti-abortion statute providing for civil damages against physician); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 83-84 (1976) (striking down both civil and criminal penalties against physician); *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 201-02 (6th Cir. 1997) (declaring Ohio statute unconstitutional because of provision for strict liability for damages against physician for certain late-term abortions); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1467 (8th Cir. 1995) (striking down civil damages provision in anti-abortion statute because it provided for strict liability); *Causeway Med. Suite v. Foster*, 43 F. Supp. 2d 604, 619 (E.D. La. 1999) (permanently enjoining enforcement of partial-birth abortion statute containing both criminal and civil provisions).

In *Casey*, the Supreme Court case that partially reaffirmed *Roe v. Wade*, the Court struck down the civil damages portion of a spousal-notification statute without considering any standing or Eleventh Amendment problems. *Casey*, 505 U.S. at 898. The Court recognized that the provision at issue, section 3209 of Pennsylvania's abortion law, provided for two kinds of remedies if a physician violated the provision's spousal notification requirement: (1) revocation of the physician's license by the state, and (2) liability to the husband for damages. *Id.* at 887-81. The Court declared section 3209 invalid in its entirety, without separately discussing whether the Court had jurisdiction to review the tort remedy provision, as the Seventh and Eleventh Circuits did in the "partial-birth abortion" cases discussed above. *Id.* at 898. Perhaps the tort remedy provision was simply not severable from the regulatory remedy, and therefore the entire spousal notification statute had to be struck down, but neither the Supreme Court opinion nor the lower court opinion on remand discusses this issue. *See id.*

Several other lower federal courts have also reached similar conclusions with respect to challenges to civil damages provisions of anti-abortion statutes.¹⁵⁶ But when tort causes of action are combined with a criminal statute that has been enjoined, the court's holding on the criminal provision significantly reduces the risk associated with the civil liability provision. By decoupling the civil remedies from any criminal remedies, the Louisiana and Oklahoma legislatures managed to enact a tort law that violates constitutional rights yet completely evades judicial review.

III. THE COURTS' FLAWED ANALYSIS OF SELF-ENFORCING TORT LEGISLATION

If fundamental constitutional rights are to have real meaning, courts must have a method for conducting preenforcement review of tort statutes that operate as bans on constitutionally protected conduct. To hold otherwise, as courts have done, defies both reason and precedent. Taken to its logical conclusion, the *Okpalobi v. Foster*¹⁵⁷ approach leaves state legislators free to "privatize" infringements on fundamental rights through the use of tort remedies, with no avenue for judicial protection of those rights. Reason dictates that state legislators should not be permitted to violate constitutional rights with impunity simply because they have found a clever way to manipulate the law. Furthermore, the key precedent here—*Ex parte Young*¹⁵⁸—establishes that state officials cannot evade judicial review when they violate constitutional rights, even if asserting the power of judicial review requires finessing legal formalities.

The key term used by the courts in describing these tort laws is "self-enforcing." The few courts that have addressed these unusual types of tort statutes have described the laws as "self-effectuating" or "self-enforcing," but without defining precisely what such terms mean in this context.¹⁵⁹ All laws can more generally be described as self-enforcing, in the sense that they establish

at 890-91, 893-94, 895 (finding subsection (e) of section 3209 on "penalty" combines both the regulatory and civil liability remedies); *Planned Parenthood of Se. Pa. v. Casey*, 978 F.2d 74, 78 (3d Cir.) (severing all spousal notification requirements as unconstitutional without differentiating between regulatory and civil remedies), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992). It is tempting to make more of *Casey*'s holding on the tort remedy, particularly since standing (unlike Eleventh Amendment immunity) cannot be waived by defendants and should be raised and considered by the courts sua sponte. Since the Court did not expressly consider the standing issue, however, it remains uncertain how the Court would treat an *Okpalobi*-like statute.

156. See, e.g., *Summit Med. Ctr. of Ala., Inc. v. Riley*, 274 F. Supp. 2d 1262, 1278-1283 (M.D. Ala. 2003) (following *Summit* and holding that challenge to civil damages provision of "informed consent" statute was barred by Eleventh Amendment); *Women's Med. Prof'l Corp. v. Taft*, 162 F. Supp. 2d 929, 963-66 (S.D. Ohio 2001) (holding that criminal provision of partial-birth-abortion law was unconstitutional but plaintiffs lacked standing to seek injunctive or declaratory relief with respect to civil damages provision of statute), *vacated on other grounds*, 353 F.3d 436 (6th Cir. 2003).

157. 244 F.3d 405 (5th Cir. 2001) (en banc).

158. 209 U.S. 123 (1908).

159. See, e.g., *Okpalobi v. Foster*, 190 F.3d 337, 349 (5th Cir. 1999) (describing Act 825 as "immediately and coercively self-enforcing"), *rev'd en banc*, 244 F.3d 405 (5th Cir. 2001); *Allied Artists Pictures Corp. v. Rhodes*, 473 F. Supp. 560, 570 (S.D. Ohio 1979) (describing a tort statute allowing only private enforcement as "drafted to be self-enforcing"), *aff'd* 679 F.2d 656 (6th Cir. 1982).

norms of behavior and provide incentives to conform to those norms in order to avoid some kind of liability or punishment. In the statutes at issue here, "self-enforcing" has a much more specific meaning. A self-enforcing tort statute means a tort law that imposes such a high risk of a severe penalty directed at constitutionally protected conduct that it freezes that conduct in the same way as would a criminal ban. In other words, the tort law does not just shift costs for unjustified or unwarranted injuries, but in effect it operates like a direct prohibition on the conduct being regulated. For example, in the statute at issue in *Okpalobi*, the combination of removal of the defense of consent and removal of the law from medical malpractice limitations exposes doctors to an extremely high risk of catastrophic liability. The *Okpalobi* tort law is a strict liability tort statute targeted at a fundamental right, which presents an immediate constitutional problem by chilling the exercise of the right.¹⁶⁰

Through the mechanism of self-enforcing tort remedies, state legislators can ban constitutionally protected conduct by making it prohibitively expensive. Self-enforcing tort statutes manipulate the line between "public," i.e., criminal or regulatory laws, and ostensibly "private" tort laws. A self-enforcing tort law is essentially a publicly enforced law appearing in the guise of a privately enforced tort law. Although styled as privately enforced tort legislation, in operation a self-enforcing tort statute is direct government regulation of the targeted conduct, similar to a criminal or regulatory fine. As explained further in Part IV, legislators use self-enforcing tort laws to arrogate the enforcement power of the executive to itself—to assume the role of enforcer and thereby also evade the judicial branch. The statute at issue in *Okpalobi* in particular represents a cynical manipulation of distinctions the law draws between public and private actors.

The courts' current approach insulates any statute styled as "tort" legislation from constitutional scrutiny, despite a showing that the legislation causes an immediate injury to fundamental rights that cannot be remedied without preenforcement judicial review. This formalistic mode of analysis—the assumption that there are easily recognizable and clear categories or boundaries between "private" and "public" law—ignores the larger potential problem of legislatures attempting to shift regulation into private hands in order to avoid constitutional accountability. Although the "privatization" of criminal or

160. See Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 867-76 (1999) (arguing that Supreme Court has consistently rejected strict liability in criminal context for conduct related to freedom of speech, freedom of association, and abortion). See also *infra* Part IV.A for a discussion of constitutional problems with imposing strict tort liability for the exercise of constitutionally protected rights. A self-enforcing tort law will most likely arise in the context of strict liability aimed at constitutionally protected conduct, but even a tort law based on a negligence standard could eviscerate constitutional rights. Suppose a state crafts a tort law that creates unrestricted liability for negligent infliction of emotional distress in the provision of an abortion, removes the defense of consent, and fails to limit the definition of negligence or define the standard of care. If a patient later has regrets about obtaining an abortion and can sue for damages based on her emotional distress, such a law could be just as chilling on the provision of abortions. See Pamela S. Quinn, Note, *Preserving Minors' Rights After Casey: The "New Battlefield" of Negligence and Strict Liability Statutes*, 49 DUKE L.J. 297, 327 (1999) (arguing that suits for negligent infliction of emotional distress or negligence in obtaining parental consent could also chill exercise of abortion rights).

regulatory law has thus far been largely restricted to the abortion context, as long as there is the political will in the state legislatures to utilize this tort strategy any number of constitutional rights could be attacked with impunity.

One could imagine any number of state tort statutes written to directly challenge Supreme Court decisions on fundamental rights yet evade judicial review.¹⁶¹ For example, pro-choice legislators could draft a law granting abortion clinic employees and patients a cause of action for damages for emotional distress against abortion protestors outside those clinics, which would chill the protestors' exercise of their First Amendment rights.¹⁶² In the post-*Brown v. Board of Education*¹⁶³ era, one could imagine segregationist legislators creating tort causes of action against school board members who established integrated classrooms.¹⁶⁴ A state could grant a civil cause of action against a white person who sells a home to a person of color, in favor of any other person living in the neighborhood;¹⁶⁵ or against organizers of a parade, in favor of anyone offended by the theme of the parade.¹⁶⁶ States could promulgate tort laws restricting interracial marriage, or chilling the exercise of First Amendment rights related to defamation or flag burning.¹⁶⁷ If tort statutes are categorically unreviewable in federal court, there is no logical limit to states' ability to violate constitutional rights through the use of self-enforcing tort legislation.¹⁶⁸ Reason dictates against such an absurd result.

A counter to this argument may be that the Fifth Circuit and other courts' position that "private" tort legislation should not be amenable to preenforcement review is reasonable based on existing legal rules. The core underlying concern of the courts, buried underneath the doctrinal formulations of standing doctrine and *Ex parte Young*, is a floodgate problem. Particularly with respect to standing doctrine, self-enforcing tort laws do not fit within the

161. One existing example is the *Allied* case cited in *Okpalobi*. In *Allied*, private enforcement of a trade practices law was used to allegedly violate free speech and other federal rights. *Allied*, 473 F. Supp. at 563. See *supra* notes 69-79 and accompanying text for a discussion of *Allied*.

162. Cf. *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 377-81 (1997) (using narrowly tailored restrictions on expressive conduct of protesters outside abortion clinic).

163. 349 U.S. 294 (1955).

164. Cf. *Bush v. Orleans Parish Sch. Bd.*, 188 F. Supp. 916, 920-21 (E.D. La. 1960) (describing how state legislators attempted to take over school board functions in order to defy federal court desegregation orders and holding that such actions should be subject to judicial review). This case is discussed further *infra* notes 355-63 and accompanying text.

165. Cf. *Barrows v. Jackson*, 346 U.S. 249, 259 (1953) (barring state court from awarding damages for breach of racially restrictive covenant).

166. Cf. *Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43, 44 (1977) (holding injunction against wearing or displaying swastika must be stayed pending adjudication of First Amendment rights).

167. See Caitlin E. Borgmann, *Legislative Arrogance and Constitutional Accountability*, 79 S. CAL. L. REV. 753, 760-61 (2006) (describing other possible examples of self-enforcing tort laws that impinge on constitutional rights); Terry O'Neill, *Flying Under the Radar: Louisiana's New "Stealth Abortion Law,"* NAT'L NOW TIMES, Special Edition 2001, available at <http://www.now.org/nnt/special-2001/stealth.html> (suggesting possibility of other kinds of tort legislation that would in effect ban interracial marriage or allow racially restrictive covenants).

168. See *infra* Part IV.A for a discussion of the effects test for self-enforcing tort legislation.

established paradigm, as evidenced by the number of courts that have relied solely on standing to reject preenforcement judicial review of tort laws. Separation of powers principles, as articulated through standing doctrine, circumscribe the courts' role.¹⁶⁹ We generally do not want people suing just anybody as a defendant simply to use the judicial power to review legislative action. This fundamental principle is reflected in the causation requirement of standing. Self-enforcing tort laws thus present a vexing problem from the perspective of standing requirements because courts fear they will open a floodgate of challenges to any and all tort statutes if they do not adhere to the rules of standing.¹⁷⁰ Similarly, under *Ex parte Young*, courts fear that if there is no specific connection between the defendant's enforcement power and the challenged statute, the limits set by the Eleventh Amendment will be meaningless.¹⁷¹ If a party can sue the Attorney General or Governor, simply based on their official title, in a preenforcement challenge to a tort statute, in theory any person can challenge any tort law in federal court at any time. There would arguably be no limit to federal judicial scrutiny of state tort legislative enactments, which raises concerns both about the balance of power between the judicial and legislative branches and about federal encroachment on state prerogatives. Rather than open this floodgate, federal courts have gone to the opposite extreme and categorically denied preenforcement challenges to all tort statutes.

On the other hand, of course courts should not permit the exploitation of otherwise reasonable legal limits when the resulting effect is to evade government accountability and to make a mockery of constitutional rights. The courts' current approach leaves no way to test laws that in essence operate as a criminal ban on constitutionally protected conduct as long as the law is veiled in a private right of action. Not only does the reasoning in *Okpalobi* lead to the absurd result that state legislatures can eviscerate constitutional rights across the board merely by disguising their attacks as private rights of action, but also key precedent in this context does not support the courts' approach to self-enforcing tort laws. *Ex parte Young* was also concerned with a floodgate problem—that the Eleventh Amendment would be rendered meaningless if individuals could sue any state officials in bringing federal challenges to state statutes.¹⁷² The Supreme Court was equally concerned, however, that constitutional rights would be rendered meaningless if individuals could not obtain preenforcement judicial review of unconstitutional state regulation.¹⁷³ These twin concerns resulted in quite a bit of tension in the *Ex parte Young* decision, between adopting a

169. *Allen v. Wright*, 468 U.S. 737, 757 (1984).

170. *E.g.*, *Okpalobi v. Foster*, 190 F.3d 337, 347 (5th Cir. 1999), *rev'd en banc*, 244 F.3d 405 (5th Cir. 2001); *Allied Artists Pictures Corp. v. Rhodes*, 473 F. Supp. 560, 571 (S.D. Ohio 1979), *aff'd*, 679 F.2d 656 (6th Cir. 1982).

171. *See Ex parte Young*, 209 U.S. 123, 157 (1908) (requiring some connection to enforcement because otherwise Attorney General could always be sued, effectively eliminating states' Eleventh Amendment immunity).

172. *Id.* at 166-67.

173. *Id.* at 165.

formalist approach and reading the Eleventh Amendment strictly, or a more functional approach that seeks flexibility in ensuring that constitutional rights are protected by preenforcement federal judicial review. The resulting “fiction”—that individuals can sue state officials for violations of federal law but only those with “some connection” to the challenged statute—is an effort at a functional approach. Ultimately, *Ex parte Young* stands for the fundamental principle that courts must make constitutional rights meaningful by ensuring judicial review. Even though fidelity to this principle required the creation of some rather convoluted legal fictions (particularly the notion that the state official is not the state for purposes of the Eleventh Amendment but is engaged in state action for purposes of the Fourteenth Amendment), *Ex parte Young* established a bottom line that if judicial review is the only means for protecting constitutional rights it must be asserted.

Unfortunately, the few courts that recognized that self-enforcing tort laws threaten constitutional rights and allowed preenforcement challenges have rested their decisions on unpersuasive reasoning. The *Allied* court, relied on by the panel in *Okpalobi*, described federal court review of state civil law as acceptable when the statutes “have been concerned with the enforcement of programs, civil or criminal, dealing with the relations between the state and the individual.”¹⁷⁴ In other words, the “public” nature of the tort statute at issue has been relevant to the question of whether federal courts should assert jurisdiction to review state tort laws.¹⁷⁵ Where a state officer has a connection with a challenged statute only based on general duties to uphold and defend state law, courts have stated that there must “be a real, not ephemeral, likelihood or realistic potential that the connection will be employed against plaintiffs’ interests.”¹⁷⁶ Similarly, the *Okpalobi* panel proposed a “continuum” test for both the standing and *Ex parte Young* inquiries, involving a case-by-case analysis to resolve where the law in question falls on “the continuum between public regulation and private action.”¹⁷⁷

Likewise, in a number of cases analyzing *Ex parte Young*, lower courts have deemed this additional inquiry into the “public” or “private” nature of the law

174. *Allied*, 473 F. Supp. at 567 (citing *Gras v. Stevens*, 415 F. Supp. 1148, 1152 (S.D.N.Y. 1976)).

175. See *NAACP v. California*, 511 F. Supp. 1244, 1254 (E.D. Cal. 1981) (noting confusion among courts with respect to scope of *Ex parte Young* connection requirement and stating that courts have “creat[ed] a distinction based on the nature of the statute under attack” in determining whether general duties to enforce state laws are sufficient).

176. *Allied*, 473 F. Supp. at 568; see also *Rode v. Dellarciprete*, 845 F.2d 1195, 1208 (3d Cir. 1988) (finding no likelihood that Governor would enforce state police administrative regulations).

177. *Okpalobi v. Foster*, 190 F.3d 337, 346 (5th Cir. 1999), *rev’d en banc*, 244 F.3d 405 (5th Cir. 2001). Such a case-by-case analysis depending on the nature of the tort statute has been explicitly rejected in the *Ex parte Young* context by a majority of the Supreme Court. *Verizon Md. Inc. v. Pub. Serv. Comm’n of Md.*, 535 U.S. 635, 645 (2002) (rejected by majority); *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 293 (1997) (rejected by three Justices). The Court has reiterated that “[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a ‘straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.’” *Verizon Md. Inc.*, 535 U.S. at 645 (alteration in original) (quoting *Coeur d’Alene Tribe*, 521 U.S. at 296).

mandatory because they fear a floodgate of lawsuits against states unmoored from any limits placed by the Eleventh Amendment. Courts opine that this public/private analysis is necessary "to preclude parties from testing the constitutionality of state legislation by simply naming the governor as a defendant, a practice which if unchecked would effectively eviscerate the Eleventh Amendment."¹⁷⁸ In general, in cases where courts have looked to the nature of the statute in question to determine whether a state official's general duty to enforce state laws is sufficient to assert jurisdiction to review the challenged statute, courts are more likely to conclude that such general duties are sufficient when the law can be characterized as addressing "public" rather than "private" concerns. Thus, in cases involving state election law, civil rights claims, or other rights that the court could characterize as involving "public" values or interests, general enforcement duties under state law have been found sufficient to establish the requisite enforcement connection.¹⁷⁹ In contrast, in cases relating to so-called "private" disputes, such as marital regulations, a state official's general duty to enforce state laws has been considered insufficient.¹⁸⁰

Characterizing laws as either "public" or "private," however, is an arbitrary and easily manipulable line to draw. Critical theorists have long questioned the categories of public/private as a false dichotomy.¹⁸¹ At some level, all laws are directed to the public interest. Even statutes regarding domestic relations law are enacted to serve the public interest in the private ordering of individual relationships—the private is deeply structured by law. Feminist legal theorists in particular have criticized the public/private dichotomy, especially for insulating the family, arguably women's primary place of subordination, from legal

178. *Allied*, 473 F. Supp. at 568.

179. *See, e.g., Luckey v. Harris*, 860 F.2d 1012, 1015-16 (11th Cir. 1988) (holding that, in civil rights action seeking constitutionally sufficient indigent defense services, the Governor has sufficient contacts with alleged unlawful statute because he is generally responsible for law enforcement); *Allied*, 473 F. Supp. at 571 (allowing suit based on Governor's general duty to uphold state legislation where tort statute was "self-enforcing"); *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984, 988 n.7 (S.D.N.Y. 1970) (allowing suit against Governor based on general obligation to take care that state laws are faithfully executed in challenge to state election laws).

180. *See, e.g., Mendez v. Heller*, 530 F.2d 457, 460 (2d Cir. 1976) (holding that Eleventh Amendment barred suit challenging jurisdictional requirements for divorce); *Merrick v. Merrick*, 441 F. Supp. 143, 146 (S.D.N.Y. 1977) (holding that Eleventh Amendment barred suit challenging laws governing child custody); *Gras v. Stevens*, 415 F. Supp. 1148, 1152 (S.D.N.Y. 1976) (holding that Eleventh Amendment barred suit challenging divorce regulations).

181. *See, e.g., Susan Moller Okin, Justice and Gender: An Unfinished Debate*, 72 *FORDHAM L. REV.* 1537, 1552 (2004) (discussing feminist critiques of dichotomy between "public" and "private" spheres and noting that feminist theorists have pointed out that "[b]ecause the state is deeply implicated in the formation and functioning of families, the notion that it can choose whether to intervene in the formation and functioning of families is nonsense; the only real question is *how* it intervenes" (quoting Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 *U. MICH. J.L. REFORM* 835, 837 (1985))). *See generally* *CHALLENGING THE PUBLIC/PRIVATE DIVIDE: FEMINISM, LAW AND PUBLIC POLICY* (Susan B. Boyd ed., 1997) (collecting essays examining impact of public/private divide on state intervention, family-work balancing, regulation of motherhood, and global markets); *PUBLIC AND PRIVATE: FEMINIST LEGAL DEBATES* (Margaret Thornton ed., 1995) (exploring ambiguities to which women are subjected by analytic distinction between public and private action).

scrutiny.¹⁸² This criticism is particularly salient in the context of tort laws regulating abortion, which could conceivably be characterized as a matter of “private” rather than “public” concern. Courts addressing self-enforcing tort laws erroneously describe these laws as if they clearly fall into categories of “private” tort legislation versus “public” criminal or regulatory law. Or, as noted above, laws are characterized and divided by subject matter, as if family laws fall obviously into a “private” category and almost any other subject matter of law falls into a “public” category.¹⁸³

Although the dichotomy of “public” and “private” is conceptually problematic, it is deeply embedded in our law. We recognize the difference between state actors and private actors in many contexts. Constitutional law embeds this dichotomy through the state action doctrine, which provides that only public or governmental actors are subject to constitutional restrictions.¹⁸⁴ Although these distinctions are not always clearly defined, due to the lack of a coherent theoretical foundation for the public/private dichotomy, such a divide does serve important institutional concerns, such as the separation of powers and federalism concerns at play in the question of federal court jurisdiction to review self-enforcing tort laws.¹⁸⁵ The courts’ concern with opening a floodgate of lawsuits, to essentially allow individuals to use the federal judiciary to “survey the statute books” of states,¹⁸⁶ is not unfounded if courts lack a coherent means of distinguishing tort statutes that are “self-enforcing.” Ultimately, courts are not likely to jettison the public/private distinction because of concerns with too much oversight by the judiciary, and particularly by the federal judiciary over state government.¹⁸⁷

If the law is going to take this divide between public and private seriously, however, courts should not simply allow facile manipulation of these distinctions and permit state legislators’ use of “private” torts to deny constitutional rights while avoiding constitutional remedies. Utilizing a mechanical method of analysis that completely excludes any law labeled as a “tort” law from preenforcement review is not a workable approach given the problem of self-enforcing tort laws. Yet, due to the deeper conceptual difficulties with the

182. See Okin, *supra* note 181, at 1551-52 (arguing families are not unaffected by coercive laws); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 948, 951 (2002) (arguing that historical view of Nineteenth Amendment shows breakdown between categories of “private” sphere of family versus “public” sphere with respect to women’s rights).

183. Siegel, *supra* note 182, at 981-83.

184. Metzger, *supra* note 23, at 1400-02.

185. See *id.* at 1407-10, 1448 (“Doing away with the public-private divide, artifice though it may be, would make every question of government policy a potential constitutional issue and thus ultimately subject to judicial scrutiny and resolution. Judicial intrusiveness in the ordinary workings of the political order would rise to the level of unbearability.”).

186. *Allied Artists Pictures Corp. v. Rhodes*, 473 F. Supp. 560, 571 (S.D. Ohio 1979) (internal quotation marks omitted), *aff’d*, 679 F.2d 656 (6th Cir. 1982).

187. See Metzger, *supra* note 23, at 1448 (arguing that, despite academic attacks on public-private divide, Supreme Court will not jettison this dichotomy because of concerns about limits of federal judicial role in our democracy).

public/private dichotomy, a test that relies on that dichotomy will also fail. We need not rely on or resolve the deep and thorny issues surrounding the public/private divide in order to adequately address self-enforcing tort statutes, however. Part IV proposes a new method that would allow for a more nuanced consideration of self-enforcing tort legislation without opening the feared floodgate to federal court review of all kinds of state tort statutes or delving into the likely irresolvable controversies surrounding the public/private dichotomy.

IV. PIERCING THE VEIL OF "PRIVATE" RIGHTS OF ACTION

To address the underlying concern of the courts regarding opening a floodgate, and to solve the unique doctrinal problems raised by "self-enforcing" tort statutes, this Article proposes two solutions. First, it proposes a new test for ferreting out self-enforcing tort legislation that attacks fundamental constitutional rights and subjecting only this narrow type of tort statute to preenforcement judicial review. This new test will address the courts' floodgate concerns without resorting to a public/private analysis. Second, it argues that the appropriate defendants to a challenge to a self-enforcing tort law are the state legislators who enact the law. Suing state legislators would solve the doctrinal problems presented by both standing doctrine and *Ex parte Young*.¹⁸⁸

A. A New Test for Self-Enforcing Tort Legislation

A better test for analyzing whether a particular tort law is "self-enforcing" is to ask whether the tort statute has the *effect* of inhibiting constitutionally protected conduct. Such an effect would occur where *a reasonable person would not take the risk of engaging in the targeted conduct under the tort law's scheme of liability*. This test does not require courts to consider where a tort law falls on "the continuum between public regulation and private action," or otherwise rely on the public/private divide.¹⁸⁹ Rather, it focuses the court on the crucial question for determining whether a tort law is self-enforcing: Does the law impose such a high risk of a draconian penalty on constitutionally protected conduct that it essentially bans that conduct? This new test is a means to an end—using this test will allay courts' fears of opening a floodgate of challenges to general tort laws. Under this new test, only self-enforcing tort laws, which operate as a direct governmental prohibition on constitutionally protected behavior without any enforcement by state or private parties, will be subject to preenforcement review.

Furthermore, this effects test for self-enforcing tort laws could be limited to established constitutional rights.¹⁹⁰ If courts are concerned with opening a floodgate of lawsuits to general tort laws, the effects test could be limited to

188. 209 U.S. 123 (1908).

189. *Okpalobi v. Foster*, 190 F.3d 337, 346 (5th Cir. 1999), *rev'd en banc*, 244 F.3d 405 (5th Cir. 2001).

190. *Ex parte Young* itself is not limited to protecting constitutional rights, but protects all federal rights.

protecting only fundamental rights or rights subject to heightened scrutiny by the Supreme Court. This limit would prevent challenges to every tort law that would be subject to a rational basis test. Courts should be less concerned with the floodgate problem when fundamental rights are at stake.¹⁹¹ When the effect of a tort law is to chill the exercise of established constitutional rights, logic and precedent dictate that federal courts step in and protect those rights.

With this limit, the proposed reasonable person test that focuses on the effect of the challenged tort law has a number of advantages. From a practical point of view, the reasonable person standard is already quite familiar to the courts. In addition, using a reasonable person standard takes account of the fact that some individuals may be less risk averse and may continue to engage in the targeted conduct despite the threat of severe tort liability. Self-enforcing tort statutes threaten constitutional rights because of the chilling effect they have on constitutionally protected conduct. Even if a few risk-taking individuals might still engage in the targeted activity, evidence that the challenged tort law would chill the average, risk-averse individual from exercising his or her constitutional rights is sufficient to show a constitutional injury.¹⁹² Using this effects test thus takes account of the fact that self-enforcing tort statutes essentially achieve the same result as a criminal or regulatory fine, in that they chill the exercise of constitutionally protected conduct, without entering into a vague analysis regarding whether the nature of the tort law is "public" or "private." Finally, this "effects on a reasonable person" test addresses the fact that no government official or nongovernmental party needs to "enforce" the tort statute by filing suit in order for the statute to violate constitutional rights, but it does not open the door to preenforcement challenges to any and all tort laws. Only self-enforcing tort laws would be subject to preenforcement review under this test.

Utilizing this new method to test for a self-enforcing tort law would require the following analysis. Usually, "[a]n allegation of an ongoing violation of federal law . . . is ordinarily sufficient" to establish jurisdiction.¹⁹³ When an individual attempts to bring a preenforcement challenge to a tort law, she must allege that the tort law targets a constitutional right and has a draconian effect on the exercise of that right. In other words, the plaintiff must allege an ongoing violation of a constitutional right by showing that the tort law's scheme of liability chills the exercise of the right. Courts can analyze whether the tort statute could have the effect of chilling constitutionally protected conduct at the

191. See *Paul v. Davis*, 424 U.S. 693, 700-01 (1976) (describing floodgate concerns with civil rights statutes but noting that concern should be lessened when fundamental rights are at stake).

192. See *Ex parte Young*, 209 U.S. at 165 (stating that individuals should not be left with Hobson's choice because it will chill exercise of constitutional rights). In permitting suits against state officers, *Ex parte Young* particularly emphasized the importance of allowing for preenforcement review in federal court of unconstitutional state statutes. See *id.* ("To await proceedings against the company in a state court, grounded upon 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 . . . if it should be finally determined that the act was valid. This risk the company ought not to be required to take.").

193. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 281 (1997).

first stage solely for jurisdictional purposes and address the merits question at a later stage for purposes of granting equitable relief.¹⁹⁴

The precise contours of this effects test will depend on the constitutional right at issue. A few examples can illustrate how the test could apply. Self-enforcing tort laws will largely arise in cases of strict liability tort statutes directed at constitutionally protected conduct, although there are some cases where even a negligence standard would be sufficiently chilling.¹⁹⁵ For example, applying this test in the abortion context means that state tort statutes that create strict liability for the provision of abortion services would likely be subject to preenforcement review in federal courts.¹⁹⁶ The Supreme Court has recognized that strict liability with respect to abortion services can violate the right by chilling the provision of abortions. In *Colautti v. Franklin*,¹⁹⁷ the Court held that, although states may punish performance of an abortion after viability, states cannot do so by attaching strict liability to determinations of viability.¹⁹⁸ The Court stated that "the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*."¹⁹⁹ The Court struck down the statute on vagueness grounds and also noted that such a statute could have "a profound chilling effect on the willingness of physicians to perform abortions near the point of viability."²⁰⁰

When considering the constitutionality of statutes regulating abortion, constitutional concerns are generally raised by laws that lack an element of intent, which is necessary to protect physicians who perform abortions with due

194. This may seem like a redundant analysis. If the court agrees that the plaintiff has made sufficient allegations that the tort statute has the effect of chilling constitutionally protected conduct at the jurisdictional stage, it is likely to then conclude that the tort law violates constitutional rights at the merits stage. Nevertheless, courts engage in a kind of redundant analysis of constitutional claims at an early, jurisdictional stage of litigation in other contexts as well, such as in addressing claims of qualified immunity. See, e.g., *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (holding that in analyzing claims of qualified immunity, courts should first address whether factual record shows violation of constitutional right before analyzing whether qualified immunity applies; if immunity does not apply, then court should address "merits" of constitutional claim). One basic idea behind qualified immunity is that when state officials knowingly violate clearly established constitutional rights, their actions should be subject to suit. Similarly, when state legislators knowingly attack established constitutional rights through self-enforcing tort laws, their actions should be subject to suit.

195. See *infra* notes 203-04 discussing strict liability in tort. See also A.J. Stone, III, Comment, *Constitution: Tort Law as an End-Run Around Abortion Rights After Planned Parenthood v. Casey*, 8 AM. U.J. GENDER SOC. POL'Y & L. 471, 513 (2000) (arguing that even tort statutes based on negligence, such as negligent infliction of emotional distress, could chill provision of abortions in certain cases).

196. For example, strict liability provisions regarding parental consent laws could be self-enforcing tort statutes. See Quinn, *supra* note 160, at 324-25 (arguing strict liability for failing to notify parent would unconstitutionally "chill the willingness of abortion providers to perform abortions").

197. 439 U.S. 379 (1979).

198. *Colautti*, 439 U.S. at 396.

199. *Id.*

200. *Id.*

care and in good faith from civil liability.²⁰¹ Thus, a tort law that requires physicians to provide abortions with due care, or that defines the standard of care more specifically, would not be “self-enforcing” as defined here. A reasonable person would not be chilled from providing abortion services when a tort law has an established standard of care that allows the doctor to avoid liability. Therefore, such a tort law would not be subject to preenforcement review.

The First Amendment provides another example of how the effects test can apply to private tort statutes. In *Texas v. Johnson*,²⁰² the Supreme Court famously held that burning the United States flag is a form of expression protected by the First Amendment and thus cannot be subjected to a criminal ban.²⁰³ Suppose that, in response to this decision, hypothetical State X promulgates a tort statute creating a private cause of action related to flag burning. The statute provides that any person who burns the flag of the United States on public property (such as a public sidewalk) is strictly liable to an individual who personally suffers damages as a result, including damages for emotional distress. Furthermore, assumption of risk or consent is not a defense to liability. In other words, State X’s statute creates a private cause of action for damages against an individual who publicly burns the flag and thereby offends other individuals who witness the event. If a plaintiff could show that the threat of such a lawsuit would chill the actions of a reasonable person who wished to express their First Amendment rights by flag burning—that the effect of the law is that a reasonable person would not risk burning the flag in public—the tort law is self-enforcing. In essence, the state has created a tort statute that will override the Supreme Court’s controversial decision in *Johnson* and ban the burning of the flag.

Similarly, suppose that pro-choice legislators wish to override the Supreme Court’s protection of pro-life demonstrators’ free speech rights. For example, in *Schenck v. Pro-Choice Network of Western New York*,²⁰⁴ the Supreme Court held that a court-ordered “floating” buffer zone, which required pro-life protestors to stay fifteen feet away from people and vehicles entering and leaving an abortion clinic, violated the First Amendment.²⁰⁵ State legislators who disagree with this holding could promulgate a “private” damages statute granting

201. *E.g.*, *Okpalobi v. Foster*, 190 F.3d 337, 360 (5th Cir. 1999) (invalidating abortion statute because strict liability made it possible for physicians performing legal procedures in good faith to be liable for accidental violations), *rev’d en banc*, 244 F.3d 405 (5th Cir. 2001); *Summit Med. Assocs., P.C. v. James*, 984 F. Supp. 1404, 1447 (M.D. Ala. 1998) (cautioning “perils of strict liability” and holding “where, as here, the specter of medical expert disagreement conjoins with a statute imposing strict criminal and civil liability for an erroneous medical determination, the result could very well be ‘a profound chilling effect on the willingness of physicians to perform abortions’” (quoting *Colautti*, 439 U.S. at 396)).

202. 491 U.S. 397 (1989).

203. *Johnson*, 491 U.S. at 420; *see also* *United States v. Eichman*, 496 U.S. 310, 318-19 (1990) (striking down federal ban on flag burning as violation of First Amendment).

204. 519 U.S. 357 (1997).

205. *Schenck*, 519 U.S. at 377.

a cause of action to abortion clinic patients and employees against protestors for intentional infliction of emotional distress if the protestors come within fifteen feet of people entering and leaving the clinic. Perhaps some protestors would still engage in close contact, but the effect of such a tort law on a reasonable person would be to maintain a fifteen foot distance when protesting outside abortion clinics rather than risk the costs of defending and potential liability from a tort suit.

Another useful hypothetical is the case of defamation laws. In *New York Times Co. v. Sullivan*,²⁰⁶ the Supreme Court held that the common law of libel is a "state action" that must comport with First Amendment requirements, and in particular held that state libel law could not impose liability without fault.²⁰⁷ The Court stated that although an action for defamation is a "civil lawsuit between private parties, the Alabama courts have applied a state rule of law which [allegedly] . . . impose[s] invalid restrictions on their constitutional freedoms It matters not that the law has been applied in a civil action and that it is common law only" ²⁰⁸

That case rose to the Supreme Court through a private lawsuit initiated in state court.²⁰⁹ Suppose, however, a state legislature now decides that it disagrees with the Supreme Court's decision in *Sullivan* and promulgates a new libel law ignoring the First Amendment requirements set forth by the Supreme Court. The mere existence of a strict liability tort statute regulating defamation would chill the exercise of First Amendment rights, as explained by the Court in *Sullivan*.²¹⁰ Thus, the effects test would be met—if the effect of the tort law is to immediately chill constitutionally protected conduct, without any enforcement through a tort lawsuit, courts should have preenforcement jurisdiction to review it.

How this "effects" test with respect to state tort laws would play out beyond the First Amendment and abortion contexts is not quite as clear. Any tort law that has the effect of violating fundamental constitutional rights would have to do so by chilling protected conduct through the threat of potentially catastrophic liability. The Supreme Court has explicitly recognized protection against laws that chill the exercise of fundamental rights in First Amendment speech and association cases and abortion cases.²¹¹ The analysis could work in other contexts as well, however.

206. 376 U.S. 254 (1964).

207. *Sullivan*, 376 U.S. at 265; see also *Gertz v. Robert Welch*, 418 U.S. 323, 347 (1974) (holding that "so long as [state libel statutes] do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual").

208. *Sullivan*, 376 U.S. at 265.

209. *N.Y. Times Co. v. Sullivan*, 144 So. 2d 25 (Ala. 1962).

210. *Sullivan*, 376 U.S. at 279-80.

211. See *Colautti v. Franklin*, 439 U.S. 379, 396 (1979) (invalidating statute that "could have a profound chilling effect on the willingness of physicians to perform abortions near the point of viability"); *Smith v. California*, 361 U.S. 147, 154-55 (1959) (invalidating statute imposing strict liability for possession of obscene material due to "inhibitory effect" on selling books that were not obscene);

Suppose for a moment that the Supreme Court declares that state bans on same-sex marriage violate the Equal Protection Clause.²¹² Therefore, all states must allow gay and lesbian couples to submit marriage licenses in the same manner as heterosexual couples. In response, an anti-same-sex marriage state enacts a tort law providing a cause of action for emotional distress damages to the parents of any same-sex couple against the minister or other functionary who signs the marriage license and eliminates consent of the couple as a defense. Because it is a privately enforced tort law, under *Okpalobi* no preenforcement judicial review would be allowed. Under the effects on a reasonable person test, however, a plaintiff could very likely show that the effect of the tort law is to severely restrict access to same-sex marriages in violation of the hypothetical Supreme Court ruling. Because a reasonable person would not be willing to sign a marriage license under the threat of strict liability created by this hypothetical tort statute, the law should be subject to preenforcement review.

Although using this proposed test to define and ferret out self-enforcing tort laws will provide courts with a mechanism for avoiding the floodgate problem, there are a number of potential difficulties with using an effects test. First, as mentioned already, it may be difficult to apply the effects test when analyzing tort legislation outside the First Amendment and abortion contexts, where courts have already acknowledged constitutional problems with laws that chill the exercise of those rights. Second, injured parties may also face a heavy evidentiary burden in establishing that a tort law has the immediate and ongoing effect of violating their constitutional rights. How draconian must the law be for a court to find that the liability potential of a tort statute makes it too “chilling”? For example, what if the *Okpalobi v. Foster*²¹³ statute had been written to limit liability in each case to \$100? Such a statute would likely make abortions more expensive but perhaps not prohibitively so, in which case it could be difficult for plaintiffs to prove that the law would have the effect of placing a “substantial obstacle” in the path of women seeking abortions.²¹⁴ Furthermore, how courts define a “chilling” effect can be very malleable.²¹⁵ Finally, the Supreme Court

Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (invalidating statute requiring teachers to take oath swearing they had not been members of certain organizations as restriction that engendered “caution and timidity in their associations by potential teachers”); Michaels, *supra* note 160, at 867-77 (noting courts have prohibited strict liability in context of free speech, association, and abortion due to chilling effects and arguing that whenever underlying act cannot be criminalized, strict liability should be unconstitutional (citing *United States v. X-Citement Video*, 513 U.S. 64 (1994))); Quinn, *supra* note 160, at 324-25 (arguing that strict liability in parental consent laws is unconstitutional).

212. The model for this hypothetical is *Loving v. Virginia*, 388 U.S. 1 (1967), the landmark case declaring that racially based restraints on marriage violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

213. 244 F.3d 405 (5th Cir. 2001).

214. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (holding that law that has “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus” constitutes undue and therefore unconstitutional burden on woman’s right to decide whether to have abortion). The undue burden test established by *Casey* is an example of an effects test that is difficult to apply because it is so fact based and changeable.

215. See Michaels, *supra* note 160, at 890-91 (noting pliability of chilling effect standard).

generally disfavors effects tests due to the problem that many statutes have "incidental effects" on fundamental rights.²¹⁶ Professor Dorf has argued that the Supreme Court should, and in fact largely does, only scrutinize laws with incidental effects when they place a *substantial* burden on fundamental rights.²¹⁷ Because of the difficulty with defining how to limit incidental burdens on fundamental rights, however, an effects test is easily subject to manipulation and may not capture all cases that it should.²¹⁸

Arguably, courts could use a purpose test to determine whether a tort law is actually a guise for legislators to attack fundamental rights.²¹⁹ The Louisiana law at issue in *Okpalobi* implicitly evinces a purpose to violate abortion rights, as well as having the effect of violating the right. Yet, proving legislative purpose is often extremely difficult. Courts are reluctant to infer a "bad" intent on the part of legislatures.²²⁰ In the context of equal protection analysis, where the Court does require proof of "bad" purpose on the part of legislatures to establish a claim of discrimination based on race or gender, plaintiffs have had great difficulty proving their claims.²²¹ In addition, the effects test used here can also be understood as a surrogate for a purpose test in analyzing tort statutes.²²² If the effect of the tort law is that a reasonable person would not engage in the constitutionally protected conduct subject to liability, it is likely that the legislature's purpose in enacting the law was to chill the conduct at issue by styling the regulation as "private" tort legislation in order to evade judicial review.

216. See Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 85-86 (1997) (stating that Supreme Court is wary of effects tests because "the Justices believe that for courts to invalidate every governmental act that incidentally burdens constitutional rights . . . would infringe too far on powers that must, as a matter of good sense, be vested in government").

217. See Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1179 (1996) (describing Supreme Court's reluctance to scrutinize laws that have incidental burdens on constitutional rights but arguing that laws that have incidental effect of substantially burdening fundamental rights should be subject to heightened scrutiny).

218. See Fallon, *supra* note 216, at 85-86 (explaining Supreme Court is wary of effects test because it allows judges unfettered discretion and yields unpredictable results).

219. See Note, *After Ayotte: The Need to Defend Abortion Rights with Renewed "Purpose,"* 119 HARV. L. REV. 2552, 2569 (2006) (arguing improper legislative motive taints entire statute, which must therefore be held invalid).

220. See Lawrence G. Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 23 (1981) (noting difficulty of proving legislative intent); Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 150 (1981) (arguing that "one need not show *intent* to deter or penalize exercise of a right so long as one can show that a law's *effect* is to withhold ordinary levels of protection with respect to that right").

221. See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that disproportionate racial impact of facially race-neutral statute does not prove invidious discrimination based on race or trigger strict scrutiny); Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 355 (1987) (criticizing purpose requirement in equal protection analysis).

222. Fallon, *supra* note 216, at 94 (arguing that "effects-based tests can reasonably be viewed as surrogates for purpose tests" and noting evidentiary and institutional difficulties with proving that legislature acted with improper motive).

Despite these potential difficulties with applying an effects test, focusing on the effects of a tort statute on constitutional rights is still a better method for defining a tort statute as “self-enforcing” than relying on a public/private analysis. The effects test at least provides less conceptually problematic grounds to narrow preenforcement review of tort statutes. When this effects test establishes that a tort law is self-enforcing, courts should recognize that the mere enactment of the tort statute is government prohibition of the exercise of fundamental rights. Injured parties should be permitted to seek declaratory relief against the statute, as they would be if the law was not disguised as a privately enforced tort statute.

B. Who Can You Sue? Applying the New Approach to Sue Legislative and Executive Officials

Using the “effects on a reasonable person” test for ferreting out self-enforcing tort laws addresses the courts’ underlying fear of opening a floodgate to preenforcement challenges to all kinds of state tort laws. Once courts recognize that, although styled as a privately enforced tort statute, a self-enforcing tort law has the same chilling effect on constitutional rights as a publicly enforced statute, then logic and precedent dictate preenforcement review. *Ex parte Young* long ago established that state officials cannot punish the exercise of constitutional rights without their actions being subject to federal court review.²²³ Simply because state legislators have now found a way to camouflage their punishment of constitutional conduct through tort remedies is no reason to reject the precedent set by *Ex parte Young*. Given that a self-enforcing tort law operates in effect like a criminal or regulatory law, *Ex parte Young* establishes that there *ought* to be a state official to sue in order to protect constitutional rights. Nevertheless, courts must still address the doctrinal problem presented by standing—who can you sue?

This Part argues that the proper parties to sue are the individual state legislative actors who vote to enact the self-enforcing tort law. Every “public law” statute basically involves three governmental actors: legislative officials who draft and promulgate the law, executive officials who enforce the law, and judicial officials who review the law.²²⁴ Self-enforcing tort laws are attempts by legislators to arrogate the power of the executive to themselves—to assume the role of enforcer and thereby also evade the judicial branch. Based on the argument that self-enforcing tort statutes are not really “privately” enforced, this Part proposes that these laws are in fact publicly “enforced” by state legislators merely by their enactment. Through self-enforcing tort laws, state legislators have found a clever way to enforce their enactments without any collaboration with the executive or the judiciary. Once courts recognize that self-enforcing tort statutes are publicly enforced by legislators rather than executive officials, the

223. *Ex Parte Young*, 209 U.S. 123, 145 (1908).

224. Of course, with respect to regulatory laws, administrative agencies may be charged with all three functions.

doctrinal solution is relatively straightforward—sue the individual legislators who enacted the law.

This Part proceeds in three parts. First, it analyzes the “causation” problem of self-enforcing tort laws and argues that a suit against the officials who enacted the challenged law would solve the puzzle presented by standing. Second, it argues that those courts that relied on *Ex parte Young* as a bar to suit erroneously interpreted the *Ex parte Young* doctrine, and the reasoning behind *Ex parte Young* further supports allowing suit against legislative officials in order to test the constitutionality of a self-enforcing tort law. Third, it addresses the potential hurdle of legislative immunity and argues that the common law doctrine of legislative immunity should not apply to suits against legislative officials when challenging the enactment of self-enforcing tort laws.

1. Standing to Challenge Legislative Actions

Although a few courts relied on the Eleventh Amendment and *Ex parte Young* test as a bar to preenforcement challenges to tort laws, most courts have concluded that standing is the primary hurdle, particularly since justiciability issues are usually decided prior to affirmative defenses such as immunity.²²⁵ As explained in Part II, standing has three elements that plaintiffs must establish: injury, causation, and redressability.

Article III standing is one of the most confused and criticized areas of federal courts doctrine. Many courts and commentators have attacked the inconsistency in application of standing rules.²²⁶ A number of scholars have argued that standing doctrine is easily manipulated depending on how the injury is characterized and whether the court wishes to reach the merits.²²⁷ Scholars have also criticized the use of an “autonomous” causation element in standing doctrine, as compared to a previous focus on causation and redressability as a single, overlapping inquiry.²²⁸ Nevertheless, the Supreme Court has reiterated that causation is a separate inquiry and a separate bar to jurisdiction.²²⁹

225. *E.g.*, *Okpalobi v. Foster*, 244 F.3d 405, 424-29 (5th Cir. 2001), *rev'd en banc*, 244 F.3d 405 (5th Cir. 2001); *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1329 (11th Cir. 1999); *see also* *Scott v. Taylor*, 405 F.3d 1251, 1258-59 (11th Cir. 2005) (arguing standing should be determined first as jurisdictional matter, prior to determining claims of immunity).

226. *See, e.g.*, *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (“We need not mince words when we say that the concept of ‘Art. III standing’ has not been defined with complete consistency in all of the various cases decided by this Court”); Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 42 (1984) (critiquing standing doctrine on ground that, *inter alia*, as applied it unduly prevents people with serious injuries from obtaining a judicial remedy).

227. *See, e.g.*, LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 100 (1985) (examining Supreme Court cases on standing and concluding that Court’s view of merits often dictate standing determinations); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1464-66 (1988) (stating that causation determinations often depend on how injury is characterized).

228. Scholars have criticized the causation element of standing as particularly manipulable and used as a guise for disfavor of the merits. *See, e.g.*, TRIBE, *supra* note 58, at 424-34 (criticizing use of

Of course, the difficult question faced by the courts that have addressed self-enforcing tort statutes is the causation element. The courts that have considered the standing question in this context have agreed that self-enforcing tort statutes create an ongoing injury.²³⁰ Furthermore, the redressability requirement, which focuses on whether the court's action would relieve a plaintiff's injury, can be satisfied by declaratory relief against the challenged tort statute.²³¹ The *Okpalobi* opinion was incorrect in holding that redressability could not be met because the availability of declaratory relief would allow for sufficient redress against the chilling effect of a self-enforcing tort law.²³² The availability of declaratory relief still does not solve the problem of causation, however. Although the Declaratory Judgment Act provides an alternative mechanism of preenforcement relief, it does not change the requirements of standing—injury, causation, and redressability must still be established.²³³ As the *Okpalobi* court opined, although it does not “challenge that the plaintiffs are suffering a threatened injury,” the injury alleged “is not, and cannot possibly be, caused by the defendants [Attorney General and Governor of Louisiana] . . . that is, these defendants cannot prevent purely private litigants from filing and prosecuting a cause of action under Act 825.”²³⁴

Due to the way in which standing doctrine has developed, the element of causation mandates looking to enforcement. The crux of the dilemma presented by self-enforcing tort legislation is that, at least as decided so far, there is no one to sue. If no state official can enforce the tort law and thereby “cause” the injury, and any private party who may in the future enforce the law is as yet unknown,

“autonomous causation requirement”); Gene R. Nichol, Jr., *Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint*, 69 KY. L.J. 185, 198-201 (1980) (noting causation element of standing analysis to be “most troubling”); Sunstein, *supra* note 227, at 1459 (“[C]ausation requirements are being used to do work that has little to do with causation.”).

229. *United States v. Hays*, 515 U.S. 737, 743 (1995).

230. *E.g., Okpalobi*, 244 F.3d at 427 (recognizing that plaintiffs were suffering threatened injury); *Hope Clinic v. Ryan*, 249 F.3d 603, 605 (7th Cir. 2001) (acknowledging implicitly that plaintiffs had an injury).

231. *Okpalobi*, 244 F.3d at 435-36 (Benavides, J., concurring in part and dissenting in part). Although Judge Benavides's opinion explains how the plaintiffs established an injury in fact and persuasively argues that a declaration of unconstitutionality would redress that injury, it never directly addresses the problem of causation. Note that the Declaratory Judgment Act does not abolish the requirements standing. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937); *Okpalobi*, 244 F.3d at 431 (Higginbotham, J., concurring) (“[A]lthough the Declaratory Judgment Act ‘brings to the present a litigable controversy, which otherwise might only be tried in the future,’ it does not jettison traditional standing requirements.” (quoting *Societe de Conditionnement en Aluminium v. Hunter Eng'g Co.*, 655 F.2d 938, 943 (9th Cir. 1981))).

232. See *supra* Part II.B discussing the *Summit* and *Hope Clinic* cases.

233. See *supra* Part II.A for a discussion of standing and declaratory relief. See also *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1040 (D.C. Cir. 1981) (“The standard for finding a justiciable ‘case or controversy’ in a declaratory judgment action is no less demanding than the standard in any other type of action.”); *N. Va. Women's Med. Ctr. v. Balch*, 617 F.2d 1045, 1049 (4th Cir. 1980) (finding no case or controversy for declaratory relief against judges who acquitted criminal defendants of criminal trespass outside abortion clinic on grounds that defendants believed trespass was necessary to save lives and that law permitting abortions was unconstitutional).

234. *Okpalobi*, 244 F.3d at 427.

there is seemingly no one to bring to court in a preenforcement suit. Most disturbingly, a self-enforcing tort law is likely never to be “enforced” by a private party because its self-enforcing nature could prevent anyone from engaging in the targeted conduct as long as the law is on the books. Causation thus seems to present an insurmountable hurdle to a preenforcement challenge to a tort law.

Yet, to simply hold that privately enforced tort laws categorically *never* meet Article III standing requirements would allow state legislators to cloak unconstitutional regulatory actions in tort garb and thereby insulate such actions from constitutional review. Looking for “causation” by tracing the injury from the challenged statute to potential *future* “enforcement” by tort plaintiffs, where no enforcement is necessary to achieve the constitutional injury, makes little sense.²³⁵

Instead, the injury of self-enforcing tort laws traces back to the legislators that enacted the law. Because no lawsuit or prosecution is needed to “enforce” a self-enforcing tort law, the mere enactment of such legislation is an enforcement action, so to speak.²³⁶ The “enforcement” is embedded in the tort law itself. The officials who enact a self-enforcing tort statute “cause” the injury to the relevant individuals (i.e., the doctors and their patients in *Okpalobi*) simply by their vote.²³⁷ In essence, state legislators have assumed the role of enforcer traditionally left to executive officials by enacting self-enforcing tort laws. Instead of having the structure that current law assumes is standard—three

235. The few other commentators to have addressed self-enforcing tort laws have argued essentially for an exception to the causation element of standing. See Achilles, *supra* note 124, at 874-75 (arguing that *Okpalobi* court should have relaxed standing requirements); Borgmann, *supra* note 167, at 776-80 (reasoning that self-executing tort statutes cause harm when enacted, not just when enforced). Many critics have noted that the Supreme Court has utilized expansive interpretations, or arguably outright manipulation, of elements of standing doctrine to allow federal courts to either address or avoid the merits of constitutional claims. See *supra* note 228 for sources criticizing use of causation element to avoid addressing merits. Therefore, one route to addressing self-enforcing tort laws is to tweak standing doctrine in this context, as the Court has in other contexts. Yet, because Article III standing is a constitutionally based jurisdictional requirement, it is generally difficult to argue for an exception to the rules of standing. Lower federal courts are understandably reluctant to simply create an exception to an established constitutional rule for asserting jurisdiction, which may explain why courts have firmly rejected this approach. On the other hand, courts may be more willing to tweak the common law doctrine of legislative immunity, as discussed in detail *infra* Part IV.B.3.a. Unlike standing, legislative immunity is nonconstitutional and nonjurisdictional—it is an affirmative defense. Furthermore, proposals to create an exception to standing rules do not answer the underlying concern of the courts of opening a floodgate of challenges to state tort laws. If the general duty to uphold or defend state legislation usually assigned to Attorneys General and Governors is sufficient to satisfy standing, then any state law can be challenged by suing those two officials. Courts need some method for limiting judicial review to self-enforcing tort legislation, such as the “effects on a reasonable person” test proposed in this Article.

236. See *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1157 (10th Cir. 2005) (stating that Nova’s requirement of parental consent in all cases “was a response to the enactment of” challenged statute); *Allied Artists Pictures Corp. v. Rhodes*, 473 F. Supp. 560, 571 (S.D. Ohio 1979), *aff’d*, 679 F.2d 656 (6th Cir. 1982) (describing self-enforcing law as where “enforcement arguably commenced against plaintiffs upon its enactment”).

237. See *Okpalobi*, 244 F.3d at 435 (Benavides, J., concurring in part and dissenting in part) (arguing that causation of injury is “directly traceable to the promulgation of [the] Act”).

separate actors engaged in three separate functions of legislation, enforcement, and judicial review—self-enforcing tort statutes bury the enforcement function in legislation and thereby have also evaded judicial review. Filing suit against the state legislators who enact self-enforcing tort laws would solve the causation problem because the injury caused by the statute flows directly from the actions of the legislators. Furthermore, establishing standing to sue the legislators would bring these laws in line with the logic and precedent of *Ex parte Young* by allowing for preenforcement judicial review.

A number of courts have held that suits against individual state legislators for action taken in their legislative capacity are justiciable—meaning that the requirements of standing can be met. In addition, courts have specifically rejected the argument that constitutional challenges to legislative actions by state legislators are nonjusticiable political questions.²³⁸ One court stated that although “the [state] Senators may deem it inappropriate to find themselves as defendants in a federal court, the overriding fact is that the Fourteenth Amendment and § 1983 were intended to radically alter the distribution of power between the federal government and the states.”²³⁹ Accordingly, the court held that “although fully cognizant of the respect due members of a state legislature when they act within the sphere of legitimate state interests, we reject the Senators’ arguments that . . . claims against them are not justiciable.”²⁴⁰

Critics of this position might argue that allowing a challenge to a privately enforced tort statute against state legislators to test the constitutionality of the statute presents the paradigmatic “advisory opinion” and violates the separation of powers principles standing doctrine is designed to protect. The requirement of causation is “a means of ensuring against certain sorts of actions against governmental defendants, actions that raise serious questions of judicial role.”²⁴¹ A number of courts that denied standing to challenge tort laws have pointed out “the very real problem of state officers being named as essentially symbolic defendants” who do not have a real stake in the defense.²⁴² This problem is why the effects test proposed in this Article is crucial. The effects test will ensure that state legislators will only be subject to suit when they enact self-enforcing tort laws and are thereby assuming the executive role as enforcers. Legislators who

238. See, e.g., *Bond v. Floyd*, 385 U.S. 116, 131 (1966) (holding that Court had jurisdiction to review whether Georgia House of Representatives deprived one of its members of his constitutional rights); *Larsen v. Senate of the Commonwealth of Pa.*, 152 F.3d 240, 246-47 (3d Cir. 1998) (holding that political question doctrine is concerned with separation of powers and does not apply to federal judicial review of *state* legislative action); *Parker v. Merlino*, 646 F.2d 848, 852 (3d Cir. 1981) (holding that group of New Jersey state Senators could file § 1983 claim against other state Senators); *Davids v. Akers*, 549 F.2d 120, 123 (9th Cir. 1977) (determining that, although idea of federal court meddling in internal affairs of state legislature is “startlingly unattractive,” constitutional claims against Speaker of Arizona House of Representatives are justiciable as there are no separation of powers concerns).

239. *Larsen*, 152 F.3d at 248.

240. *Id.*

241. Sunstein, *supra* note 227, at 1459.

242. *NAACP v. California*, 511 F. Supp. 1244, 1256 (E.D. Cal. 1981).

vote for such a law have a strong stake in defending its constitutionality—probably the strongest stake. When the effect of a tort law is to prevent a reasonable person from engaging in constitutionally protected conduct, legislators should be subject to suit. Allowing for judicial review of self-enforcing tort legislation is the only way to ensure that state legislators do not punish constitutional rights with impunity.²⁴³

243. If we are to focus on “enforcement” as the key issue for purposes of standing, there is arguably official enforcement of a tort statute at some point—that is through the state courts. Even the *Okpalobi* panel opinion noted:

Act 825, on its face, does not direct the State or its officers to do anything. Rather, the Act envisions private law suits brought by abortion patients against abortion providers in state courts, leaving the judicial branch of the state government with the most direct involvement in enforcing the Act. Therefore, one argument goes, the plaintiffs’ quarrel is with Louisiana courts rather than the Governor.

Okpalobi v. Foster, 190 F.3d 337, 346 (5th Cir. 1999), *rev’d en banc*, 244 F.3d 405 (5th Cir. 2001). This suggests the possibility that, to solve the dilemma caused by the “causation” element of standing, plaintiffs could name state court judges or court clerks who enter judicial orders as defendants in a suit for prospective relief against a self-enforcing tort statute. Lawsuits for prospective relief against judges have been allowed to proceed only when judges are sued in their administrative or enforcement capacity, however. *See Listenbee ex rel. Brandon E. v. Reynolds*, 201 F.3d 194, 199 (3d Cir. 2000) (denying relief because plaintiffs sued judges, “who are neutral adjudicators and not enforcers or administrators”). The reason is not because of judicial immunity, but because of standing. Although judges are not entitled to official immunity from suits for declaratory relief, *see Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984); *Reynolds*, 201 F.3d at 198, courts have found nonadministrative cases against judges to be nonjusticiable because of lack of standing or barred by the Eleventh Amendment. There are no courts that have allowed a challenge to a state statute to proceed against a state court judge on the ground that the judge, simply by adjudicating a case pursuant to that law at some future point, will “enforce” the law and thereby “cause” injury. The argument is that the judges are not the cause of plaintiff’s injury under the statute simply by being the neutral adjudicator of a potential lawsuit by a private party. *See, e.g., Reynolds*, 201 F.3d at 199 (holding that declaratory relief against judges still permitted but judges were not proper defendants because they were neutral adjudicators and not enforcers or administrators); *Shalaby v. Freedman*, No. C 03-03358 CRB, 2003 WL 22416492, at *4 (N.D. Cal. Oct. 21, 2003) (“It is thus unsurprising that Shalaby has not cited a single case, and the Court has not located any, in which a plaintiff challenging a civil statute enforced by private litigants was able to avoid the Eleventh Amendment bar by suing the judges of a state.”); *Falwell v. City of Lynchburg*, 198 F. Supp. 2d 765, 778 (W.D. Va. 2002) (“This job does not turn the judge into either an ‘enforcer’ of the law or a proper party the Plaintiffs could sue after suffering an adverse decision. Under this logic, any Plaintiff who lost any case in any circuit court of the Commonwealth or was burdened by any particular law in the Virginia code, could sue the circuit judge in the plaintiff’s jurisdiction.”).

Similarly, court clerks or other judicial personnel are not “enforcers” of a state tort law and thereby the cause of a plaintiff’s injury simply by entering court orders as issued by the judge. Causation is a difficult hurdle in a suit against court personnel challenging a state statute primarily because the chain of causation is too attenuated. A judge would not “enforce” the challenged tort statute unless an independent third party actually filed suit under the law. A third party’s independent actions can break the chain of causation for standing purposes. *See Ass’n for Children for Enforcement of Support, Inc. v. Conger*, 899 F.2d 1164, 1166 (11th Cir. 1990) (holding that plaintiff, who had been told by attorney for one party to child support hearing that she could not attend hearing, lacked standing to sue state court judge for determination of her right to attend: “the injury resulted not from Judge Conger’s conduct, but from the conduct of an independent third party”). For example, the Fifth Circuit held that a class of chancery judges and court clerks lacked a sufficient personal stake to meet standing in a case challenging the constitutionality of involuntary civil

2. The Principle of *Ex parte Young*

Ex parte Young's connection requirement mimics the causation element of Article III standing. Both look for the state official who will enforce the challenged state law, although for different reasons. Standing looks to enforcement through the element of causation to protect separation of powers by ensuring a concrete controversy between the plaintiff and defendant. *Ex parte Young* looks at enforcement through the requirement of "some connection" out of concern for federalism principles (i.e., encroachment on state prerogatives); arguably, if any state official can be named in a suit, the "fictional" line that *Ex parte Young* draws dissolves entirely.²⁴⁴ Because the two inquiries are overlapping, suing state legislators for enacting self-enforcing tort laws would also resolve the "connection" requirement of *Ex parte Young* under the same theory, i.e., that state legislators are acting as enforcers of such laws.

This is not to suggest, however, that the courts that have relied on *Ex parte Young* to bar preenforcement review of self-enforcing tort laws have been correct in their analysis. This Part critiques courts' reliance on *Ex parte Young* to reject review of self-enforcing tort laws and argues that the principles animating *Ex parte Young* support allowing suit against the individual legislators who enact a self-enforcing tort law. *Ex parte Young* sets a precedent for what courts should be doing in the context of self-enforcing tort laws—ensuring judicial review in order to protect constitutional rights.

The reasoning behind *Ex Parte Young* provides key support for federal judicial review of self-enforcing tort laws. Although *Ex parte Young* went out of its way to make clear that the Eleventh Amendment was not being sacrificed for the sake of the Fourteenth Amendment, practically speaking *Ex parte Young* effected a substantial limitation on state immunity from lawsuits challenging

commitment proceedings administered by them. *Chancery Clerk v. Wallace*, 646 F.2d 151, 159-60 (5th Cir. 1981). The court did, however, grant leave to substitute as defendants state officials with executive responsibility for defending the challenged procedures. *Id.*; see also *Grant v. Johnson*, 15 F.3d 146, 148 (9th Cir. 1994) (finding standing question uncertain and instead relying on implied limitation in § 1983, stating that § 1983 does not "encompass suits against state judges acting in their adjudicative capacity" because judge "has no stake in upholding statute: he is not the plaintiff's adversary").

The problems raised by a suit against state court judges to challenge a tort statute are analogous to the problems with *Shelley v. Kraemer*, 334 U.S. 1 (1948), which held that court enforcement of racially restrictive covenants violated equal protection. *Id.* at 20. *Shelley* has long been criticized because, under its reasoning, ultimately any private action would have to comport with constitutional requirements. Private rights only have meaning if, eventually, they can be enforced in court. Arguably, if court enforcement of general contract law is "state action," all private arrangements are essentially subject to the Federal Constitution, thereby eviscerating the "state action" requirement. Although the Supreme Court has never overruled *Shelley*, it has rarely relied on it to find state action. See, e.g., *Evans v. Abney*, 396 U.S. 435, 445-46 (1970) (finding no state action when park was returned to private ownership because original grantor had willed park for whites only, with right of reversion if provision not followed).

244. See *Ex parte Young*, 209 U.S. 123, 157 (1908) ("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." (emphasis added)).

violations of federal law.²⁴⁵ In permitting suits against state officers, *Ex parte Young* emphasized the importance of allowing for a preenforcement federal remedy against state statutes that violate the Constitution. Otherwise, injured parties would have to make a "Hobson's choice" between violating state laws and facing the risk of "enormous penalties" or else submitting to an unconstitutional state law.²⁴⁶ *Ex parte Young* stressed that the doctrine's "fiction" serves to protect the supremacy of federal law.²⁴⁷ This underlying concern for the protection of constitutional rights should animate current interpretation of *Ex parte Young*'s doctrine.

By preventing preenforcement review of self-enforcing tort laws that restrict abortion rights, proponents of such legislation blatantly flout constitutional rights. Doctors and their patients are left to face the "Hobson's choice" of either risking severe penalties for the exercise of constitutional rights while awaiting a lawsuit from an unknown tort plaintiff, or complying with state law directives by abandoning their constitutional rights.²⁴⁸ *Ex parte Young* serves precisely to avoid this dilemma.²⁴⁹ Certainly, "the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States."²⁵⁰ But this is precisely the balance that *Ex parte Young* already strikes, a balance that falls in favor of vindicating constitutional rights through preenforcement judicial review.²⁵¹

245. See *id.* at 150 ("We may assume that each exists in full force, and that we must give to the 11th Amendment all the effect it naturally would have, without cutting it down or rendering its meaning any more narrow than the language, fairly interpreted, would warrant.").

246. *Id.* at 165. The Supreme Court later explained that the state official need not already have taken or even threatened to take action to enforce the challenged law before plaintiffs can file suit pursuant to *Ex parte Young*. *Steffel v. Thompson*, 415 U.S. 452, 460-62 (1974) (holding that *Younger* abstention doctrine, which instructs federal courts not to enjoin pending state prosecutions, does not apply to federal declaratory action brought before state prosecution had commenced, noting that "a refusal on the part of the federal courts to intervene . . . may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity").

247. *Ex parte Young*, 209 U.S. at 144-45. *Ex parte Young* rested in part on the "superior authority of that [Federal] Constitution" in holding that "[t]he state has no power to impart to [its officials] any immunity from responsibility to the supreme authority of the United States." *Id.* at 160.

248. See, e.g., *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) ("When enforcement actions are imminent . . . there is no adequate remedy at law Like the plaintiff in *Young*, then, respondents were faced with a Hobson's choice"); *Okla. Operating Co. v. Love*, 252 U.S. 331, 336-37 (1919) (explaining that without *Ex parte Young* exception only way to challenge state statute would be to violate it and thereby risk suffering penalties).

249. See, e.g., *Okpalobi v. Foster*, 244 F.3d 405, 448 (5th Cir. 2001) (Parker, J., dissenting) (stating that *Ex parte Young* stands for principle "of permitting preenforcement officer suits to vindicate federal rights and hold state officials responsible to the supreme authority of the United States" (internal quotation marks and citations omitted)), *rev'd en banc*, 244 F.3d 405 (5th Cir. 2001).

250. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984); see also *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 270 (1997) ("Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts . . .").

251. See *TRIBE*, *supra* note 58, at 566 ("That *Young* represents a balance of federal and state interests does not mean the doctrine's application should be balanced against other factors in any given case. Instead, *Young*'s rule recognizing federal judicial power in suits against state officers to

Thus, the *Okpalobi* plurality and other courts that have unduly narrowed *Ex parte Young* to bar challenges to unconstitutional self-enforcing tort statutes make a serious error. The holding in *Okpalobi* removes any incentives for state legislatures to uphold federal law by removing the threat of judicial review. The “fiction” created by *Ex parte Young* is precisely that—a fiction that suing the state official involved in enforcement of the statute is not a suit against the state itself. As Professor Monaghan has noted: “Everyone now recognizes that nothing but a fiction is involved [in *Ex parte Young*], one designed, as the Court subsequently recognized, ‘to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States.’”²⁵² The *Okpalobi* plurality deviates from the principles outlined in *Ex parte Young* and elevates form over substance where it acknowledges that the challenged law creates an ongoing injury to constitutional rights but refuses to provide prospective relief against that injury.

Of course, one might argue that the entire area of Eleventh Amendment jurisprudence is an elevation of form over substance.²⁵³ Perhaps the larger question raised here is how does one coherently critique a fiction anyway?²⁵⁴ The best answer would seem to be to look at the purpose behind the fiction. Clearly, the Court felt the need to draw some line in *Ex parte Young* in order to pay lip service to the Eleventh Amendment and federalism concerns. If that line is openly described as “fictional,” there must be some “real” basis on which to determine the extent of that fiction. That underlying basis is the need to make constitutional rights meaningful by ensuring judicial review. When all

enjoin ongoing violations of federal law itself strikes the requisite balance between state and federal interests.” (internal quotations omitted)). *Ex parte Young* also emphasizes the need for a federal court to address federal constitutional questions in a preenforcement challenge. *Ex parte Young*, 209 U.S. at 160; *Coeur d’Alene Tribe*, 521 U.S. at 293. As Professor Richard Fallon has stated:

The case’s doctrinal innovation lay in its authorization of an injunction to prevent a state’s attorney general from initiating a suit in state court, where federal rights at least in theory would have been protected as fully as in federal court. The decision’s plain policy was to permit the vindication of federal rights in federal court, implicitly on the assumption that a federal forum would ensure more effective vindication of federal constitutional claims.

Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1197 (1988) (footnote omitted). Similarly, the Supreme Court has repeatedly held that 42 U.S.C. § 1983 was meant to give federal courts a preeminent role in enforcing constitutional rights. *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 502-03 (1982); *Monroe v. Pape*, 365 U.S. 167, 180 (1961).

252. Henry Paul Monaghan, *The Sovereign Immunity “Exception,”* 110 HARV. L. REV. 102, 127 (1996) (internal quotation marks and footnote omitted). In addition, when placing limits on the *Ex parte Young* doctrine, the Supreme Court has largely focused on the effects of the remedy on a state’s sovereign immunity. Thus, *Ex parte Young* cannot be used to expose states to retroactive monetary relief or to quiet title to submerged lands. *Coeur d’Alene Tribe*, 521 U.S. at 165; *Edelman v. Jordan*, 415 U.S. 651, 651 (1974). In contrast, the injunctive and declaratory relief requested by the plaintiffs in *Okpalobi* and other similar cases is precisely the type of remedy envisioned by *Ex parte Young*.

253. See David P. Currie, *Ex Parte Young After Seminole Tribe*, 72 N.Y.U. L. REV. 547, 548 (1998) (arguing that *Ex parte Young* contravenes Hans’s interpretation of the Eleventh Amendment for “[o]ne does not go to the trouble of amending the Constitution in order to alter the caption on the complaint”).

254. I thank Susan Frelich Appleton for raising this point.

acknowledge that the starting point is a fiction, it seems absurd to elevate the technicalities of the fiction over the principles on which the fiction was decided in the first place. Courts that have relied on *Ex parte Young*'s connection requirement to prevent preenforcement review of self-enforcing tort laws have simply ignored the purpose behind *Ex parte Young*'s fiction. Rejecting a strict reading of the Eleventh Amendment, *Ex parte Young* held that courts must assert the power of judicial review when it is the only way to protect constitutional rights. *Ex parte Young* can and should be read more broadly to allow for preenforcement review of self-enforcing tort statutes to protect constitutional rights.

Despite the Supreme Court's recent expansions of state sovereign immunity under the Eleventh Amendment, the Court has not retrenched with respect to the availability of *Ex parte Young* suits against individual state officers.²⁵⁵ To the contrary, *Ex parte Young* remains a vital doctrine.²⁵⁶ The Supreme Court has

255. The Court recently reaffirmed the holding in *Ex parte Young* in *Verizon Maryland Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002). There the Court held that the Eleventh Amendment presents no bar to suits against state officials as long as there is an allegation of a violation of federal law. *Id.* at 645. Justice Scalia, writing for a unanimous Court, declared: "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Id.* (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring)). The Supreme Court's affirmation of *Ex parte Young* in *Verizon Maryland* strongly suggests that any narrowing of the *Ex parte Young* doctrine is not imminent.

Several scholars have noted that rapid changes in Eleventh Amendment law have not affected the availability of the *Ex parte Young* remedy. See Wayne L. Baker, *Seminole Speaks to Sovereign Immunity and Ex parte Young*, 71 ST. JOHN'S L. REV. 739, 766 (1997) (concluding that *Seminole Tribe* has not changed the applicability of *Ex parte Young*); Monaghan, *supra* note 252, at 103 ("[L]ittle has changed after the *Seminole Tribe* decision because the rule of *Ex parte Young* remains in full force. . . . In that sense, sovereign immunity has become a rare exception to the otherwise prevailing system of state governmental accountability in federal court for violations of federal law, an exception many, including this author, find difficult to justify."). One commentator goes so far as to state, "My message is one of calm placidity: Not to worry; *Ex parte Young* is alive and well and living in the Supreme Court." Currie, *supra* note 253, at 547.

256. Although two Rehnquist Court cases created narrow exceptions to the *Ex parte Young* doctrine, the Court upheld *Ex parte Young*'s basic principle in both cases. First, in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1990), the Court held that the *Ex parte Young* doctrine does not apply to federal statutory rights "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right." *Id.* at 74. Thus, the Court inferred congressional intent to displace *Ex parte Young* as the remedy for violation of federal law. *Seminole Tribe* has no effect on the availability of *Ex parte Young* to remedy violations of constitutional rights because it only addresses statutory remedies, which can be altered by Congress. See Baker, *supra* note 255, at 766 ("[U]nlike the Court's Eleventh Amendment analysis, the opinion does little to change the applicability of *Ex parte Young*, and Congress can easily empower future legislation by creating a private right of action against state officials, notwithstanding a limited remedial scheme."); Currie, *supra* note 253, at 550 (arguing that *Seminole Tribe* will have no effect on vindication of constitutional rights pursuant to *Ex parte Young*); Monaghan, *supra* note 252, at 132 ("*Seminole Tribe* does not disturb the doctrine of *Young*"). Furthermore, *Seminole Tribe* has been interpreted narrowly. See, e.g., *Verizon Maryland*, 535 U.S. at 647 (holding that existence of statutory scheme did not foreclose *Ex parte Young* remedy); *Ellis v. Univ. of Kan. Med. Ctr.*, 163 F.3d 1186, 1197 (10th Cir. 1998) (holding that *Seminole Tribe* does not bar claims under 42 U.S.C. §§ 1983 and 1985).

continued to reiterate that the principle underlying *Ex parte Young* is fundamental to the concept of federalism embodied in the Constitution. In fact, the Court has emphasized the importance of *Ex parte Young* as an alternative to suits against the state to remedy state violations of federal rights.²⁵⁷ A number of scholars have argued that the Supreme Court's recent expansive Eleventh Amendment jurisprudence is more rhetorical than real, due to the availability of the *Ex parte Young* remedy.²⁵⁸ Of course, the Court's expansion of Eleventh Amendment immunity also means that there will be increased pressure on *Ex*

Second, in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), the Court carved out a special exception to *Ex parte Young* for suits to quiet title to submerged lands. CHEMERINSKY, *supra* note 125, at 436; see also *Elephant Butte Irrigation Dist. of N.M. v. Dep't of the Interior*, 160 F.3d 602, 611-13 (10th Cir. 1998) (holding that *Coeur d'Alene Tribe* represents "the extreme and unusual case" in which traditional *Ex parte Young* analysis does not apply). Although it created a new, narrow exception to *Ex parte Young* in the *Coeur d'Alene Tribe* case, the Court also reaffirmed the validity of the *Ex parte Young* doctrine, and in particular the vital purpose of *Ex parte Young* in effectuating the Supremacy Clause. As Justice O'Connor stated in her concurrence in *Coeur d'Alene Tribe*: "We have frequently acknowledged the importance of having federal courts open to enforce and interpret federal rights. . . . There is no need to call into question the importance of having federal courts interpret federal rights—particularly as a means of serving a federal interest in uniformity" 521 U.S. at 293 (O'Connor, J., concurring). Furthermore, the majority emphasized that the Court "do[es] not, then, question the continuing validity of the *Ex parte Young* doctrine." *Id.* at 269 (majority opinion). Thus, the Supreme Court's *Ex parte Young* test remained "a straightforward inquiry into whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Id.* at 296 (O'Connor, J., concurring). In *Coeur d'Alene Tribe*, Justice Kennedy proposed an extreme narrowing of *Ex parte Young*, but only Chief Justice Rehnquist joined Justice Kennedy's opinion with regard to adopting a "case-by-case approach to the *Young* doctrine." *Id.* at 280 (Kennedy, J., concurring). Justice Kennedy argued that "[n]either in theory nor in practice has it been shown problematic to have federal claims resolved in state courts." *Id.* at 274-75. Justice O'Connor, joined by Justice Scalia and Justice Thomas, explicitly rejected this analysis, stating that "[t]his approach unnecessarily recharacterizes and narrows much of our *Young* jurisprudence." *Coeur d'Alene Tribe*, 521 U.S. at 291 (O'Connor, J., concurring). The four dissenters also rejected Justice Kennedy's approach to *Ex parte Young* but recognized that Justice O'Connor's concurrence was controlling because it rests on narrower grounds. *Id.* at 298 (Souter, J., dissenting).

257. See *Coeur d'Alene Tribe*, 521 U.S. at 269 (majority opinion) ("We do not . . . question the continuing validity of the *Ex parte Young* doctrine."); *Green v. Mansour*, 474 U.S. 64, 68 (1985) ("Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law."); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) ("[T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" (quoting *Ex parte Young*, 209 U.S. at 160)).

258. See, e.g., John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 49 (1998) ("In almost every case where action against a state is barred by the Eleventh Amendment, suit against a state officer is permitted under Section 1983."); Monaghan, *supra* note 252, at 103 ("[L]ittle has changed after the *Seminole Tribe* decision because the rule of *Ex parte Young* remains in full force."); Carlos Manuel Vazquez, *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1790 (1997) ("I conclude that as long as the Constitution continues to be interpreted to authorize private suits against state officers who violate federal law, an interpretation of the Constitution as barring private damage actions against the states themselves does not raise severe rule-of-law problems."). But see Hartley, *supra* note 56, at 399-402 (arguing that individual and official capacity suits against state officers pursuant to *Ex parte Young* are insufficient remedy because of doctrine of qualified immunity and that *Ex parte Young* does not close enforcement gap created by Court's Eleventh Amendment jurisprudence).

parte Young as the only avenue to vindicate federal rights.²⁵⁹ Thus, it is more important than ever that *Ex parte Young* be interpreted broadly, because in many cases, it is the only available mechanism for subjecting state laws to federal constitutional scrutiny.

The doctrinal confusion generated by *Ex parte Young*'s "some connection" requirement is due to the Supreme Court's failure to clarify two prior, conflicting cases. *Ex parte Young* relied heavily on a prior case, *Smyth v. Ames*,²⁶⁰ which similarly held that a suit against individual state officers for the purpose of preventing them, as officers of the state, from enforcing an unconstitutional enactment was not a suit against a state within the meaning of the Eleventh Amendment.²⁶¹ *Ex parte Young* explained that there was no special provision in the statute at issue in *Smyth* imposing an enforcement duty on the Attorney General, yet there the Court held that the Attorney General's broad powers under state law were sufficient authority to enforce such laws and were therefore a sufficient enforcement "connection."²⁶²

The defendant in *Ex parte Young* objected that a Supreme Court decision subsequent to *Smyth*, *Fitts v. McGhee*,²⁶³ limited this principle.²⁶⁴ *Fitts* held that in the absence of any "special relation" to the challenged statute on the part of the defendant state official, the Eleventh Amendment bar could not be avoided.²⁶⁵ The Supreme Court in *Ex parte Young* specifically rejected the "special relation" requirement of *Fitts*, however.²⁶⁶ But rather than simply overruling *Fitts*, the Supreme Court limited its holding on two grounds. First, the Court soundly rejected *Fitts*'s notion that a plaintiff should be content with the option of first violating an unconstitutional state statute and then defending

259. Hartley, *supra* note 56, at 382-83.

260. 169 U.S. 466 (1898).

261. *Smyth*, 169 U.S. at 518-19.

262. *Okpalobi v. Foster*, 190 F.3d 337, 344 (5th Cir. 1999) (citing *Ex parte Young*, 209 U.S. at 154).

263. 172 U.S. 516 (1899).

264. *Ex parte Young*, 209 U.S. at 156.

265. *Fitts*, 172 U.S. at 529-30. In *Fitts*, the Alabama legislature fixed the rate of tolls to be charged for crossing a certain bridge. *Id.* at 516. As a remedy for violation of the toll rate, the statute authorized any person who paid a higher rate than the statutorily authorized toll to seek twenty dollars in penalties. *Id.* The Supreme Court held that the Eleventh Amendment barred federal court review of the statute. *Id.* at 532-33. The Court emphasized that the state officials in question "were not expressly directed to see to [the statute's] enforcement." *Id.* at 530. Thus, the Court held that the suit was in fact a suit against the state. *Fitts*, 172 U.S. at 530. The Court stated that to argue otherwise would allow "the constitutionality of every act passed by the legislature [to] be tested by a suit against the governor and the attorney general." *Id.*

266. *Ex parte Young*, 209 U.S. at 156-57. The Court attempted to distinguish *Fitts*, noting that "[n]o officer of the State had any official connection with the recovery of [any] penalties." *Id.* at 156. Since the statute in *Fitts* did not limit persons who could seek the twenty dollar penalty to private persons, however, arguably, the Attorney General or Governor could have sought the penalty pursuant to "general duties" under state law. *See id.* at 158 (recognizing that the *Fitts* requirement of an officer being "specially charged" with enforcement is met where officer has general duty to enforce all laws of state).

herself in state court, at least where serious harm can occur in the interim.²⁶⁷ Second, the Court rejected the notion that the state official must be “specially charged” with a duty to enforce the challenged statute.²⁶⁸ Instead, the Court held that the defendant state official need merely have “some connection,” based on state law generally, with the future enforcement or recovery of penalties under the challenged statute.²⁶⁹ Although in *Ex parte Young* the Court departed from *Fitts*’s “close connection” or “special relation” requirement, it neither explicitly overruled *Fitts* nor specified what “some connection” means.²⁷⁰ Depending on how one reads the *Ex parte Young–Smyth–Fitts* trilogy, courts have more or less flexibility in finding a state defendant with “some connection” to a challenged state law in order to ensure the vindication of constitutional rights. This tension between *Ex parte Young*, *Smyth*, and *Fitts* with respect to the precise scope of the “connection” requirement has led to much confusion among lower courts as to the limits of *Ex parte Young*.²⁷¹ Although some courts have held that, in certain circumstances, a general duty of the Attorney General or Governor under state law to uphold and defend state legislation is sufficient to allow suit under *Ex parte Young*,²⁷² other courts reject this approach entirely.²⁷³ Still, in

267. *Id.* at 163-65.

268. *Id.* at 157-58.

269. *Ex parte Young*, 209 U.S. at 157-58.

270. See *City of Altus v. Carr*, 255 F. Supp. 828, 834-35 (W.D. Tex. 1966) (attempting to explain relationship between *Ex parte Young* and *Fitts*); Monaghan, *supra* note 252, at 126 n.165 (noting that *Ex parte Young* did not create doctrine of suits against state officials but “simply reconciled, or rationalized, the Court’s prior precedents”).

271. As one court phrased the issue:

Courts have had considerable difficulty in coming to terms with this [“connection” requirement] in cases where the requisite connection with enforcement allegedly arises by virtue of general enforcement obligations attendant to particular state offices. This difficulty is due in no small part to the Supreme Court’s opinion in *Ex parte Young*. . . .

....

This uncertainty is aggravated by the Supreme Court’s discussion in *Ex parte Young* of *Smyth v. Ames* . . . and *Fitts v. McGhee*

NAACP v. California, 511 F. Supp. 1244, 1251-52 (E.D. Cal. 1981) (citations omitted). In his dissent in *Ex parte Young*, Justice Harlan noted that *Fitts* “is not overruled, but is, I fear, frittered away or put out of sight by [the *Ex parte Young* majority’s] unwarranted distinctions.” *Ex parte Young*, 209 U.S. at 193 (Harlan, J., dissenting).

272. See, e.g., *Luckey v. Harris*, 860 F.2d 1012, 1015-16 (11th Cir. 1988) (holding that, in civil rights action seeking constitutionally sufficient indigent defense services, the Governor has sufficient contacts with alleged unlawful statute because he is generally responsible for law enforcement); *Rode v. Dellarciprete*, 845 F.2d 1195, 1208 (3d Cir. 1988) (permitting case to proceed against defendant whose sole connection to challenged statute was general authority to uphold law, provided there was “real, not ephemeral, likelihood or realistic potential that the connection will be employed against the plaintiff’s interests” (quoting *Allied Artists Pictures Corp. v. Rhodes*, 473 F. Supp. 560, 568 (S.D. Ohio 1979))); *Allied Artists*, 473 F. Supp. at 566, 570 (allowing suit based on Governor’s general duty to uphold state legislation where tort statute was “self-enforcing”), *aff’d*, 679 F.2d 656 (6th Cir. 1982); *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984, 988 n.7 (S.D.N.Y. 1970) (allowing suit against Governor based on general obligation to take care that state laws are faithfully executed in challenge to state election laws); cf. *Papasan v. Allain*, 478 U.S. 265, 282 & n.14 (1986) (holding that Secretary of State was responsible for “general supervision” of local school officials and could be enjoined under

many of the cases in which courts have held that the *Ex parte Young* doctrine does not apply because of an insufficient enforcement connection between the named defendants and the challenged statute, the plaintiffs had merely named the "wrong" state officials as defendants. The case could still move forward for preenforcement review merely by naming as a defendant the official with the proper "connection" as determined by the court.²⁷⁴ In contrast, *Okpalobi* and other courts leave no avenue for judicial review of an unconstitutional self-enforcing tort law. *Ex parte Young* should not be interpreted to allow for this result when the very purpose of its fiction is to ensure judicial review.

One additional point with respect to *Ex parte Young* merits consideration here. This proposal to sue individual legislators will likely raise a concern about what type of prospective relief the parties injured by a self-enforcing tort law could request. Pursuant to *Ex parte Young*, the parties challenging a self-enforcing tort law would arguably have standing to request both injunctive and declaratory relief. In the case of a self-enforcing tort law, however, there is no "enforcement" action to enjoin through a court order. In theory, the injured parties could request injunctive relief ordering the repeal of the challenged tort statute. Such a drastic request for relief seems both unlikely to succeed and unnecessary, however. Because plaintiffs are barred from suing the legislature as an entity by the Eleventh Amendment, a court could not order the legislature as a whole to repeal the law (in contrast to cases in which courts have issued injunctions to enact or repeal laws to local government bodies that are not

Ex parte Young in suit challenging distribution of funds from school lands); *Mobil Oil Corp. v. Attorney Gen.*, 940 F.2d 73, 76-77 (4th Cir. 1991) (holding that case or controversy existed even if statute was mainly intended to be enforced by private lawsuits because Attorney General had right to intervene).

273. See, e.g., *1st Westco Corp. v. Sch. Dist. of Phila.*, 6 F.3d 108, 113 (3d Cir. 1993) ("General authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law."); *Shell Oil Co. v. Noel*, 608 F.2d 208, 211-12 (1st Cir. 1979) ("The mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute. . . . [I]t has been held that in an action attacking the constitutionality of a statute a governor or an attorney general has not a sufficiently intimate connection with the statute to be a proper defendant if all that is shown is that the statute in question determines the right of one private person to recover from another . . .").

274. See, e.g., *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 847 (9th Cir. 2002) (holding that suit could not proceed against the Governor but could proceed against other state officials with more direct enforcement connection); *Snoeck v. Brussa*, 153 F.3d 984, 987-88 (9th Cir. 1998) (holding that suit against judicial commission was barred by Eleventh Amendment where plaintiffs filed suit alleging that requirement of confidentiality in commission rules violated their First Amendment rights; plaintiffs must file suit against state supreme court, which enforces rules). Compare *Muskraat v. United States*, 219 U.S. 346, 361-63 (1911) (finding no case or controversy exists in preenforcement challenge to federal statute), with *Gritts v. Fisher*, 224 U.S. 640, 641 (1912) (allowing challenge to same federal statute where Secretaries of Interior and Treasury were named as defendants); *Lytle v. Griffith*, 240 F.3d 404, 410 (4th Cir. 2001) (questioning whether Governor is proper defendant), with *Lytle v. Doyle*, 326 F.3d 463, 468 (4th Cir. 2003) (allowing same suit against different state officials), and *1st Westco Corp.*, 6 F.3d at 113 (holding that proper state defendant is school district, not commonwealth officials), and *Sweat v. Hull*, 200 F. Supp. 2d 1162, 1172-75 (D. Ariz. 2001) (holding that suit could not proceed against Governor due to insufficient connection but suit could proceed against other state officials).

protected by Eleventh Amendment immunity²⁷⁵). Ordering individual legislators to vote to repeal the challenged statute is arguably an ineffective solution,²⁷⁶ and in any case seems more invasive of state legislative prerogatives than is necessary.²⁷⁷ A declaratory judgment declaring the challenged tort statute unconstitutional would provide sufficient redressability, with minimal intrusion into the state legislative process.²⁷⁸ No affirmative conduct would be required of the state legislators, and the injured parties would be sufficiently assured against liability under the self-enforcing tort statute by a declaratory judgment stating that such a law was unconstitutional.

In sum, the reasoning behind *Ex parte Young* provides further support for the argument that there *ought* to be someone to sue when faced with a self-enforcing tort law. Standing doctrine requires that suit to be against the state officials who enacted the self-enforcing tort legislation.

3. Legislative Immunity No Bar to Suit

Since suing individual state legislators in a challenge to self-enforcing tort legislation would address the strictures of standing requirements, as well as fulfill *Ex parte Young*'s underlying goal of protecting constitutional rights through judicial review, the only remaining hurdle is one not yet addressed by courts or commentators—legislative immunity. Legislative immunity is a doctrine of federal common law that may be raised as an affirmative defense by individual state legislators and, in some instances, by governors or other executive officials engaged in legislative acts.

This section argues that, in the case of self-enforcing tort laws, legislative immunity should not apply to any of these state officials. Allowing state legislators to raise the defense of legislative immunity against challenges to self-enforcing tort laws would completely immunize these laws from judicial review, even when they violate constitutional rights. Not only would such immunity

275. Cf. *Spallone v. United States*, 493 U.S. 265, 279-80 (1990) (holding that court could order city council to enact ordinance pursuant to consent decree because Eleventh Amendment does not bar suit against local government entity).

276. *Scott v. Taylor*, 405 F.3d 1251, 1259 (11th Cir. 2005) (Jordan, J., concurring) (arguing that plaintiff could not obtain injunctive relief against legislators for allegedly unconstitutional law because "even an extraordinary decree ordering the legislators to vote to repeal or amend Act 401 would be ineffective, for the [individual] legislators, by themselves, are powerless to pass laws").

277. See *Larsen v. Senate of the Commonwealth of Pa.*, 152 F.2d 240, 254 (3d Cir. 1998) (rejecting request for injunctive relief against state Senators because: "Larsen seeks reinstatement—nothing less than that the individual Senators rescind their guilty vote on his impeachment. It is difficult to imagine a remedy that would more directly interfere with the role assigned exclusively to the Senators by the Pennsylvania Constitution."); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz & Principle?*, 111 HARV. L. REV. 2180, 2251-52 (1998) (arguing that compelling legislators to vote is more troubling than compelling judicial or executive actors to follow outside mandates and analogizing compelled voting to compelled speech).

278. Cf. *Colo. Common Cause v. Bledsoe*, 810 P.2d 201, 211-12 (Co. 1991) (holding that, under state constitution's speech-or-debate clause, which is analogous to federal law, declaratory relief against unconstitutional legislative action would be permitted even though injunctive relief would not be permitted).

contradict the fundamental principle animating *Ex parte Young*, but it would also contradict the purposes of legislative immunity. The doctrine of legislative immunity relies on an understanding that unconstitutional legislative action can be captured at the enforcement end. It does not protect legislators from suit when they are acting like executive officers in an enforcement capacity. Because legislators are asserting executive enforcement powers when they enact self-enforcing tort laws, legislative immunity should not apply.

a. State Legislators

Legislative immunity protects government officials from lawsuits challenging "legislative" actions.²⁷⁹ It is an affirmative defense that may be waived. If individual legislators or other officials do not raise the defense, the case would be justiciable.²⁸⁰ As described above, a number of cases against individual legislators have proceeded to judgment where the defense of legislative immunity was not raised.²⁸¹ Obviously, however, it is quite likely that state legislators who wish to immunize a self-enforcing tort statute from legal challenge would raise this defense.

The legislative immunity afforded to individual members of the U.S. Congress derives from the Speech or Debate Clause of the United States Constitution.²⁸² State legislators are not entitled to immunity based on the constitutional protection provided in Article I, § 6.²⁸³ Nevertheless, the Supreme Court has developed a common law doctrine of legislative immunity for state, regional, and local legislators against suits brought pursuant to 42 U.S.C. § 1983 similar to federal constitutionally based legislative immunity. The Civil Rights Act of 1871,²⁸⁴ which established § 1983, is the statutory mechanism that expressly allows suits against state officials for violations of federal law—it essentially codifies *Ex parte Young*. Although absolute legislative immunity

279. The courts have struggled to define what counts as "legislative" actions, as described *infra* notes 311-12, 321-27, and accompanying text.

280. See *supra* Part IV.B.1 for a discussion of standing to sue individual state legislators. See, e.g., *Larsen*, 152 F.2d at 248, 252 (rejecting argument that suit against state Senators was nonjusticiable political question but going on to find absolute legislative immunity applied).

281. See *Bond v. Floyd*, 385 U.S. 116, 131 (1966) (holding that Court had jurisdiction to review whether Georgia House of Representatives deprived one of its members of his constitutional rights; defense of legislative immunity not raised); *Parker v. Merlino*, 646 F.2d 848, 852 (3d Cir. 1981) (holding that group of New Jersey state Senators could file § 1983 claim against other state Senators; again, defense of legislative immunity was not raised on appeal); *Dauids v. Akers*, 549 F.2d 120, 123 (9th Cir. 1977) (holding that constitutional claims against state Senators are justiciable as there are no separation of powers concerns; Senators apparently did not raise defense of legislative immunity).

282. U.S. CONST. art. I, § 6, cl. 1 ("[F]or any speech or debate in either House, [Senators and Representatives] shall not be questioned in any other place.").

283. *Cole v. Gray*, 638 F.2d 804, 810 (5th Cir. 1981); *United States v. DiCarlo*, 565 F.2d 802, 805 (1st Cir. 1977); 26A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, *FEDERAL PRACTICE & PROCEDURE: EVIDENCE* § 5675 (1992) ("The refusal to extend speech or debate privilege protection to state legislators could be called a 'retreat' only by someone who could not distinguish between riding an escalator and falling down stairs.").

284. 42 U.S.C. § 1983 (2000).

against § 1983 claims is a creation of federal common law, the Supreme Court has emphasized that it is analogous to the constitutional protection accorded to federal legislators, at least for civil lawsuits.²⁸⁵ It has long been settled that state legislators are entitled to absolute legislative immunity from § 1983 damages liability,²⁸⁶ but more recently the Supreme Court held that legislative immunity extends to suits for prospective relief as well.²⁸⁷ No other officials besides legislative actors have immunity from § 1983 suits for prospective relief.

Over time, the Court has relied on several different rationales for preserving the common law doctrine of legislative immunity in the § 1983 context and for treating legislative actors differently than other state actors in terms of prospective relief. First, in a line of cases discussing absolute legislative immunity for § 1983 lawsuits, the Supreme Court concluded that Congress did not intend § 1983 to abrogate the common law immunity of state legislators when it enacted the statute in 1871. Second, beyond the historical roots of legislative immunity, the Court has also emphasized the importance of protecting the independence of legislators and the democratic process. Third, and probably most importantly, the Court has emphasized the need to shield legislators from the disruption and delay of defending lawsuits.

In early cases in which the Court held that Congress did not abrogate common law state legislative immunity when it enacted § 1983, the Court relied heavily on the historical roots of legislative immunity. In *Tenney v. Brandhove*,²⁸⁸ the first case to hold that state legislative officials are absolutely immune from § 1983 liability for monetary damages, the Court concluded that common law legislative immunity survived the enactment of § 1983, even for claims of constitutional violations.²⁸⁹ *Tenney* emphasized the long tradition at common law of legislative immunity, describing the development of the doctrine in England and its eventual adoption by the Framers.²⁹⁰ Based on its historical analysis, the Court concluded that Congress could not have intended § 1983 to “impinge on a tradition so well grounded in history and reason.”²⁹¹

285. See *Tenney v. Brandhove*, 341 U.S. 367, 373-74 (1951) (explaining that immunity for federal legislators was reflection of immunity enjoyed by most state legislators at framing of Federal Constitution). Supreme Court of Va. v. *Consumers Union of the U.S., Inc.*, 446 U.S. 719, 732-33 (1980) (“We have also recognized that state legislators enjoy common-law immunity from liability for their legislative acts, an immunity that is similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause. . . . Although the separation-of-powers doctrine justifies a broader privilege for Congressmen than for state legislators in criminal actions, *United States v. Gillock*, 445 U.S. 360 (1980), we generally have equated the legislative immunity to which state legislators are entitled under § 1983 to that accorded Congressmen under the Constitution.”).

286. *Tenney*, 341 U.S. at 371-76.

287. See *Consumers Union*, 446 U.S. at 732-33; cf. *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 503 (1975) (holding that Speech or Debate Clause immunizes Congresspersons from suits for either prospective relief or damages).

288. 341 U.S. 367 (1951).

289. *Tenney*, 341 U.S. at 377.

290. *Id.* at 372.

291. *Id.* at 376. In a later case discussing legislative immunity from § 1983 suits, the Court again underscored the long tradition of legislative immunity in the common law: “The immunity of

Because the Court has extended legislative immunity to regional and local legislators who historically did not receive such immunity, the Court has also emphasized other policy rationales behind immunity for individual legislators. In *Bogan v. Scott-Harris*,²⁹² the Court's most recent case on legislative immunity, the Court extended absolute legislative immunity to local legislators.²⁹³ The Court stated that the doctrine of legislative immunity finds support not only in common law tradition, "but also in reason," and therefore the "rationales for according absolute immunity to federal, state, and regional legislators apply with equal force to local legislators."²⁹⁴ The Court opined that legislative immunity serves to protect "the exercise of legislative discretion" and ensures the independence of individual legislators by preventing judicial interference.²⁹⁵ Scholars have also suggested that the purpose of legislative immunity is to prevent the executive from using the judiciary as a weapon to attack the legislative branch and to preserve the separation of powers.²⁹⁶ Nevertheless, the separation of powers rationale does not fully explain why legislative immunity should apply to § 1983 suits by private citizens or to state legislators sued in federal court, where arguably separation of powers concerns do not directly apply since such suits do not involve coequal branches of the same level of government.²⁹⁷

Another rationale the Court has recently relied on more heavily, one that is broader than the separation of powers argument for legislative immunity, is to shield legislators from the inconvenience and disruption that defending a lawsuit can bring. In *Bogan*, the Court particularly emphasized that legislators should

legislators from civil suit for what they do or say as legislators has its roots in the parliamentary struggles of 16th- and 17th-century England; such immunity was consistently recognized in the common law and was taken as a matter of course by our Nation's founders." *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 403 (1979); *see also id.* at 406-07 (Marshall, J., dissenting) ("Underlying the decision in *Tenney* was a recognition of the unique status of the legislative privilege, maintained for several centuries at common law and enshrined in the Federal Constitution, Art. I, § 6, as well as in all but seven of the States' constitutions. Absent evidence of explicit congressional intent, the Court was unwilling to strip state legislators of a protection so long enjoyed when there remained power in the voters to 'discourag[e] or correc[t] abuses by their elected representatives." (alteration in original) (citations omitted)); *Section 1983 and Federalism*, 90 HARV. L. REV. 1190, 1200 (1977) ("The legislative immunity . . . enjoys a unique historical position.").

292. 523 U.S. 44 (1998).

293. *Bogan*, 523 U.S. at 53-54.

294. *Id.* at 52.

295. *Id.*; *see also Gravel v. United States*, 408 U.S. 606, 617 (1972) (stating that legislative immunity, "prevent[s] intimidation of legislators by the Executive and accountability before a possibly hostile judiciary"); *Larsen v. Senate of the Commonwealth of Pa.*, 152 F.3d 240, 250 (3d Cir. 1998) ("As such, [legislative immunity] reinforces the separation of powers that is fundamental to the structure of both the federal and state governments.").

296. Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1146-47 (1973).

297. *Cf.* 26A WRIGHT & GRAHAM, *supra* note 283, § 5675 (stating that separation of powers argument in support of Speech or Debate Clause does not explain "why legislators should be immune from attacks from private citizens or in non-federal fora").

not be inhibited by the "time and energy required to defend against a lawsuit."²⁹⁸ According to the Court, legislative immunity serves not only to protect legislators, but also to serve the public good by preserving legislative resources.²⁹⁹ This last rationale better explains why state and local legislators should be immune from private suits in federal court under § 1983, and why the Court extended legislative immunity to suits for prospective relief where the individual legislator has no personal liability.³⁰⁰

Although for some time it was uncertain whether legislative immunity would extend to § 1983 suits for prospective relief,³⁰¹ in *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*,³⁰² the Court held that legislative immunity also applies to claims for injunctive and declaratory relief.³⁰³ Notably, no other state officials, including judges and prosecutors, have absolute immunity from a suit requesting prospective relief based on § 1983. In *Consumers Union*, however, the Court rejected the argument that prospective relief should be treated differently than damages relief for purposes of legislative immunity. The Court explained that although previous cases upholding legislative immunity under § 1983 only addressed actions for damages, the rationale of preserving legislative resources was equally applicable to § 1983 actions seeking declaratory or injunctive relief.³⁰⁴ In reaching this conclusion, the Court emphasized that "a private civil action, whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy,

298. *Bogan*, 523 U.S. at 52; see also *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975) ("[A] private civil action . . . creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation.").

299. *Bogan*, 523 U.S. at 53 ("Bereft of any historical antecedent to the regional agency, we relied almost exclusively on *Tenney's* description of the purposes of legislative immunity and the importance of such immunity in advancing the 'public good.'"); see also *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 404-05 (1979) (noting that *Tenney* Court found immunity for state legislator not in the Speech or Debate Clause or in any state constitutions or statutes but rather in the need for such immunity in order to protect the public good); *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) ("Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good.").

300. 26A WRIGHT & GRAHAM, *supra* note 283, § 5675 (discussing and critiquing rationales for legislative immunity in context of Speech or Debate Clause).

301. *Compare Jordan v. Hutcheson*, 323 F.2d 597, 604 (4th Cir. 1963) (stating courts do not normally grant "wholly prospective equitable relief against legislative action"), with *Eslinger v. Thomas*, 476 F.2d 225, 230 (4th Cir. 1973) (holding that legislators are not immune from suit for prospective relief).

302. 446 U.S. 719 (1980).

303. *Consumers Union*, 446 U.S. at 732; see also *Scott v. Taylor*, 405 F.3d 1251, 1254 (11th Cir. 2005) (applying *Consumers Union* to deny declaratory and injunctive relief in § 1983 claim against state legislators and election commission); *Larsen v. Senate of the Commonwealth of Pa.*, 152 F.3d 240, 252-53 (3d Cir. 1998) (reading *Consumers Union* as holding absolute legislative immunity applied to prospective equitable relief as well as to action for monetary damages).

304. *Consumers Union*, 446 U.S. at 732. The Court emphasized that "[i]n holding that § 1983 'does not create civil liability' for acts . . . 'in a field where legislators traditionally have power to act,' we did not distinguish between actions for damages and those for prospective relief." *Id.* at 732-33 (quoting *Tenney*, 341 U.S. at 379) (citation omitted).

and attention from their legislative tasks to defend the litigation.”³⁰⁵ Therefore, legislators “should be protected not only from the consequences of litigation’s results but also from the burden of defending themselves.”³⁰⁶

Although legislative immunity thus provides broad protection, it does not necessarily apply to all actions taken by legislators. Another significant aspect of legislative immunity, and of official immunity in general, is that the Supreme Court takes a functional approach to the question of whether immunity applies. A court determines whether an individual state official is entitled to absolute legislative, judicial, or prosecutorial immunity by analyzing the official function performed, rather than by a formalist approach that would look only to the title of the official’s office.³⁰⁷ The Supreme Court has explained:

Running through our cases, with fair consistency, is a “functional” approach to immunity questions other than those that have been decided by express constitutional or statutory enactment. Under that approach, we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions.³⁰⁸

For example, judges have absolute immunity for their judicial functions, but not when they act in an administrative or executive capacity, such as by firing employees.³⁰⁹ Similarly, officials are entitled to absolute legislative immunity only when engaged in legislative functions. This functional approach obviously has led to definitional problems, and the Supreme Court and lower courts have struggled to delimit what counts as a protected legislative function. The Court has generally described protected activity as any conduct that falls within “the sphere of legitimate legislative activity.”³¹⁰

In determining whether challenged acts fall within the sphere of legitimate legislative activity, the Supreme Court has made it clear that legislative immunity applies to legislative acts regardless of the official’s purpose in engaging in the challenged action. The Court has repeatedly stated that courts should not look into a legislator’s motive in calculating whether legislative immunity applies.

305. *Id.* at 733 (quoting *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 503 (1975)).

306. *Id.* at 732 (quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967)).

307. *See Manzi v. DiCarlo*, 982 F. Supp. 125, 128 (E.D.N.Y. 1997) (“The Supreme Court has utilized a functional analysis to determine when immunity is available, in order to insure that immunity is not extended further than its purposes require.”); *TRIBE, supra* note 227, at 1015-20 (noting that Supreme Court’s decisions are guided by “distinction[s] between legislative and political acts,” rather than by category of official performing acts); 26A *WRIGHT & GRAHAM, supra* note 283, § 5675 (noting that Supreme Court’s determination of whether official is entitled to immunity is dependent on whether act in question is performed in legislative context).

308. *Forrester v. White*, 484 U.S. 219, 224 (1988).

309. *See id.* at 220-21 (holding that judge who demoted and dismissed probation officer was not entitled to judicial immunity).

310. *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951); *see also Powell v. Ridge*, 247 F.3d 520, 525 (3d Cir. 2001) (noting without deciding that state legislators may have waived legislative immunity by intervening in suit against executive branch officers and personnel).

"Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it."³¹¹ This is because the "privilege of absolute immunity would be of little value if [legislators] could be subjected to the cost and inconvenience and distraction of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives."³¹²

When faced with the criticism that absolute immunity will lead to abuses and unchecked power of the legislature, the Court has repeatedly responded: "Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses."³¹³ Relying on the will of the voters to recognize and check abuses of individual constitutional rights by state officials is hardly a satisfying scheme, however, and it is directly contrary to the remedy that *Ex parte Young* establishes. Much critique of legislative immunity (and of other immunity doctrines as well) is based on this problem of having a right without a remedy.³¹⁴ Again, no other state official is entitled to absolute immunity against prospective relief.³¹⁵

In practice, however, extending legislative immunity to prospective remedies has had little effect on the protection of constitutional rights, since usually injured parties have no need to obtain declaratory or injunctive relief against the legislators who enact a specific statute. Instead, unconstitutional legislative action is simply captured at the enforcement end. Plaintiffs seeking to enjoin the enforcement of a law they believe is unconstitutional can obtain judicial review by filing suit against the state official who enforces the law.³¹⁶ Unlike legislative officials, executive officials who are charged with enforcement of legislation have no common law immunity from suit for prospective relief.³¹⁷

311. *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998).

312. *Id.* at 54-55 (internal quotation omitted); see also *Tenney*, 341 U.S. at 377 ("The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good.").

313. *Tenney*, 341 U.S. at 378; cf. *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 510-11 (1975) (internal citation omitted) ("Respondents make the familiar argument that the broad protection granted by the Clause creates a potential for abuse. That is correct, and in *Brewster* we noted that the risk of such abuse was 'the conscious choice of the Framers' buttressed and justified by history. Our consistently broad construction of the Speech or Debate Clause rests on the belief that it must be so construed to provide the independence which is its central purpose.").

314. See, e.g., *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 408 (1979) (Marshall, J., dissenting) (arguing that legislative immunity should not be expanded because "[a] doctrine that denies redress for constitutional wrongs should, in my judgment, be narrowly confined to those contexts where history and public policy compel its acceptance"); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90 (1999) (discussing right-remedy gap in constitutional law with focus on availability of money damages versus availability of prospective relief).

315. See *Tenney*, 341 U.S. at 385 (Douglas, J., dissenting) (noting that "[n]o other public official has complete immunity for his actions").

316. And, as described in detail earlier, *Ex parte Young* allows a preenforcement suit to proceed.

317. The rationales for treating legislative actors differently than executive actors are explained *infra*.

A number of commentators have noted that this "substitution of defendants" theory justifies absolute legislative immunity even from prospective relief.³¹⁸ In other words, "the availability of judicial relief against those who carry out the judgments of legislative bodies should be regarded as reconciling the existence of legislative immunity with the rule of law."³¹⁹ The different doctrines of official immunity fit together like pieces of a puzzle, which when viewed in the full picture largely ensures judicial review of allegedly unconstitutional state legislation.³²⁰

For example, in a number of Speech and Debate Clause cases, the Supreme Court held that, although individual legislators are entitled to immunity from suit even for allegedly unconstitutional actions, injured parties could bring suit against the legislators' aides or employees who merely carried out the legislative will. In *Powell v. McCormack*,³²¹ the Court held that members of Congress were entitled to legislative immunity in a suit challenging the refusal by the House to seat a duly elected member.³²² The Court also stated, however, that an action against the House employees who acted pursuant to House orders to exclude the plaintiff would not be barred, and that the decision to exclude plaintiff could thereby be subject to judicial review.³²³ Similarly, in *Kilbourn v. Thompson*,³²⁴ although the Court found that judgment could not be entered against the defendant members of the House, the Court did allow the Sergeant-at-Arms to be held liable for false imprisonment, even though he did nothing more than execute the House Resolution that the plaintiff Kilbourn be imprisoned.³²⁵ In another case, the Court explained its reasoning in *Kilbourn*, observing that the "resolution authorizing Kilbourn's arrest . . . was clearly legislative in nature. But the resolution was subject to judicial review insofar as its execution impinged on a citizen's rights as it did there. That the House could with impunity order an

318. Jeffries, *supra* note 314, at 93 n.22 ("[The] legislator who passes the law may have absolute immunity, but the executive officer who enforces it does not. Usually, the opportunity to sue an enforcement official suffices to establish liability for unconstitutional legislation."); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 400-06 (1987) (arguing that executive accountability is perhaps necessary concomitant to legislative immunity).

319. Jackson, *supra* note 277, 2249-50.

320. This theory underlying absolute legislative immunity—that legislation is captured for judicial review through enforcement officials—works well for obtaining judicial review of legislation, but not as well for preventing abuses that stem from appropriations and investigatory powers of legislation, where there may be no executive involvement in enforcement. See 26A WRIGHT & GRAHAM, *supra* note 283, § 5675 (discussing absolute legislative immunity and stating: "This legislative hegemony may seem more acceptable if one supposes that Congressional abuses will stem from legislation which is subject to veto and judicial review. But these checks and balances do not work well to prevent abuses that stem from the appropriation power or the investigatory power of Congress." (footnotes omitted)); Jeffries, *supra* note 314, at 93 n.22 (stating that even though absolute legislative immunity generally does not bar judicial review because of option to substitute enforcement officials as defendants, there are "some situations in which no alternative remedy exists").

321. 395 U.S. 486 (1969).

322. *Powell*, 395 U.S. at 489, 506.

323. *Id.* at 506.

324. 103 U.S. 168 (1880).

325. *Kilbourn*, 103 U.S. at 201.

unconstitutional arrest afforded no protection for those who made the arrest.”³²⁶ Although there are some instances where the work of legislative aides or employees is so integral to the legislative process that the aide may also be entitled to legislative immunity, for the most part courts have ensured that unconstitutional legislative actions will be subject to judicial review by capturing the actions through the enforcing officials.³²⁷

326. *Gravel v. United States*, 408 U.S. 606, 618 (1972). In several other Speech and Debate Clause cases, the Court has similarly noted that, although legislators were entitled to immunity, the plaintiff could sue an employee of the legislators who would carry out the legislative vote. See *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 516 (1975) (Marshall, J., concurring) (stating that although Speech or Debate Clause barred suit against Senators and their counsel, plaintiffs could seek injunctive relief against functionaries seeking to enforce nonlegislative commands of legislators); *Doe v. McMillan*, 412 U.S. 306, 319-24 (1973) (holding that congressional committee members and their staff involved in investigating and compiling report are immune pursuant to Speech or Debate Clause, but persons who, with authorization from Congress, perform function of disseminating report and thereby infringe on right of privacy are not immune from private suit); *Dombrowski v. Eastland*, 387 U.S. 82, 84-85 (1967) (holding that disputed issues of fact prevented dismissal of suit against Senate subcommittee employee who allegedly conspired to violate plaintiff's Fourth Amendment rights and determining that legislative immunity does not protect such an employee).

327. The Court has noted that legislators should be more highly protected by immunity than legislative aides. For example, in *Tenney v. Brandhove*, the first case to uphold state legislative immunity against § 1983 claims, the Court stated: “It should be noted that this is a case in which the defendants are members of a legislature. Legislative privilege in such a case deserves greater respect than where an official acting on behalf of the legislature is sued or the legislature seeks the affirmative aid of the courts to assert a privilege.” 341 U.S. 367, 378 (1951). On the other hand, courts have permitted legislative aides in some cases to assert absolute legislative immunity. In these cases, the Court has emphasized that the work of such aides was “so critical to the Members’ performance that they must be treated as [the Members’] alter egos.” *Eastland*, 421 U.S. at 507. Thus, lawyers and staff performing investigative work or compiling reports for legislative committees have been protected by legislative immunity. See *Doe*, 412 U.S. at 319-24 (holding that certain staff members of legislative committee were entitled to legislative immunity); *Romero-Barcelo v. Hernandez-Agosto*, 75 F.3d 23, 31-32 (1st Cir. 1996) (holding that legislators and chief counsel for legislators’ committee were absolutely immune from suit); *Green v. DeCamp*, 612 F.2d 368, 371 (8th Cir. 1980) (holding that counsel for state legislative committee was protected from liability by absolute immunity). The Court has distinguished these cases using a functional analysis, describing some actions by legislative aides as “essential to legislating,” but other kinds of actions as simply “nonlegislative” and therefore not protected by immunity. *Gravel*, 408 U.S. at 621. For example, Justice Marshall explained that legislators and their aides are both protected by immunity if “the conduct of the latter would be a protected legislative act if performed by the [legislators themselves]. At the same time, however, the Speech or Debate Clause does not insulate legislative functionaries carrying out nonlegislative tasks.” *Eastland*, 421 U.S. at 516-17 (Marshall, J., concurring) (internal quotation marks and citations omitted). In other words, legislative immunity shields acts by legislative aides that are “an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to consideration and passage or rejection of proposed legislation” but not actions in “executing a legislative order” or “carrying out [legislative] directions.” *Gravel*, 408 U.S. at 620-21, 625; see also *Eastland*, 421 U.S. at 507-08 (rejecting argument that legislative immunity does not apply to subpoenas because subpoenas are routinely used to obtain information used in “legislating”). Unfortunately, the case law is not clear on precisely what types of actions by legislative employees are “essential to legislating” and would be protected by immunity. See *Nat’l Ass’n of Soc. Workers v. Harwood*, 69 F.3d 622, 635, 638 (1st Cir. 1995) (revealing disagreement between majority and dissent on scope of legislative immunity for aides carrying out legislative orders).

In fact, in each of the Supreme Court cases addressing common law legislative immunity for § 1983 suits, plaintiffs at least had the potential to obtain judicial review of the allegedly unconstitutional legislative conduct by substituting another defendant not protected by absolute legislative immunity.³²⁸ In *Tenney*, one Justice noted that the plaintiff could challenge the allegedly unconstitutional legislative committee investigations when the committee attempted to enforce its powers by bringing contempt charges against the plaintiff.³²⁹ In *Bogan* and *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*,³³⁰ where the Court extended legislative immunity to local and regional legislators respectively, the Court noted that although the plaintiffs' suit could not proceed against individual legislators, suit could proceed against the local or regional entity as a whole, since such entities are not entitled to Eleventh Amendment immunity.³³¹

Finally, in *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, the Supreme Court held that the defendant state officials could be sued for prospective relief not in their legislative capacity, but in their capacity as administrators who enforced the challenged rules.³³² The *Consumers Union* case involved a challenge to civil rights attorneys' fees imposed on Virginia state court judges by a district court based on its holding that the state Bar Code's prohibition of advertising by attorneys was unconstitutional. The Supreme Court held that in promulgating the Bar Code's disciplinary rules the defendant judges were acting in a legislative capacity, and therefore, were entitled to absolute legislative immunity for enacting the unconstitutional rule.³³³ Since the judges were also *enforcers* of the Bar Code, however, the Court permitted prospective relief against the judges in their enforcement capacity pursuant to *Ex parte Young*.³³⁴

Similarly, a number of other lower court cases have recognized that even though individual legislators have absolute immunity from challenges to legislative actions, state officials who enforce those actions are available to serve

328. See *Bogan v. Scott-Harris*, 523 U.S. 44, 53 (1998) (noting that plaintiffs could obtain relief for alleged First Amendment violation against local governing board as an entity since local entities are not protected by Eleventh Amendment immunity); *Supreme Court of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 736 (1980) (providing equitable relief against defendants in their capacity as administrators); *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401-02 (1979) (holding that plaintiff could obtain relief against regional agency as entity since it was not protected by Eleventh Amendment immunity); *Tenney*, 341 U.S. at 379-80 (Black, J., concurring) (stating that "there is still much room for challenge to the Committee action" because if and when committee attempted to enforce its power through fine, imprisonment, contempt or other charges, plaintiff could defend on ground that committee's actions were unconstitutional).

329. *Tenney*, 341 U.S. at 379-80.

330. 440 U.S. 391 (1979).

331. *Bogan*, 523 U.S. at 53; *Lake Country Estates*, 440 U.S. at 401-02.

332. 446 U.S. 719, 736 (1980).

333. *Consumers Union*, 446 U.S. at 734.

334. *Id.* at 736-37 ("[W]e believe that the Virginia Court and its chief justice properly were held liable in their enforcement capacities.").

as defendants to ensure judicial review.³³⁵ Those cases in which the allegedly unconstitutional legislative action could not be captured for judicial review at the enforcement end generally have addressed legislative activities other than the enactment of legislation, such as internal appropriations and operations rules.³³⁶ In sum, absolute legislative immunity from § 1983 suits, even for prospective relief, has not immunized allegedly unconstitutional legislation from judicial review—the action is simply captured for judicial review at the enforcement end.³³⁷

As in the standing context, the dilemma with self-enforcing tort statutes is that no separate enforcement action is necessary for the statute to achieve its goal of prohibiting constitutionally protected conduct, and in fact no enforcement action by any private party may ever be brought. There is little to no possibility of capturing a self-enforcing tort statute at the enforcement end.

335. See *Scott v. Taylor*, 405 F.3d 1251, 1256 (11th Cir. 2005) (declaring plaintiff's assertion that absolute legislative immunity will leave her no recourse at all incorrect because she could maintain suit against Board of Elections); *Star Distribs., Ltd. v. Marino*, 613 F.2d 4, 7-8 (2d Cir. 1980) (holding that public interest requires that state legislators be immune from suit for § 1983 liability for prospective relief but noting that plaintiff could still raise his constitutional challenge to legislative subpoena if and when legislature attempted to enforce subpoena); *Eslinger v. Thomas*, 476 F.2d 225, 228, 230 (4th Cir. 1973) (holding that state Senators and Lieutenant Governor had absolute legislative immunity but suit could be brought against Clerk of South Carolina Senate who would enforce resolution disallowing appointment of females as senate pages, and determining that resolution was unconstitutional).

336. *Youngblood v. DeWeese*, 352 F.3d 836, 842 (3d Cir. 2003) (granting legislative immunity to state Representatives in claim alleging denial of adequate budget appropriation because permitting such claim to go forward would “enable the judicial branch to scrutinize the manner in which the General Assembly allocates internal funds” and thus “compromise the independence of the legislative branch, the very principle legislative immunity is intended to protect”); *Larsen v. Senate of the Commonwealth of Pa.*, 152 F.3d 240, 248 (3d Cir. 1998) (finding legislative immunity where state court judge challenged legislator's impeachment process and requested repeal of state legislators' votes on his impeachment); *Nat'l Ass'n of Soc. Workers v. Harwood*, 69 F.3d 622, 633-34 (1st Cir. 1995) (holding that legislative aides who enforced allegedly unconstitutional resolution prohibiting public lobbyists from House floor were entitled to legislative immunity but noting that “there may be some conduct, even within the legislative sphere, that is so flagrantly violative of fundamental constitutional protections that traditional notions of legislative immunity would not deter judicial intervention”); *Green v. DeCamp*, 612 F.2d 368, 371, 372 (8th Cir. 1980) (holding that plaintiff failed to state claim under § 1983 for constitutional violation but nevertheless holding that defendant state Senators and Senators' counsel on legislative committee, which investigated and released report critical of plaintiff's conduct during homicide investigation, were entitled to legislative immunity); *Porter v. Bainbridge*, 405 F. Supp. 83, 90-91 (S.D. Ind. 1975) (finding no claim for relief under § 1983 where Republican candidate challenged manner in which Indiana House of Representatives conducted recount of votes and seated his Democratic opponent but nevertheless also stating that legislative officials and their employees had legislative immunity under § 1983).

337. 1A MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES §9.08[B], at 9-200.1 (4th ed. 2006). Schwartz observes:

The extension of legislative immunity to prospective relief has had little pragmatic significance. There is normally no need for § 1983 plaintiffs to enjoin the legislative process or the enactment of specific legislation. It is usually sufficient that relief may be granted against the executive and administrative officials who are charged with enforcing legislative enactments that allegedly conflict with federal law.

Id.

Again, the key point is that the enactment of a self-enforcing tort statute is the enforcement action in and of itself; there is no other person or state official to sue besides the individual legislators who have caused the injury by enacting the law. Allowing legislators to raise the defense of legislative immunity to a self-enforcing tort law would allow an unconstitutional piece of legislation to be completely immunized from judicial review, a result that absolute legislative immunity is not meant to produce and that in fact defies the "substitute defendants" theory that justifies legislative immunity even from claims for prospective relief.³³⁸

Furthermore, not only would allowing a defense of legislative immunity contradict the "substitute executive defendants" theory behind permitting immunity for prospective relief, but it would also contradict the doctrine as it currently stands. As explained above, the Supreme Court has made it clear that it follows a functional approach to official immunity. This functional approach requires courts to determine whether official action is legislative in nature or executive in nature, or both. Because absolute legislative immunity extends only to "conduct within the scope of legislative authority or within the traditional sphere of legislative activity," the Supreme Court has had to define what kinds of acts fall within the scope of legislative activity.³³⁹ In *Bogan*, the Supreme Court explained that official action will be considered legislative in nature when it is (1) legislative in form, in that it follows a traditional legislative process, and (2)

338. Furthermore, given the history and purpose of § 1983, this result is not what Congress could have intended. See *Ammond v. McGahn*, 390 F. Supp. 655, 657-60 (D.N.J. 1975) (holding Senators comprising state Democratic caucus not immune from Democratic Senator's § 1983 action alleging exclusion in retaliation for publicly criticizing caucus and declaring that absolute immunity in such circumstances is wholly inconsistent with purpose of § 1983), *rev'd on other grounds*, 532 F.2d 325 (3d Cir. 1976).

339. See *Supreme Court of Va. v. Consumer's Union of the U.S., Inc.*, 446 U.S. 719, 734-36 (1980) (holding Virginia Supreme Court was legislating, and therefore, immune when promulgating rules of professional responsibility, but was also enforcing rules, and therefore subject to suit for injunctive and declaratory relief, when acting pursuant to statute granting them independent authority to initiate suits against attorneys); *Thornton v. City of St. Helens*, 425 F.3d 1158, 1163 (9th Cir. 2005) (holding that for legislative immunity to attach, allegedly unlawful action must have been legislative function); *Baird v. Bd. of Educ. for Warren Cmty. Unit Sch. Dist. No. 205*, 389 F.3d 685, 696 (7th Cir. 2004) (determining that school board's termination of school superintendent involved administrative, not legislative, acts and defendants were not entitled to legislative immunity); *Green*, 612 F.2d at 371 (stating that conduct of state legislative committee that exceeds legitimate legislative activity or is not essential to legislative process is not entitled to legislative immunity); *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1256 (5th Cir. 1976) (expressing view that state legislator acting within traditional sphere of legislative activity is immune from suit under § 1983 and this immunity is not destroyed even where motivation for the challenged conduct is questionable or unworthy); *Horne v. Russell County Comm'n*, 379 F. Supp. 2d 1305, 1336 (M.D. Ala. 2005) (holding legislators entitled to absolute immunity from suit under § 1983 for all actions taken in sphere of legitimate legislative activity). It is important to note, however, that official action does not fall outside the sphere of legitimate legislative activity merely because plaintiffs allege that such activities violate their constitutional rights. *Colon Berrios v. Hernandez Agosto*, 716 F.2d 85, 91 (1st Cir. 1983) (holding that legislators do not lose immunity merely because plaintiffs allege that such activities violate their constitutional rights and judiciary committee activities fell within legitimate sphere of legislative activity).

legislative in substance, in that it reflects discretionary policymaking and has prospective implications.³⁴⁰

Understandably, courts have experienced frequent difficulty in applying this definition and in distinguishing legislative acts from executive acts.³⁴¹ Lower courts have developed criteria to determine whether an official action is legislative in character, which largely follow *Bogan's* focus on procedure and substance.³⁴² That is, that the process used for the challenged action occurred through established legislative procedures, and that the substance of the action reflects policymaking of a general scope with potential impact on the public at large, rather than on a small number of persons or single individual.³⁴³ Despite some amount of definitional uncertainty, the passage of a self-enforcing tort statute by a state legislature would fall within *Bogan's* definition of legislative activities, as long as established state legislative procedures were followed and

340. *Bogan v. Scott-Harris*, 523 U.S. 44, 55-56 (1998).

341. For example, the Supreme Court has recognized absolute immunity for committee-related activities of legislators, but not for public statements and press releases. Compare *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (holding legislative committee's investigative activities immunized), and *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501 (1975) (holding committee related acts immunized), with *Hutchinson v. Proxmire*, 443 U.S. 111, 133 (1979) (finding press statements not immunized).

There is a split in lower courts as to whether the hiring and firing of legislative personnel should be considered a legislative task for which absolute immunity exists or merely an administrative task deserving only qualified immunity. See *Camacho v. Brandon*, 317 F.3d 153, 164-65 (2d Cir. 2003) (discussing circuit split on this issue). Compare *Chateaubriand v. Gaspard*, 97 F.3d 1218, 1221 (9th Cir. 1996) (denying legislative immunity), *Carver v. Foerster*, 102 F.3d 96, 100 (3d Cir. 1996) (same), and *Davis v. Passman*, 544 F.2d 865, 880 (5th Cir. 1977) (same), *rev'd on other grounds*, 442 U.S. 228 (1979), with *Carlos v. Santos*, 123 F.3d 61, 66 (2d Cir. 1997) (granting legislative immunity), and *Agromayor v. Colberg*, 738 F.2d 55, 60 (1st Cir. 1984) (same).

Legislative immunity has been applied to state legislators who voted for particular legislation, *see, e.g., City of Safety Harbor*, 529 F.2d at 1256-57, or participated in committee work, *see, e.g., Colon Berrios*, 716 F.2d at 90; *Star Distribs., Ltd. v. Marino*, 613 F.2d 4, 9 (2d Cir. 1980), or served on a statutory commission, *see, e.g., Bergman v. Stein*, 404 F. Supp. 287, 298-99 (S.D.N.Y. 1975).

A legislative official's casting of a vote does not in all circumstances count as legislative in nature, however. For example, in *Smith v. Lomax*, 45 F.3d 402, 403, 406 (11th Cir. 1995), members of a county legislative body who voted to terminate an employee allegedly based on her race were not entitled to legislative immunity because the vote in that case was not legislative but administrative in nature. Similarly, a borough council's abolition of the police force by vote, rather than by enactment, was not a legislative act because state law required that legislative powers of boroughs be exercised by ordinance and not merely by vote. *Donivan v. Dallastown Borough*, 835 F.2d 486, 489 (3d Cir. 1987).

342. *See, e.g., Lomax*, 45 F.3d at 406 (holding that members of county board of commissioners were not entitled to absolute legislative immunity when voting to dismiss employee because employment action was administrative rather than legislative).

343. *See, e.g., Chateaubriand*, 97 F.3d at 1220 (considering whether official action involves formulation of policy as opposed to ad hoc decision making and whether action applies to few individuals or to public at large in applying legislative immunity); *Ryan v. Burlington County*, 889 F.2d 1286, 1290-91 (3d Cir. 1989) (holding that to come within legislative immunity, conduct must be both procedurally and substantively legislative, by following established legislative procedures and involving policymaking of general scope); *Cutting v. Muzzey*, 724 F.2d 259, 261 (1st Cir. 1984) (stating that courts should focus on nature of facts relied on, process utilized, and impact of state action in determining whether acts are legislative in nature).

the substance of the tort law is dealing with a class of persons, rather than a single individual.³⁴⁴

Self-enforcing tort legislation serves dual functions, however—it is both a legislative act and an executive enforcement act. This dual function is the crux of the argument for why self-enforcing tort statutes require preenforcement judicial review and why suit should be had against the legislators who enact the law. Such suit will be allowed, according to the “effects on a reasonable person test,” only to tort statutes that are truly self-enforcing, i.e., situations in which legislators have arrogated the enforcement powers of the executive to themselves. Given that under this test a self-enforcing tort statute serves two functions, both legislative and executive, according to existing doctrine legislative immunity should not apply.

In a number of cases, which I will call “dual function” cases, the Court has refused to apply absolute legislative immunity when the same actor engages in both legislative and executive functions. For example, in the *Consumers Union* case, which established that legislators are entitled to absolute immunity even from prospective relief, the Court in fact allowed suit for prospective relief against the defendant state officials who were engaged in both legislative and executive functions. Even though defendants were judges of the state court system, they were treated as legislators in their role as issuers of the state Bar Code and granted legislative immunity.³⁴⁵ Yet, since the judges were also enforcers of the Bar Code, the Court permitted prospective relief against the judges in their enforcement capacity.³⁴⁶ Under the dual function approach, the same defendants operated in two capacities, both legislative and executive, and could be held liable for prospective relief in their executive capacity. The Court in *Consumers Union* emphasized that prosecutors (the enforcers of the law) enjoy absolute immunity only from damages liability, citing *Ex parte Young* as the doctrine that has naturally allowed a myriad of injunctive suits against state officers who threaten to enforce an allegedly unconstitutional law. Notably, the Court emphasized:

If prosecutors and law enforcement personnel cannot be proceeded against for declaratory relief, putative plaintiffs would have to await the institution of state-court proceedings against them in order to

344. See *Bogan v. Scott-Harris*, 523 U.S. 44, 47, 55-56 (1998) (holding that defendants' actions were both procedurally and substantively legislative, even though plaintiff alleged that sole reason for budget change was to terminate her employment); *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1047 (9th Cir. 1988) (stating that rules of general applicability “within an affected profession, industry or type of business” will be considered legislative in character); *Eslinger v. Thomas*, 476 F.2d 225, 228 (4th Cir. 1973) (noting that passing of acts and resolutions is very essence of legislative process); *Redwood Village v. Graham*, 819 F. Supp. 867, 871 (D.N.D. 1993) (holding that regulations promulgated by agency were “classically legislative” as rules were of general applicability, even though in reality rules only affected plaintiff).

345. Supreme Court of Va. v. *Consumers Union of the U.S., Inc.*, 446 U.S. 719, 734 (1980) (“[T]he Virginia Court is exercising the State’s entire legislative power with respect to regulating the Bar, and its members are the State’s legislators for the purpose of issuing the Bar Code. Thus the Virginia Court and its members are immune from suit when acting in their legislative capacity.”).

346. *Id.* at 736-37 (“[W]e believe that the Virginia Court and its chief justice properly were held liable in their enforcement capacities.”).

assert their federal constitutional claims. This is not the way the law has developed, and, because of its own inherent and statutory enforcement powers, immunity does not shield the Virginia Court and its chief justice from suit in this case.³⁴⁷

Similarly, state legislators, by enacting a self-enforcing tort law, engage in both legislative and prosecutorial or enforcement functions at the same time. Based on the dual function approach used by the courts, state legislators should not be able to raise absolute legislative immunity as a bar to obtaining declaratory relief against a self-enforcing tort statute. Legislators have no immunity from suit for prospective relief when they are also functioning in an executive enforcement capacity.

A number of lower courts have also applied this “dual function” approach to allow suit to proceed against state officials who act in both legislative and executive capacities. For example, the Seventh Circuit followed *Consumers Union* in a case involving similar facts, where judges of the state supreme court both promulgated and enforced administrative rules.³⁴⁸ In another interesting “dual function” case, *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*,³⁴⁹ plaintiffs brought a § 1983 suit against a library board to challenge its policy restricting access to sexually explicit material on library computers. Plaintiffs argued that the policy violated their First Amendment rights.³⁵⁰ A federal district court held that the board members could claim absolute legislative immunity for adopting the policy.³⁵¹ The court found that adoption of the policy fit within the definition of a legislative act because “the Policy is prospective in nature, and of general application.”³⁵² The plaintiffs could still pursue their suit for prospective relief against the board members, however, since the board members also had a prominent role in enforcing the challenged policy. Because of their dual role as enforcers, the board members were not protected by legislative immunity, and the allegedly unconstitutional regulation could be subject to preenforcement review.³⁵³ In sum, when the same state officials perform dual functions, both legislative and executive, they are subject to suit in their executive capacity. As one district court put it, “that which *Consumers Union* giveth to the named defendants—namely, a derivative

347. *Id.* at 737.

348. *Lawline v. Am. Bar Ass’n*, 956 F.2d 1378, 1382 (7th Cir. 1992) (holding that, in lawsuit challenging adoption of two attorney disciplinary rules by justices of state supreme court, justices were protected by legislative immunity but action for declaratory relief could proceed against them as enforcers of rules); see also *Hughes v. Lipscher*, 852 F. Supp. 293, 298-99 (D.N.J. 1994) (holding that, where Administrative Director of New Jersey Supreme Court had both legislative and enforcement functions in promulgating administrative directives, Director could be subject to suit for prospective relief and be subject to civil rights attorneys fees based on enforcement function).

349. 2 F. Supp. 2d 783 (E.D. Va. 1998).

350. *Mainstream Loudoun*, 2 F. Supp. 2d at 787.

351. *Id.* at 783.

352. *Id.* at 788.

353. *Id.* at 789.

legislative immunity . . . *vis-à-vis* its promulgatory actions—it also taketh away as a result of the defendants' own enforcement activities."³⁵⁴

Another interesting legislative immunity case, from the post-*Brown v. Board of Education*³⁵⁵ era, provides further support for denying legislative immunity for legislators who enact self-enforcing tort laws. In *Bush v. Orleans Parish School Board*,³⁵⁶ parents of local school children sought to restrain a committee of Louisiana state legislators from interfering with federal court ordered desegregation efforts. The Louisiana legislature had declared that it would not recognize the Supreme Court's decision in *Brown* and enacted a package of legislation that included abolishing the local school board and transferring its functions to a legislative committee.³⁵⁷ The parents charged that the members of this committee, acting pursuant to legislative enactment, were attempting to enforce unconstitutional legislative resolutions aimed at frustrating school desegregation.³⁵⁸ The court found that the legislative resolutions attempting to maintain segregated schools were unconstitutional; however, since these resolutions were implemented by the legislative committee, the members of the committee raised the defense of absolute legislative immunity.

The court held that there was no merit in their claim of legislative immunity.³⁵⁹ The court observed that there was "no effort to restrain the Louisiana Legislature as a whole, or any individual legislator, in the performance of a legislative function."³⁶⁰ Although legislative committee work is usually treated as a legislative function, here the court found that the members of the legislative committee were purporting to act as the administrators of the local schools, a nonlegislative function.³⁶¹ The court emphasized:

Having found a statute unconstitutional, it is elementary that a court has power to enjoin all those charged with its execution. Normally, these are officers of the executive branch, but when the legislature itself seeks to act as executor of its own laws, then, quite obviously, it is no longer legislating and is no more immune from process than the administrative officials it supersedes.³⁶²

By using a functional approach to official immunity, the court was able to hold the Louisiana legislators accountable for their blatantly unconstitutional actions. In contrast, if the state legislators had instead promulgated a tort law granting money damages against members of the school board who established

354. *Hughes v. Lipscher*, 852 F. Supp. 293, 300 (D.N.J. 1994); *see also May v. Cooperman*, 578 F. Supp. 1308, 1317 (D.N.J. 1984) (holding legislative immunity inapplicable to intervenor-defendants representing legislature because defendants adopted "quasi-enforcement role by intervening to defend" challenged statute).

355. 349 U.S. 294 (1955).

356. 188 F. Supp. 916 (E.D. La. 1960).

357. *Bush*, 188 F. Supp. at 921.

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.* at 122.

362. *Bush*, 188 F. Supp. at 922.

integrated classrooms, the *Okpalobi* approach would deny judicial review and allow legislators to in effect violate equal protection. Unlike in *Okpalobi*, the novel use of legislative enactments in order to evade the Supreme Court's dictates and eviscerate established constitutional rights did not deter the *Bush* court from ensuring judicial review.³⁶³ Similarly, where the legislature "itself seeks to act as executor of its own laws" through the enactment of self-enforcing tort laws, courts should deny any claims of legislative immunity. Without judicial review, there will be no means of protecting constitutional rights from legislative encroachment through draconian tort remedies. Both policy and doctrine support courts taking a functional approach and rejecting legislative immunity in the case of self-enforcing tort laws.

Of course, the proposition that a state legislator's vote to enact a piece of tort legislation is also an enforcement action may be viewed as stretching the functional analysis of legislative immunity a bit too far.³⁶⁴ Legislators will argue that they will be subject to unnecessary judicial scrutiny and sidetracked by the time and energy required to defend a civil suit for every tort law they pass. Critics may raise the same floodgate concern raised by the courts, except that courts will now be opening the floodgate to challenges against state legislators. This could be particularly troubling given that the policies supporting legislative immunity are especially concerned with protecting legislators from the burdens and distractions of defending lawsuits.

These concerns are exaggerated, however, primarily because the "effects on a reasonable person" test will restrict suits against state legislators to self-enforcing tort laws. A preenforcement suit against legislators will be permitted only where legislators use tort statutes to violate fundamental constitutional rights by arrogating enforcement powers to themselves. Injured parties will need to establish in the first instance that the mere enactment of the tort statute causes a cognizable, ongoing constitutional injury. In addition, the effects on a reasonable person test will render any preenforcement judicial review of state tort law consistent with the underlying policies of legislative immunity. Utilizing an effects test means that the courts would not be looking into legislative motive or the purpose behind the challenged tort law. The test would not require personal testimony from any legislators, as the focus of the inquiry is on the effects of the law on the injured parties. Again, the burden of proof would be on the challengers to show that the tort law targets a fundamental constitutional

363. The Court noted: "However ingeniously worded some of the statutes may be, admittedly the sole object . . . of the Louisiana Legislature is to preserve a system of segregated public schools in defiance of the mandate of the Supreme Court in *Brown*." *Id.* at 927. Similarly, in *Bush v. Orleans Parish School Board*, 191 F. Supp. 871, 879 (E.D. La. 1961), a U.S. District Court enjoined a state legislature and individual members thereof from not only "enforcing or seeking to enforce" laws and resolutions requiring continued racial segregation but also from "interfering in any way with the operation of the public schools."

364. See *supra* note 341 for more on this point. Although there are some cases holding that voting for a particular action may be executive rather than legislative in nature, these cases generally deal with local governmental bodies voting on a narrow administrative issue rather than passing an ordinance or law of more general scope.

right and is so draconian that it causes ongoing constitutional injury. Furthermore, since the challengers would only seek declaratory relief, no legislative action would be required of individual legislators.³⁶⁵

Although it could be somewhat burdensome to legislators to defend lawsuits challenging the mere enactment of a tort law in some cases, legislators can use early stage litigation tools to dismiss frivolous cases and, importantly, are entitled to immediate appeal from a denial of legislative immunity.³⁶⁶ Finally, courts should not forget that self-enforcing tort laws are a problem of the legislators' own creation. Legislators are presuming to co-opt the power of the executive to themselves and then claim absolute legislative immunity.³⁶⁷ Not only is the problem of the legislators' own creation, but the solution is simple. If legislators wish to avoid the disruption of litigation, they should leave enforcement to the executive, who is accustomed to dealing with § 1983 lawsuits.³⁶⁸

365. *Cf. Colo. Common Cause v. Bledsoe*, 810 P.2d 201, 211 (Colo. 1991) (reasoning that declaratory relief does not interfere with legislative activities to same extent as injunctive relief or damages because court's declaration neither compels nor restrains legislative action).

366. *See Helstoski v. Meanor*, 442 U.S. 500, 506 (1979) (holding denial of claim of legislative immunity pursuant to Speech or Debate Clause is immediately appealable). Furthermore, courts have noted that legislative immunity does not ensure that legislators never have to defend against lawsuits. 26A WRIGHT & GRAHAM, *supra* note 283, § 5675 (citing, *inter alia*, *Gravel v. United States*, 408 U.S. 606, 622 (1972) (no immunity where criminal conduct threatens person or property of others), *United States v. Brewster*, 408 U.S. 501, 513 (1972) (no immunity when lobbying executive agencies on behalf of constituents or campaign contributors), and *United States v. Myers*, 692 F.2d 823, 849 (2d Cir. 1982) (no immunity where legislator failed to file required financial disclosure statement)).

367. For example, the Third Circuit held that legislative immunity did not protect state legislators who intervened to defend the constitutionality of a state statute when executive officials refused to perform that function. *Planned Parenthood of Cent. N.J. v. Attorney Gen. of N.J.*, 297 F.3d 253, 262, 264 (3d Cir. 2002). Once the legislators invoked executive enforcement powers, they had no claim to absolute legislative immunity. *Id.* at 262.

368. If we recognize that the injury caused by a self-enforcing tort law should be traced back to the legislators who enact the challenged law, then there may be other functionaries who assist in that process who may be sued. For example, some states require the Governor to file approved legislation with the Secretary of State, who then presumably sees to its dissemination. *E.g.*, MINN. CONST. art IV, § 23; OHIO CONST. art. II, § 1b. Could injured parties file suit for prospective relief against the Secretary of State or other functionary in order to test the constitutionality of a self-enforcing tort law? There is some tension in the case law on whether legislative immunity extends to legislative aides, employees, or other officials who execute the will of the legislature. In the end, the courts have again relied on a functional analysis to determine whether absolute legislative immunity should extend to legislative aides or employees. See *supra* note 327 for a discussion of whether legislative aides or employees are immune from suit in context of trying to capture unconstitutional legislative acts at enforcement end.

If a state has procedures in place requiring an aide or other nonlegislator, such as the Secretary of State, to carry out some functionary duty in order to enact the law, it is possible that suit for prospective relief could be had against such official without running into the bar of absolute legislative immunity. *Cf. Donohue v. Bd. of Elections of N.Y.*, 435 F. Supp. 957, 963 (E.D.N.Y. 1976) (holding that Secretary of State could be sued for injunctive relief in challenge to voter registration and conduct of presidential election, where state law requires her to prepare certified list of electors; although certification of electors is seemingly ministerial, function performed is part of enforcement of scheme to choose electors and therefore subject to suit). There are several roadblocks to such a suit, however.

In sum, both the theory behind absolute legislative immunity of capturing unconstitutional legislation at the enforcement end and the courts' functional approach to immunity supports allowing suit for declaratory relief against state legislators in the context of self-enforcing tort laws. The use of the effects test to define and limit such suits to self-enforcing tort statutes will address any fear of opening a gaping hole in legislative immunity.

b. Governors

In *Okpalobi*, the injured parties attempted to sue the Governor on the theory that the Governor was generally charged with "upholding" or "defending" all state laws. In this respect, the challengers argued that the Governor was the "enforcer" of the tort law at issue, even though he had no power to file suit under the law and thereby "cause" the constitutional injury. The court of course rejected this line of argument based on the causation issue. Perhaps a more persuasive argument for suing the Governor would be that the Governor is the cause of the constitutional injury if he or she signed the self-enforcing tort statute into law, similarly to the legislators who voted for the law.

As noted earlier, executive actors are not entitled to immunity from suits for prospective relief. Because the Supreme Court takes a functional approach to all official immunities, however, when executive officials act in a legislative capacity, the Court has allowed the executive to raise a defense of absolute legislative immunity.³⁶⁹ In *Bogan*, the Court clearly established that an executive official acting in a legislative capacity is entitled to legislative immunity. More specifically, the Court held that a mayor who signed an ordinance into law was engaging in a legislative act, and therefore was entitled to absolute legislative immunity.³⁷⁰ The Court emphasized that it has "adopted a functional approach to immunity issues so that '[w]hether an act is legislative turns on the nature of the act,' . . . rather than the nature of the actor's office or his or her intent."³⁷¹ It

First, states may not require any functionary role in order to have a proposed bill become a law. A bill may become a law automatically upon signature by the Governor or by sufficient votes in the state legislature. Second, even in states that require a functionary act prior to a bill becoming a law, if that act is viewed as an integral part of legislative activity, the nonlegislator official may still be entitled to absolute legislative immunity. As argued in this section, however, due to the dual nature of self-enforcing tort legislation, even if such functionary acts involved in putting a law "on the books" are viewed as legislative action, enacting the law also constitutes an enforcement action at the same time. Therefore, legislative aides or other officials involved in enacting a self-enforcing tort law should also be subject to suit under the functional approach to official immunity.

369. Although at least one other commentator has noted that the Governor's signing a self-enforcing tort statute would satisfy the causation element of standing, no one has addressed the question of legislative immunity as it would apply to the Governor. See Borgmann, *supra* note 167, at 778 (arguing that Governor's signing bill into law is cause of plaintiffs' injury for self-enforcing tort law).

370. See *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998) (finding that mayor committed legislative acts when he signed ordinance into law and was entitled to absolute legislative immunity).

371. *Larsen v. Senate of the Commonwealth of Pa.*, 152 F.3d 240, 249 (3d Cir. 1998) (quoting *Bogan*, 523 U.S. at 54); see also *Supreme Court of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S.

therefore follows that a Governor's signing a bill into law would be considered a legislative act entitled to absolute immunity.³⁷²

Thus, even if a suit against the Governor challenging a self-enforcing tort law satisfies the causation element of standing because it is based on a Governor's vote in favor of the law, a Governor could also raise the defense of absolute legislative immunity. Under the same "dual function" theory argued with respect to state legislators, however, the same solution applies. Because the Governor's enactment of a self-enforcing tort law is both a legislative and an enforcement action, the Governor should be subject to suit for declaratory relief on the basis of the specific action of enactment, rather than on general enforcement duties of the Governor.³⁷³ This approach both satisfies the causation requirement of standing and enables a way through the defense of legislative immunity.

V. CONCLUSION

State legislators' use of self-enforcing tort legislation makes a mockery of constitutional rights. These statutes have arisen in the abortion context because abortion is a particularly contested constitutional right that some state officials are intent on overturning. This tactic could certainly be utilized by state legislators to attack any number of constitutional rights, however. If tort statutes are categorically immune from preenforcement review, there is no logical limit

719, 734 (1980) (affording legislative immunity to justices of state supreme court when acting in their rulemaking capacity).

372. *Bogan*, 523 U.S. at 55-56 ("Petitioner Bogan's introduction of a budget and signing into law an ordinance also were formally legislative, even though he was an executive official. We have recognized that officials outside the legislative branch are entitled to legislative immunity when they perform legislative functions." (citing *Consumers Union*, 446 U.S. at 731-34; *Smiley v. Holm*, 285 U.S. 355, 372-73 (1932))); see also *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 406 (1979) (holding that "to the extent the evidence discloses that these individuals were acting in a capacity comparable to that of members of a state legislature, they are entitled to absolute immunity from federal damages liability"). A number of lower federal courts have also extended legislative immunity to executive officers when they are acting in a legislative capacity, such as by vetoing an ordinance or voting to enter into a contract. See *Tucker v. City of Richmond*, 388 F.3d 216, 224 (6th Cir. 2004) (holding mayor was entitled to absolute legislative immunity for her vote in favor of ordinance because she acted in legislative capacity in so doing); *Healy v. Town of Pembroke Park*, 831 F.2d 989, 993 (11th Cir. 1987) (granting legislative immunity to mayor's vote to contract out police service as acting in legislative capacity); *Aitchison v. Raffiani*, 708 F.2d 96, 99-100 (3d Cir. 1983) (granting legislative immunity to mayor's role in voting on ordinance); *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1193-94 (5th Cir. 1981) (granting legislative immunity to mayor's veto of ordinance); *Eslinger v. Thomas*, 476 F.2d 225, 228 (4th Cir. 1973) (holding that Lieutenant Governor of South Carolina, in his capacity as President ex officio of the state senate, was protected by legislative immunity); *Saffioti v. Wilson*, 392 F. Supp. 1335, 1343 n.10 (S.D.N.Y. 1975) (stating that in challenge to set aside Governor's veto of bill, executive is exercising legislative power rather than executive power and may be found to be within scope of legislative immunity).

373. In addition, unlike legislators, Governors are accustomed to defending suits for prospective relief challenging the constitutionality of state regulations, fitting with the theory behind legislative immunity that legislation can be captured for review at the enforcement end.

to state officials' ability to violate constitutional rights through the use of ostensibly "private" tort remedies.

In attempting to "privatize" what is essentially a publicly enforced law, state legislators are manipulating the public/private distinction to their advantage. Courts must undertake a more nuanced analysis of self-enforcing tort legislation in order to make *Ex parte Young*'s promise to protect constitutional rights meaningful. By recognizing that the promulgation of a self-enforcing tort statute is in fact an "enforcement" action by state legislators, federal courts can assert preenforcement jurisdiction over tort laws that have the effect of infringing constitutional rights by their mere existence. Both reason and precedent dictate that courts should not permit state legislators to cloak their violations of fundamental rights in the veil of private rights of action.

