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## CHALLENGES TO STATE ANTI-PREFERENCE LAWS AND THE ROLE OF FEDERAL COURTS

Michael E. Rosman\*

On November 5, 1996, the people of California passed Proposition 209 in an initiative election, which subsequently led to the addition of article 1, section 31 to the California Constitution.<sup>1</sup> That provision prohibited various state actors from “discriminat[ing] against, or grant[ing] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”<sup>2</sup> In 1998, the people of the State of Washington passed a similar provision, known as I-200, in a similar referendum, which led to a new section being added to that state’s statute books.<sup>3</sup> In 2006, the people of the State of Michigan passed another similar provision, Proposal 2, which led to the addition of article 1, section 26 to the Michigan Constitution.<sup>4</sup> Finally, the Nebraska polity passed Initiative 424 in 2008, which added article 1, section 30 to the Nebraska Constitution.<sup>5</sup>

Each of these popularly enacted provisions, which for ease of reference I will refer to as anti-preference laws, were deemed to prohibit race-conscious decision-making by the state that might be permitted under federal law, including the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.<sup>6</sup> That is not the feature that this Article focuses on, however. Rather, it focuses on the fact that these laws generally can be enforced in state court by private individuals

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<sup>1</sup> CAL. CONST. art. 1, § 31.

<sup>2</sup> *Id.* at art. 1, § 31(a).

<sup>3</sup> WASH. REV. CODE § 49.60.400 (1999).

<sup>4</sup> MICH. CONST. art. 1, § 26.

<sup>5</sup> NEB. CONST. art. I, § 30.

<sup>6</sup> U.S. CONST. amend. XIV, § 1. For reasons I have explained elsewhere, I prefer the phrase “race-conscious decision-making” to describe the conduct addressed by both the Equal Protection Clause and the anti-preference laws, as opposed to more commonly used locutions like “affirmative action” or “reverse discrimination,” at least when I am writing in an academic vein. See Michael E. Rosman, *Thoughts On Bakke and Its Effect on Race-Conscious Decision-Making*, 2002 U. CHI. LEGAL F. 45, 45 n.1.

in civil lawsuits seeking damages and other kinds of relief. As a consequence, when these provisions have been challenged in federal court as a violation of federal law in a pre-enforcement challenge, there is an obvious problem. Precisely who should be sued? That there is no obvious answer to this question—and that the absence of an obvious answer creates difficult jurisdictional problems—is the issue that this Article addresses. The questions about jurisdiction all revolve around the same basic fact: these laws are not, by and large, *enforced* by the executive branch of state government and even when they are, the primary tool of enforcement is still lawsuits brought by private individuals in which state judges enforce the law. And there is not a great deal that a lower federal court can do to restrain the behavior of unknown private individuals and state court judges.

Of course, the anti-preference laws are not the only privately enforceable laws out there. Many standards of behavior are set by “privately-enforced” laws, i.e., laws that can be enforced in a lawsuit brought by a private citizen. Defamation lawsuits under state common law<sup>7</sup> and lawsuits alleging misstatements in violation of section 11 of the Securities Act of 1933<sup>8</sup> are just two of many examples one could list. The same jurisdictional problems would arise were the constitutionality of these laws challenged in a pre-enforcement proceeding. As a general rule, they are not challenged in pre-enforcement proceedings, but rather by defendants sued for damages.<sup>9</sup>

Part I of this Article sets forth the relevant provisions of the anti-preference laws and the usual arguments that are used to claim that such laws violate federal law. I do not assess those arguments in any great detail. (That is, whether those arguments would be successful if asserted by defendants in a case alleging that they violated an anti-preference law is not something addressed at length here.) In Part II, I review more carefully the enforcement provisions of the anti-preference laws, and consider the problems with the two injunctions that have been issued so far by federal judges in cases challenging anti-preference laws. In Part III, I address the basic jurisdictional doctrines that present obstacles to challenges to privately enforceable laws being heard in federal court.

In Part IV, I consider the application of these jurisdictional doctrines to the anti-preference laws, examine various possible defendants that can be sued in federal court, and explore the problems that each presents given the jurisdictional doctrines at issue. Finally, in Part V, after considering whether Congress possibly could fix some of the problems by eliminating states’ Eleventh Amendment immunity, I suggest that testing the limits that federal law imposes on privately enforceable laws through actual cases, while perhaps not the most efficient means of developing those limits, has some distinct advantages and, in any event, is hardly something new to our jurisprudence.

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<sup>7</sup> See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 369–70 (1974) (White, J., dissenting).

<sup>8</sup> 15 U.S.C. § 77k (2006).

<sup>9</sup> See *infra* Part V.B.

## I.

The primary substantive provision of each of the anti-preference laws in California, Washington, Michigan, and Nebraska is the same. Each has a provision stating: “The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”<sup>10</sup>

The purpose of these anti-preference laws is generally understood to be an effort to prohibit race-conscious and sex-conscious decision-making by state actors that is permitted under federal law, most prominently the Fourteenth Amendment to the United States Constitution.<sup>11</sup> The Fourteenth Amendment does not prohibit the use of race-conscious decision-making by a state if the use of race is narrowly tailored to serve a compelling governmental interest. For example, the Supreme Court has held that achieving a certain kind of diversity of a college student body is a compelling governmental interest, and that the use of race in a narrowly tailored way to achieve that compelling governmental interest is not barred by the Equal Protection Clause of the Fourteenth Amendment or other federal law.<sup>12</sup> The anti-preference laws are designed to preclude that kind of race-conscious decision-making. Of course, whether the anti-preference laws achieve that goal will only be determined as they are interpreted by state courts.<sup>13</sup>

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<sup>10</sup> CAL. CONST. art. 1, § 31(a); MICH. CONST. art. 1, § 26(2); NEB. CONST. art. I, § 30; WASH. REV. CODE § 49.60.400(1) (1999). In what might be deemed a bit of redundancy, section 1 of Michigan’s constitutional provision specifically states that “[t]he University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to . . .” MICH. CONST. art. 1, § 26(1). Arguably, the named universities are subject to the prohibition even if some parts of them are not deemed “public” universities. Otherwise, it is difficult to understand what purpose the separate provision serves, especially given the broad scope given to “state” in the Michigan law. *Id.* at art. 1, § 26(3).

<sup>11</sup> *See, e.g.*, *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1489 (N.D. Cal. 1996) (“The parties do not dispute . . . that the people of California meant to do something more than simply restate existing law when they adopted Proposition 209.”), *vacated on other grounds*, 122 F.3d 692 (9th Cir.), *cert. denied*, 522 U.S. 963 (1997); *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1082–83 (Cal. 2000) (reviewing the purpose of Proposition 209 and concluding that the voters of California intended to reinstate early interpretations of the Civil Rights Act of 1964 that precluded considerations of race).

<sup>12</sup> *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

<sup>13</sup> Thus, for example, the Washington Supreme Court, answering a certified question from the Ninth Circuit, concluded that Seattle’s system of high school transfers, in which members of the racial groups “whites” and “non-whites” were given advantages in the transfer process if their racial group was underrepresented at a particular school, did not violate Washington’s anti-preference law. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 72 P.3d 151, 163–67 (Wash. 2003) (concluding that the program does not discriminate or grant preferences to any individual based upon race). The United States Supreme Court held that the program

A variety of arguments have been used to challenge the anti-preference laws as violative of federal law. None have been successful to date.<sup>14</sup> For purposes of this Article, I address only the following arguments:

1. *The Structural Discrimination Argument.* In *Hunter v. Erickson*<sup>15</sup> and *Washington v. Seattle School District No. 1*,<sup>16</sup> the Supreme Court considered the propriety of having special procedural requirements for certain kinds of laws that addressed racial issues. In *Hunter*, it was an amendment to the Akron City Charter that repealed a fair housing ordinance and made all such fair housing ordinances passed by the city council in the future subject to approval by a majority of the electors voting at a regular or general election.<sup>17</sup> In *Washington v. Seattle School Dist. No. 1*, it was a state-wide initiative in Washington that made illegal the use of mandatory busing and other enumerated techniques for purposes of racial integration of the public schools.<sup>18</sup> In each instance the Court found the law unconstitutional because it placed greater burdens on laws that were of particular interest to minorities.<sup>19</sup> Those features rendered each law violative of the Fourteenth Amendment to the Constitution.<sup>20</sup>

The rulings in *Hunter v. Erickson* and *Washington v. Seattle School District No. 1* are not without their ambiguities, nor is the “structural discrimination” argument’s application to anti-preference laws without doubt.<sup>21</sup> But, the argument goes, those

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violated the Equal Protection Clause of the Fourteenth Amendment. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). A point of this Article is that state courts, and their interpretations of both state and federal law, are important. Certainly, these cases underscore that point.

<sup>14</sup> See, e.g., *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 247 (6th Cir. 2006) (granting motion to stay stipulated injunction suspending application of Michigan Constitution article 1, section 26 pending appeal, and concluding that the arguments proffered by those supporting the stipulated injunction “[did] not offer tenable explanations for suspending Proposal 2 on the basis of federal law”); *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997) (rejecting challenge to article 1, section 31 of the California Constitution); *Coalition to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 539 F. Supp. 2d 924 (E.D. Mich. 2008) (rejecting challenge to article 1, section 26 of the Michigan Constitution); *Coral Constr., Inc. v. City and County of San Francisco*, 57 Cal. Rptr. 3d 781 (Cal. Ct. App. 2007) (rejecting challenge to article 1, section 31 of the California Constitution), *review granted*, 65 Cal. Rptr. 3d 761 (2007).

<sup>15</sup> 393 U.S. 385 (1969).

<sup>16</sup> 458 U.S. 457 (1982).

<sup>17</sup> *Hunter*, 393 U.S. at 387.

<sup>18</sup> *Seattle Sch. Dist.*, 458 U.S. at 463.

<sup>19</sup> *Id.* at 470 (holding that the initiative “allocate[d] governmental power nonneutrally, by explicitly using the racial nature of a decision to determine the decisionmaking process”); *Hunter*, 393 U.S. at 389 (holding that the charter amendment was “an explicitly racial classification treating racial housing matters differently from other racial and housing matters”).

<sup>20</sup> *Seattle Sch. Dist.*, 458 U.S. at 487; *Hunter*, 393 U.S. at 392–93.

<sup>21</sup> For example, the Court in *Washington v. Seattle School Dist. No. 1* “note[d] that the State has not attempted to reserve to itself exclusive power to deal with racial issues generally.” 458 U.S. at 479 n.22. Arguably, state anti-preference laws are efforts to do just that over a broad

cases establish the proposition that the Equal Protection Clause is violated if a law (1) addresses a “racial” issue, and (2) restructures normal government decision-making so as to create a different (and more burdensome) process for the racial issue than for other issues in the same general area.<sup>22</sup> Anti-preference laws arguably meet both conditions: they are designed to limit race-conscious decision-making, and they place a difficult obstacle in the path of those who favor such race-conscious decision-making. Although this analysis has not yet succeeded past the trial court level, it has been adopted by a number of judges.<sup>23</sup>

2. *Title VII Preemption.* Insofar as anti-preference laws restrict the use of race-conscious decision-making by employers, an argument has been made (and accepted by one district court)<sup>24</sup> that it is preempted by Title VII of the Civil Rights Act of 1964<sup>25</sup> and the Supremacy Clause of the United States Constitution.<sup>26</sup> The argument is that Title VII does not merely permit race-conscious decision-making, but encourages it. EEOC guidelines interpreting Title VII are used to support this theory.<sup>27</sup> If Congress intended to give employers the option of using race-conscious decision-making, the argument is that an anti-preference law that interferes with that option at the “employer level” undermines the purpose of Title VII.<sup>28</sup>

Again, the argument is not without potential pitfalls, and, perhaps most obviously, it only relates to one of the three areas (public employment) in which the anti-preference laws operate.<sup>29</sup> Nonetheless, it may be a plausible argument, at least for that one area.

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range of issues. At the very least, they have a broader scope than the laws at issue in *Hunter* (dealing only with housing) and *Washington v. Seattle* (only with public school assignments).

<sup>22</sup> See, e.g., Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399, 480–82 (1999).

<sup>23</sup> See *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1499–1509 (N.D. Cal. 1996) (holding that *Hunter* and *Seattle* stand for the proposition that if legislation has a “racial focus” and restructures the political process for those seeking favorable legislation on that issue, then it must be treated as if it were a racial classification, and concluding that Proposition 209 was unconstitutional as a consequence), *vacated on other grounds*, 122 F.3d 692 (9th Cir.), *cert. denied*, 522 U.S. 963 (1997); *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 712 (9th Cir. 1997) (Norris, J., respecting the denial of rehearing en banc); *id.* at 717 (Hawkins, J., commenting on the denial of rehearing en banc); *Coral Constr., Inc. v. City and County of San Francisco*, 57 Cal. Rptr. 3d 781, 804 (Cal. Ct. App. 2007) (Rivera, J., concurring and dissenting).

<sup>24</sup> *Wilson*, 946 F. Supp. at 1513–17.

<sup>25</sup> 42 U.S.C. §§ 2000e–2000e-17 (2006).

<sup>26</sup> U.S. CONST. art. VI.

<sup>27</sup> See, e.g., 29 C.F.R. § 1608.1(c) (2009) (“Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in Title VII.”).

<sup>28</sup> *Wilson*, 946 F. Supp. at 1516.

<sup>29</sup> In addition, section 708 of Title VII states that Title VII should not be deemed “to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State . . . other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.”

3. *First Amendment*. It is sometimes argued that colleges and universities have a First Amendment right to consider race and ethnicity as one of many factors, and as part of their efforts to assemble a class that is broadly diverse. This argument derives from the Supreme Court opinion in *Grutter v. Bollinger*,<sup>30</sup> and Justice Powell's opinion in *Regents of the University of California v. Bakke*.<sup>31</sup> Each of those opinions stated that a university's interest in academic freedom, grounded in the First Amendment, constituted a compelling governmental interest that permitted such institutions of higher education to consider race, in a limited way, as one of many factors in the admissions process, without violating the Equal Protection Clause or other federal law.<sup>32</sup> *Grutter* specifically upheld a law school admissions process on that ground.<sup>33</sup>

Thus, the argument goes, anti-preference laws violate the First Amendment by restricting a college or university's academic freedom right, grounded in the First Amendment, to use race in a limited way while selecting the members of its student body. It has not yet been accepted by any judge, at least as far as I am aware.<sup>34</sup> And, of course, its applicability outside of the higher education context is even more questionable. Nonetheless, I include it here because it is not an entirely implausible extension of existing Supreme Court precedent.

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These are not the only arguments that have been used to challenge anti-preference laws, but they are the most viable, in my view. Other arguments suggest that the use of race is not merely permissible and authorized by federal law, but *required* by federal law, or that the anti-preference law was born out of an animus against members of particular races who were receiving benefits. I leave these arguments to the side in this Article. Whatever their merit in a particular context, I seriously doubt that any court will hold that states are *always* required to use race-conscious decision-making, and it is the broad (i.e., facial) attacks on the anti-preference laws that I would like to focus upon.<sup>35</sup> Similarly, an attack on the motive under which an anti-preference law has been adopted seems unlikely to be successful while they are being adopted

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42 U.S.C. § 2000e-7 (2006). This arguably precludes any reliance on “conflict preemption” (i.e., preemption because a state law conflicts with the purpose of Title VII). *See Wilson*, 122 F.3d at 710.

<sup>30</sup> 539 U.S. 306 (2003).

<sup>31</sup> 438 U.S. 265 (1978).

<sup>32</sup> *Grutter*, 539 U.S. at 329–30; *Bakke*, 438 U.S. at 312.

<sup>33</sup> *Grutter*, 539 U.S. at 343–44.

<sup>34</sup> *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 247 (6th Cir. 2006) (rejecting the argument because “[t]he [u]niversities mistake interests grounded in the First Amendment . . . with First Amendment rights”).

<sup>35</sup> *Cf. Bakke*, 438 U.S. at 379 (Brennan, J., concurring and dissenting) (“[A]ny State . . . is generally free, as far as the Constitution is concerned, to abjure granting any racial preferences in its admissions program.”).

through plebiscites. In any event, such an argument would, of necessity, focus on the motives of the electorate in a particular election, and unlike the arguments I have outlined above, might not be of much use when the next election, in a different state, came along.

So, the arguments I am focusing upon do not suggest that any state official is required to engage in race-conscious decision-making. It is not, then, the underlying conduct of race neutrality that is being attacked, but a law that requires that race neutrality. To put it another way, the conduct itself may be permissible, but the law requiring it is not precisely because it limits the freedom of the regulated person/entity. One consequence of this is that a judge cannot simply enjoin the regulated person/entity from engaging in the conduct (race neutrality) in question. An analogy may be helpful.

In *Edwards v. Aguillard*,<sup>36</sup> the Court considered a Louisiana statute that required the teaching of “creation science” if evolution was taught.<sup>37</sup> The Court held that the statute was facially invalid and violated the Establishment Clause of the First Amendment,<sup>38</sup> as incorporated into the Fourteenth Amendment.<sup>39</sup> Specifically, the Court rejected the state’s identified purpose of “academic freedom” to support the law, and found that it had no secular purpose at all.<sup>40</sup> But the Court did not hold that teaching “creation science” violated the U.S. Constitution. To the contrary, it held that the purported purpose of “academic freedom” was not advanced by the statute because the statute “does not grant teachers a flexibility that they did not already possess to supplant the present science curriculum with the presentation of theories, besides evolution, about the origin of life.”<sup>41</sup> It was not teaching “creation science” that was at issue in *Edwards v. Aguillard*, but rather a law that limited teachers’ decisions to teach it or not.<sup>42</sup>

The common thread in *Edwards* and the argument against anti-preference laws that I wish to focus on, then, is that the challenge is not to the underlying conduct of a state actor, but to a law that allegedly limits the underlying conduct of a state actor.

## II.

After a brief look at the remedial schemes built into the anti-preference laws, we will look at two injunctions actually issued against the enforcement of such laws to illustrate the difficulties in formulating a proper injunction.

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<sup>36</sup> 482 U.S. 578 (1987).

<sup>37</sup> *Id.*

<sup>38</sup> U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

<sup>39</sup> U.S. CONST. amend. XIV.

<sup>40</sup> *Edwards*, 482 U.S. at 586–89.

<sup>41</sup> *Id.* at 587. *Compare id.* (“Indeed, the Court of Appeals found that no law prohibited Louisiana public school teachers from teaching any scientific theory.”), *with id.* at 599 (Powell, J., concurring) (“[T]he ‘academic freedom’ of teachers to present information in public schools, and students to receive it, . . . necessarily is circumscribed by the Establishment Clause.”).

<sup>42</sup> *Id.* at 587 (majority opinion).

### A. *The Remedial Schemes*

Each of the anti-preference laws that have been enacted in California, Washington, Michigan, and Nebraska has a similar provision about remedies: “The remedies available for violations of this section shall be the same, regardless of the injured party’s race, sex, color, ethnicity, or national origin, as are otherwise available for violations of . . . anti-discrimination law.”<sup>43</sup>

The remedy provisions, then, give “injured parties” (at least) the right to seek remedies, and those remedies are the same as those for other anti-discrimination laws. Several questions arise. First, is the authority of a state official to sue for a violation of the other anti-discrimination law a “remedy” or just a means of enforcement? If it is only the latter, a state official’s right to sue for a violation of the state’s general anti-discrimination law may not be enough to grant the state official authority to sue for a violation of the anti-preference law. Second, who grants remedies to the injured parties? Again, the answer must lie in the other state laws to which the remedy provisions refer. Each state’s law will differ, of course, but a few examples will provide a general pattern.

The general anti-discrimination provision in Michigan is known as the Elliott-Larsen Civil Rights Act.<sup>44</sup> It is a broad, sweeping law that covers opportunities with respect to employment, housing, public accommodations, public service, and educational facilities and prohibits discrimination on the basis of “religion, race, color, national origin, age, sex, height, weight, familial status, or marital status.”<sup>45</sup> Section 801 of the Act provides that a person alleging a violation may bring “a civil action for appropriate injunctive relief or damages, or both.”<sup>46</sup> At the same time, article 6 of the Act<sup>47</sup> provides some process for the Michigan Department of Civil Rights to consider complaints filed with it, and for the Michigan Civil Rights Commission to hold hearings concerning the complaint.<sup>48</sup> The Attorney General of the State of

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<sup>43</sup> CAL. CONST. art. 1, § 31(g); MICH. CONST. art. 1, § 26(6); NEB. CONST. art. 1, § 30(7); WASH. REV. CODE § 49.60.400(8) (1999). The ellipsis in the quoted text is replaced, in each of California, Michigan and Washington’s laws, by the name of the state or, in the case of Michigan and Washington, the name used in the possessive. California’s provision includes the hyphenated word “then-existing,” which is absent from the other state statutes. *See, e.g.*, Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335, 1390 (1997) (“[T]he reference to ‘then-existing California antidiscrimination law’ makes clear that the remedial scheme isn’t frozen at November 1996, but should be borrowed from whatever framework is generally in effect at the time the claim takes place.”).

<sup>44</sup> MICH. COMP. LAWS ANN. § 37.2101 (West 2001) (“This act shall be known and may be cited as the ‘Elliott-Larsen civil rights act.’”).

<sup>45</sup> *Id.* at § 37.2102(1).

<sup>46</sup> *Id.* at § 37.2801(1).

<sup>47</sup> *Id.* at §§ 37.2601–.2606.

<sup>48</sup> Section 37.2602(c) states that “[t]he department shall . . . [r]eceive, initiate, investigate, conciliate, adjust, dispose of, issue charges, and hold hearings on complaints alleging a

Michigan is tasked by statute with representing the Commission or Department in court.<sup>49</sup>

California presents a slightly more complicated situation, because there is more than one law that conceivably could be deemed an “anti-discrimination” law. The Fair Employment and Housing Act covers employment discrimination.<sup>50</sup> Other kinds of discrimination by businesses generally come under the Unruh Civil Rights Act.<sup>51</sup> The remedial provisions of the latter Act presumably would cover discrimination in “public contracting” and “public education” that violated California’s anti-preference law. The use of different statutes for different kinds of violations of California’s anti-preference law was apparently intended by those who drafted the initiative.<sup>52</sup>

While FEHA has a fairly comprehensive remedial scheme, not unlike the Elliott-Larsen Act, the Unruh Act and other likely applicable provisions have a fairly simple and straightforward remedial provision. Section 52(c) of California’s Civil Code provides that a “person aggrieved,” the Attorney General, or any district or city attorney may bring a civil action against a person or group engaged in “conduct of resistance to the full enjoyment of any of the rights described in this section.”<sup>53</sup>

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violation of this act . . .” *Id.* at § 37.2602(c). Section 37.2604, somewhat more cryptically, states that the Commission, “after a hearing on a charge issued by the department,” shall do various things depending upon its findings. *Id.* at § 37.2604. Curiously, Section 601 of the Elliott-Larsen Act, which lists the Commission’s general powers and duties, states that “[t]he commission may hold hearings, but does not identify the subject matter of the hearings. *Id.* at § 37.2601(2). The Commission is a body established by the Michigan Constitution. MICH. CONST. art. V, § 29.

<sup>49</sup> MICH. COMP. LAWS ANN. § 37.2602(b). There appear to be only two instances in which either the Department or the Commission would appear in state court in a matter related to the enforcement of the Elliott-Larsen Act section 37.2603 gives the Department authority to file a petition seeking appropriate temporary relief pending final determination of a case before the Commission. *Id.* at § 37.2603. Section 37.2606(2) permits the Commission to file a petition for “enforcement of an appealable order” in court. *Id.* at § 37.2606(2); *see* Walker v. Wolverine Fabricating & Mfg. Co., 360 N.W.2d 264, 270 (Mich. Ct. App. 1984) (“[T]he [Commission] may go to court on behalf of an aggrieved party to enforce its decision . . .”), *rev’d in part*, 391 N.W.2d 296 (Mich. 1986).

In contrast to the Michigan Attorney General’s role as a lawyer for other executive branch (or independent) agencies under the Elliott-Larsen Act, other provisions of the Michigan code give the Attorney General direct authority to sue. *See, e.g.*, MICH. COMP. LAWS ANN. § 15.271 (authority to sue for violations by public bodies of the Open Meetings Act); MICH. COMP. LAWS ANN. § 500.230 (authority to sue for penalties under the Insurance Code of 1956).

<sup>50</sup> CAL. GOV’T CODE §§ 12900–12996 (2005).

<sup>51</sup> CAL. CIV. CODE § 51 (2007); *see also id.* at § 51.5(a).

<sup>52</sup> *See* Volokh, *supra* note 43, at 1336 n.2, 1389 (The author, a “legal advisor to the pro-CCRI campaign” who “participated in the late stages of the initiative’s drafting,” asserts that “[c]ourts should borrow the remedies from the most similar area of the law—for instance, borrow from employment discrimination law in employment cases and from educational discrimination law in education cases.”).

<sup>53</sup> CAL. CIV. CODE § 52(c).

This obviously is not intended to be a comprehensive examination of the enforcement provisions in any state's anti-preference law. The only point that deserves emphasis is that individual enforcement schemes vary, and that, in almost all instances, the remedial schemes include a private individual's right to sue a transgressor.

*B. Efforts to Enjoin the Operation of Anti-Preference Laws*

A brief look at the injunctions actually issued in two cases challenging anti-preference laws illustrates the problems in formulating an effective one. In the challenge to California's anti-preference law, the district court issued a preliminary injunction against the Governor, Attorney General, and all members of the class they represented (basically, all state officials subject to the law) that

restrained and enjoined, pending trial or final judgment in this action, from implementing or enforcing Proposition 209 insofar as said amendment . . . purports to prohibit or affect affirmative action programs in public employment, public education, or public contracting.

The aforesaid preliminary injunction shall not preclude the following:

1. all defendants, including members of the defendant class, from identifying, reviewing and analyzing existing affirmative action programs. (FN 53)

(FN 53) The preliminary injunction does not, of course, interfere with the ability of any defendant . . . to *voluntarily* adopt, retain, amend or repeal an affirmative action program. It does preclude any defendant or member of the defendant class from taking any action with respect to an affirmative action program in order to enforce, implement, or otherwise comply with, Proposition 209.

. . .

3. proceedings in pending state court actions related to Article 1, section 31, including [action by the Governor to enforce it], and

4. the California Attorney General from defending Article 1, section 31 in any legal proceeding challenging its validity under the United States Constitution.<sup>54</sup>

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<sup>54</sup> Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1520–21 (N.D. Cal. 1996), *vacated on other grounds*, 122 F.3d 692 (9th Cir.), *cert. denied*, 522 U.S. 963 (1997); *cf.*

So the injunction by Judge Henderson permitted state agencies to voluntarily repeal any affirmative action program, but precluded them from implementing or complying with California's anti-preference law.<sup>55</sup> The injunction provides little guidance between the permissible voluntary repealing of programs of race-conscious decision-making and the impermissible "implementation" of the anti-preference law.<sup>56</sup> The difficulties one might have in enforcing the injunction strike me as significant. If a state executive "voluntarily" repealed a program of race-conscious decision-making in part because he or she believed it reflected the general will of the people of California, albeit without considering that will as binding, would it have violated the injunction?<sup>57</sup> Perhaps the difficulties are not sufficient to withhold relief—one imagines that an injunction precluding an employer from discriminating on the basis of race in hiring might present similar difficulties—but they do cast doubt on how effective such an injunction would be.<sup>58</sup>

Consider, too, the stipulated injunction issued in the challenge to the Michigan anti-preference law: "[I]t is ordered that the application of Article 1, section 26 of the Michigan Constitution of 1963 to the current admissions and financial aid policies of [defendant Universities] is enjoined from this date through the end of the current admissions and financial aid cycles . . . ."<sup>59</sup>

The first and most obvious problem with the injunction is that it does not state *who* is enjoined; it just passively states that "the application" of the law "is enjoined."<sup>60</sup>

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Coalition for Econ. Equity v. Wilson, No. C96-4024, 1996 WL 788375, at \*1, \*3 (N.D. Cal. Dec. 6, 1996) (issuing temporary restraining order that "RESTRAINED AND ENJOINED [the Regents of the University of California] from implementing or enforcing Proposition 209 insofar as said amendment . . . purports to prohibit or affect affirmative action programs in public employment, public education or public contracting," while noting earlier that the "University is free to implement [resolutions aimed at eliminating the use of race, ethnicity, or gender in hiring, contracting, and admissions], regardless of the outcome of this case").

<sup>55</sup> *Wilson*, 1996 WL 788375, at \*1, \*3.

<sup>56</sup> *Id.* at \*3.

<sup>57</sup> See FED. R. CIV. P. 65(d)(1) ("Every order granting an injunction and every restraining order must: . . . (B) state its terms specifically; and (C) describe in reasonable detail . . . the act or acts restrained or required.").

<sup>58</sup> Evidence for discrimination by an employer can be developed statistically, if numbers are large enough, or by implication (through comparisons of the qualifications of candidates of different races). Analogous evidentiary options for determining the motivation of a state agency's actions are not immediately obvious.

<sup>59</sup> *Coalition to Defend Affirmative Action v. Granholm*, No. 06-15024, 2006 WL 3953321, at \*1 (E.D. Mich. Dec. 19, 2006), *stay granted* by 473 F.3d 237 (6th Cir. 2006), *cert. denied sub nom.* Mich. Civ. Rights Initiative Comm. v. Coalition to Defend Affirmative Action, 129 S. Ct. 35 (2008).

<sup>60</sup> *Id.* As Judge Learned Hand once famously wrote, a court "cannot lawfully enjoin the world at large, no matter how broadly it words its decree." *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930); see also *Hope Clinic v. Ryan*, 249 F.3d 603, 605 (7th Cir. 2001) ("[A]n injunction prohibiting *the world* from filing private suits would be a flagrant violation

At that stage of the litigation, only the Governor, the Attorney General (by intervention), and the universities whose policies were affected by this injunction were defendants in the case—and they all had stipulated to it.<sup>61</sup>

Plainly, a state court judge might not be deterred from enforcing the anti-preference law by such a stipulated injunction. Would the universities who were parties have had a defense against a lawsuit that sought damages for any conduct while the injunction was in effect? It is unclear, but I doubt it. The doctrine of quasi-judicial immunity may protect those who take acts required by an injunction, but nothing in the injunction required the universities to take race-conscious measures.<sup>62</sup> (Indeed, the same would hold true of the more detailed injunction issued by Judge Henderson against implementation of the California anti-preference law.)<sup>63</sup> In any event, the doctrine of quasi-judicial immunity applies to individuals sued in their individual capacities for damages; it would not apply to individuals sued in their official capacities, and might not apply to entities amenable to suit.<sup>64</sup>

Nor is it clear that federal courts can grant any other kind of immunity through their injunctions. Justice Stevens and Justice Marshall addressed this question in *Edgar v. MITE Corp.*,<sup>65</sup> a case involving the legality of an Illinois regulation of corporate takeovers.<sup>66</sup> A preliminary injunction had been issued enjoining the Illinois Secretary of State from enforcing the statute while the case was pending.<sup>67</sup> While Justice Marshall thought that a federal court injunction against enforcement of a law should preclude later bringing suit against a party who relied on that injunction to engage in conduct violative of the law,<sup>68</sup> Justice Stevens disagreed.<sup>69</sup> “There simply is no constitutional or statutory authority that permits a federal judge to grant dispensation from a valid state law.”<sup>70</sup> That is, there is a difference between enjoining parties

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of both Article III and the due process clause (for putative private plaintiffs are entitled to be notified and heard before courts adjudicate their entitlements).”).

<sup>61</sup> *Granholm*, 2006 WL 3953321, at \*1.

<sup>62</sup> *See, e.g.*, *Richman v. Sheahan*, 270 F.3d 430, 439 (7th Cir. 2001) (where court ordered detention, officers who used excessive force were not immune from liability), *cert. denied sub nom.* *Burgeson v. Richman*, 535 U.S. 971 (2002). Indeed, the universities themselves later denied that they were capable of enforcing the law. *See infra* note 254 and accompanying text.

<sup>63</sup> *See supra* notes 54–56 and accompanying text.

<sup>64</sup> *Kentucky v. Graham*, 473 U.S. 159, 167 (1985) (explaining that entities only have sovereign immunity as distinguished from “personal-capacity” immunity); *VanHorn v. Oelschlager*, 502 F.3d 775, 779 (8th Cir. 2007) (holding that quasi-judicial immunity is not available for defendants sued in their official capacities).

<sup>65</sup> 457 U.S. 624 (1982).

<sup>66</sup> *Id.* at 626–27.

<sup>67</sup> *Id.* at 628–29.

<sup>68</sup> *Id.* at 657–58 (Marshall, J., dissenting).

<sup>69</sup> *Id.* at 647–48 (Stevens, J., concurring).

<sup>70</sup> *Id.* at 653 (Stevens, J., concurring). The majority (including Justice Stevens) did not resolve the question of immunity, concluding that it would not be decided until the Secretary of State, enjoined from enforcing the statute in question by the preliminary injunction, commenced an action under the state law. *Id.* at 630.

from taking certain actions and simply granting others immunity for any actions they may take.<sup>71</sup> An injunction that simply *permits* a university or municipality to engage in race-conscious decision-making that would otherwise violate a state anti-preference law, or even that precludes them from weighing the anti-preference law in determining whether to engage in such conduct, may not actually affect the university's or municipality's behavior because it might not preclude any subsequent state court lawsuits against it.<sup>72</sup>

### III.

The two related jurisdictional problems that I explore in this section are (1) Article III standing and (2) Eleventh Amendment immunity. In the end, each doctrine revolves around the same fundamental problems: the specific state official sued in a pre-enforcement proceeding may not have much authority to enforce the law and no judgment will preclude state judges from enforcing an anti-preference law in a lawsuit commenced by a private citizen.

#### A. Standing

In the mid-1990s, I wrote an article asserting that “[i]t is hard to read any significant number of cases or articles about standing without coming to the conclusion that few hold the internal coherence of that doctrine in high regard.”<sup>73</sup> I stand by those

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<sup>71</sup> Thus, for example, if substantially identical state and federal laws both prohibited the same conduct, an injunction against a state prosecutor, on the grounds that the law violated one of the Bill of Rights, would seem unlikely to preclude a federal prosecutor from acting under the federal law. Cf. David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. U. L. REV. 759, 762 (1979) (injunction against state prosecutor may not be effective if “the federal plaintiffs . . . have moved to another county where even the local prosecutor may not be subject to contempt”). But see Stuart Buck & Mark L. Rienzi, *Federal Courts, Overbreadth, and Vagueness: Guiding Principles for Constitutional Challenges to Uninterpreted State Statutes*, 2002 UTAH L. REV. 381, 444–45 (arguing that federal courts will uphold injunctions against state officials even if they are not specifically named parties).

<sup>72</sup> Cf. *Younger v. Harris*, 401 U.S. 37, 50–51 (1971) (“The kind of relief granted in *Dombrowski* thus does not effectively eliminate uncertainty as to the coverage of the state statute and leaves most citizens with virtually the same doubts as before regarding the danger that their conduct might eventually be subjected to criminal sanctions.”); *Dombrowski v. Pfister*, 380 U.S. 479, 491 n.7 (1965) (explaining the Court’s precedent holding that once a limiting construction of an overbroad statute has been obtained, that statute can be applied to conduct occurring prior to the adoption of the limiting construction).

<sup>73</sup> Michael E. Rosman, *Standing Alone: Standing Under The Fair Housing Act*, 60 MO. L. REV. 547, 550 (1995); see also *id.* at 550 nn.13–15. The academic skepticism of the constitutional standing cases does not seem to have diminished much since. See, e.g., Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 639 (1999) (arguing that, aside from being unmoored in the text or history of the Constitution, the “injury in fact” test “is not even coherent”).

words, but they need not deter me from the task at hand of describing what the courts have written. I focus specifically on the three elements of “constitutional” standing, which are said to derive from the case or controversy provision of Article III of the Constitution:<sup>74</sup> injury in fact, causation, and redressability.<sup>75</sup> There are also “prudential” rules of standing, which do not derive from Article III, and which Congress can eliminate if it so chooses.<sup>76</sup>

### 1. Injury “In Fact”

In describing the kinds of injuries that meet Article III requirements, the Court has used terms like “distinct,” “palpable,” “not abstract,” not “conjectural or hypothetical,”<sup>77</sup> “concrete,” “particularized,” and “actual or imminent,”<sup>78</sup> although it generally concedes that no precise definition is available.<sup>79</sup> It is generally held that the imminent possibility of prosecution under a law, or adjusting one’s behavior and abstaining from constitutionally protected conduct in order to avoid prosecution, is an “injury in fact” for standing purposes.<sup>80</sup>

Two issues related to the “injury in fact” element deserve mention. First, courts do require that there be a “credible threat” that the defendant will apply the law to the plaintiff claiming injury from its potential application.<sup>81</sup> However, the Court seems to treat recently passed statutes differently from older statutes.<sup>82</sup> While normally the

<sup>74</sup> U.S. CONST. art. III, § 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies to which the United States shall be a Party;—to Controversies between two or more States . . . .

In *United States v. Richardson*, 418 U.S. 166, 171 (1974), the Court stated that the constitutional requirements of standing derive from the case or controversy language of Article III.

<sup>75</sup> See, e.g., *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472–73 (1982). In *Allen*, the Court described standing as the most important concept in Article III. *Allen*, 468 U.S. at 750.

<sup>76</sup> *Allen*, 468 U.S. at 751; see also *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208–09 (1972) (concluding that Congress intended standing under section 810(d) of the Fair Housing Act to extend as broadly as permitted under Article III).

<sup>77</sup> *Allen*, 468 U.S. at 751–52.

<sup>78</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

<sup>79</sup> *Allen*, 468 U.S. at 751.

<sup>80</sup> See *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–31 (2007) (describing such cases).

<sup>81</sup> See, e.g., *Ellis v. Dyson*, 421 U.S. 426, 434–35 (1975).

<sup>82</sup> Compare *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (standing existed for doctors to challenge recent abortion statute passed in Georgia where it was “recent and not moribund”), with *Poe v. Ullman*, 367 U.S. 497, 503–06 (1961) (dismissing challenge to Connecticut statute that prohibited the use of contraceptives on the ground that there was no Article III case or

plaintiff must bear the burden of showing each element of standing, it appears that the existence of a recently passed statute is sufficient to meet this burden. For laws other than ones in desuetude, the *absence* of a credible threat is something usually raised and shown by the defendant, either with affidavits from the relevant parties (indicating a lack of any intent to apply the law to the plaintiff) or by showing that the law has never been applied in plaintiff's situation.<sup>83</sup>

Second, even if a credible threat alone is sufficient to invoke federal jurisdiction, it is at least possible that more is required for injunctive relief. The Court hinted at this in several cases in the mid-1970s, *Roe v. Wade*,<sup>84</sup> *Steffel v. Thompson*<sup>85</sup> and *Doran v. Salem Inn, Inc.*<sup>86</sup> In *Roe v. Wade*, the Court famously, albeit without much explanation and without actually reaching the issue of the propriety of injunctive relief, affirmed the denial of injunctive relief against the state prosecutors seeking to enforce Texas's abortion law even while it affirmed a declaratory judgment to the effect that the law was unconstitutional.<sup>87</sup> In *Steffel*, the Court held that a declaratory judgment action was available to an individual who had previously been warned to stop distributing handbills against American involvement in Vietnam on an exterior sidewalk of a shopping center, and was threatened with arrest.<sup>88</sup> The Court held that the handbill distributor could pursue his claim for declaratory relief even if he could not show the irreparable harm that would be required for an injunction against prosecution.<sup>89</sup> In *Doran*, the Court suggested that injunctive relief might not be necessary in most cases where a plaintiff's rights can be protected through the use of a declaratory judgment.<sup>90</sup> In neither *Steffel* nor *Doran*, however, did the Court explain in any kind of detail what additional injuries or other considerations need to be shown in order to establish a right to injunctive relief.<sup>91</sup> While there may be a general perception that an injury to one's constitutional rights is "irreparable" injury entitling one, at least as an initial

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controversy in the absence of a credible threat that state prosecutor intended to press criminal charges under the law).

<sup>83</sup> See, e.g., *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979) (holding that the plaintiffs had standing when defendants did not disclaim the right to prosecute them in the future).

<sup>84</sup> 410 U.S. 113 (1973).

<sup>85</sup> 415 U.S. 452 (1974).

<sup>86</sup> 422 U.S. 922 (1975).

<sup>87</sup> *Roe*, 410 U.S. at 166–67; see also *Doe*, 410 U.S. at 201.

<sup>88</sup> *Steffel*, 415 U.S. at 455. Mr. Steffel alleged that he had stopped distributing the handbills in response to the threats of arrest. A companion of his had not, and had been arrested. *Id.* at 455–56.

<sup>89</sup> *Id.* at 463.

<sup>90</sup> *Doran*, 422 U.S. at 931.

<sup>91</sup> Indeed, in *Steffel*, the Court did not reach the lower court's holding that the prospective handbill distributor could not obtain injunctive relief. *Steffel*, 415 U.S. at 463 & n.12. Footnote 12 appears to leave open the question whether an individual "required to forgo constitutionally protected activity in order to avoid arrest" has shown irreparable injury. *Id.*

matter, to injunctive relief,<sup>92</sup> the Court has occasionally used language suggesting that “irreparable harm” is a serious obstacle to obtaining injunctive relief.<sup>93</sup>

## 2. Causation

The second requirement of Article III standing is a showing of a “causal connection between the injury and the conduct complained of—the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.’”<sup>94</sup> In recent appellate court cases, where state laws enforced solely through lawsuits by private citizens were challenged, the courts all have focused on the specific defendants before them and concluded that *those* state officials had not engaged in any conduct—and were not about to engage in any conduct—that caused the injuries to plaintiffs. That is, they have distinguished a “causal connection” between the *state law* and plaintiffs’ injuries from one between *specific state officials* and plaintiffs’ injuries. Each of the cases that considered Article III standing, accordingly, found that the specific state officials were not engaging in any conduct that could harm plaintiffs.<sup>95</sup>

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<sup>92</sup> See Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 707 & n.100 (1990) (noting that “injunctions are the standard remedy in civil rights . . . litigation” and citing 11 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948, at 440 (1973), for the proposition that “when deprivation of a constitutional right is shown, ‘most courts hold that no further showing of irreparable injury is necessary’”). This seems to be the rule for threats to First Amendment liberties. See, e.g., *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”). Whether it applies outside of that context is not as clear. See, e.g., *Roe*, 410 U.S. at 166 (refusing to reach question of the propriety of district court’s denial of injunctive relief as to unconstitutional criminal statute regulating abortion, noting that “[w]e are not dealing with a statute that, on its face, appears to abridge free expression, an area of particular concern . . . .”); *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region v. Nixon*, 428 F.3d 1139, 1143 (8th Cir. 2005) (rejecting as “far too broad” the assertion that any alleged deprivation of constitutional rights is irreparable injury); *Constructors Ass’n of W. Pa. v. Kreps*, 573 F.2d 811, 820 n.33 (3d Cir. 1978) (contrasting First Amendment and equal protection rights for purposes of irreparable injury).

<sup>93</sup> See, e.g., *Younger v. Harris*, 401 U.S. 37, 46 (1971) (“Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered ‘irreparable’ in the special legal sense of that term. Instead, the threat to the plaintiff’s federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution.”). The Court in *Younger* also suggested that a “chilling effect” on First Amendment rights would be insufficient to allow a federal court to interfere with a state criminal prosecution. *Id.* at 50.

<sup>94</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)) (ellipses and brackets as in *Lujan*).

<sup>95</sup> *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1156 (10th Cir. 2005) (“[Plaintiff] has failed to demonstrate the necessary causal connection between its injury [the loss of some minor patients unable to obtain parental consent for abortions] and these defendants.”); *Hope Clinic*

Although these cases have caused some consternation in the academy, they are not alone or without precedent.<sup>96</sup> They apply the standard principle that “[a] person aggrieved by the application of a legal rule does not sue the rule *maker*—Congress, the President, the United States, a state, a state’s legislature, the judge who announced the principle of common law. He sues the person whose acts hurt him.”<sup>97</sup>

Nonetheless, there have been academic critics. Professor Borgmann, for example, has assailed this causation analysis because, in her view, “focus[ing] on whether the individual defendants had themselves caused the plaintiffs’ injuries . . . is the wrong approach to causation in these cases.”<sup>98</sup> The individual defendants in these cases are being sued “as representatives of the state itself” because it is the state itself which has

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v. Ryan, 249 F.3d 603, 605 (7th Cir. 2001) (“[P]laintiffs lack standing to contest the statutes authorizing private rights of action . . . because the defendants cannot cause the plaintiffs injury by enforcing the private-action statutes . . . .”); *Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (“The plaintiffs have never suggested that any act of the defendants [the Governor and Attorney General of Louisiana] has caused, will cause, or could possibly cause any injury to them. . . . [A] plaintiff may not sue a state official who is without any power to enforce the complained-of statute.”).

<sup>96</sup> See *Shell Oil Co. v. Noel*, 608 F.2d 208 (1st Cir. 1979), wherein Shell Oil sued the Governor and Attorney General of Rhode Island over a state law that precluded oil companies from discriminating in price between purchasers of petroleum products of like grade and quality. The law gave purchasers the right to sue for violations, but there were no criminal sanctions associated with the laws being challenged. The First Circuit dismissed the lawsuit on the ground that neither the Governor nor the Attorney General had ever taken or threatened to take any action with respect to the statute in question, explaining that:

If a complaint fails to allege, or plaintiff fails to prove, that defendant state officers have ever taken or threatened to take any action with respect to a state statute then there is no ‘actual controversy’ within the Declaratory Judgment Act, and there is ‘no case or controversy’ within Article III.

*Id.* at 213. The court seemed largely influenced by the fact that any enforcement powers of the Governor and Attorney General were speculative at best. *Id.* at 212–13 (although “not fanciful” to suppose the state courts might interpret the law to provide such enforcement powers, they “have not settled . . . those questions”).

<sup>97</sup> *Equal Employment Opportunity Comm’n v. Illinois*, 69 F.3d 167, 170 (7th Cir. 1995) (quoting *Quinones v. City of Evanston*, 58 F.3d 275, 277 (7th Cir. 1995)); see also 13A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 3531.5 (3d ed. 2008) (“The device of creating a purely civil remedy, enforceable only by an unidentifiable private citizen in some unforeseen future, seems an undesirable means of thwarting effective review. . . . Nonetheless, the majority [in *Okpalobi*] seems correct.”). Professor Manian argues that state legislators *are* the parties that have harmed those seeking to perform or have legal abortions when they pass laws so onerous in potential liability for such abortions that women and doctors are chilled from exercising their rights. Maya Manian, *Privatizing Bans on Abortion: Eviscerating Constitutional Rights Through Tort Remedies*, 80 TEMP. L. REV. 123, 165, 168–69 (2007). I address some of these arguments, *infra*, in Part IV.B.2.e.

<sup>98</sup> Caitlin E. Borgmann, *Legislative Arrogance and Constitutional Accountability*, 79 S. CAL. L. REV. 753, 776 (2006).

caused the injury.<sup>99</sup> Perhaps so, but one cannot sue the state itself under § 1983 or sue it, without its consent or Congressional assistance, consistently with the Eleventh Amendment in federal court.<sup>100</sup> Professor Borgmann alternatively suggests that both the governor of a state and its attorney general have caused, or will cause, the harm to plaintiffs seeking to exercise their abortion rights in the face of the abortion tort statutes, and thus can be sued.<sup>101</sup> She is plainly wrong about the governor, and probably about the attorney general as well.<sup>102</sup>

The more interesting questions involving causation concern situations where the defendant cannot *directly* harm the plaintiff, but can do so indirectly. As the Supreme Court noted in *Lujan*:

When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred . . . in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. . . . When . . . a plaintiff's asserted injury arises from

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<sup>99</sup> *Id.* at 777.

<sup>100</sup> *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 669–70 (1999) (recognizing that the Eleventh Amendment has been interpreted such that states retain their sovereign immunity in federal court); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (concluding that states were not “persons” for purposes of § 1983).

<sup>101</sup> Borgmann, *supra* note 98, at 778–79. An “abortion tort” statute is one where someone injured by an abortion can sue for damages. *See, e.g., LA. REV. STAT. ANN. § 9:2800.12* (2009). Depending upon the abortions covered by the statute, such laws can raise issues under the Supreme Court’s substantive due process jurisprudence.

<sup>102</sup> Professor Borgmann asserts that governors can be sued because they signed the bills into law, and although legislators are immune from suit, governors are not. Borgmann, *supra* note 98, at 778. She is wrong. When governors and other executives sign bills, they are acting in their legislative capacities and have the same legislative immunity as legislators. *See, e.g., Bogan v. Scott-Harris*, 523 U.S. 44 (1998) (declaring that a mayor signing a bill has absolute legislative immunity); *Baraka v. McGreevey*, 481 F.3d 187, 196 (3d Cir.), *cert. denied*, 128 S. Ct. 612 (2007) (describing legislative immunity for governor when signing a bill); *Women’s Emergency Network v. Bush*, 323 F.3d 937, 949 (11th Cir. 2003) (same).

As for attorneys general, Borgmann suggests that their role as the “state’s ‘chief legal officer’” obligates them “to enforce and defend” state statutes, and that that role causes harm to those wanting to engage in conduct that abortion tort law statutes make the basis of liability. Borgmann, *supra* note 98, at 778–79 (quoting LA. CONST. art. IV, § 8). But, of course, the salient point about tort law, generally, is that attorneys general do not enforce them. The one case Professor Borgmann cites, *Mobil Oil Corp. v. Attorney General of Virginia*, involved a statute that specifically gave the attorney general the authority to “investigate and bring an action.” 940 F.2d 73, 75 (4th Cir. 1991) (quoting VA. CODE ANN. § 59.1-68.2 (1991)); *see* Borgmann, *supra* note 98, at 779. Whether an attorney general’s general authority to defend the constitutionality of a statute is sufficient by itself to cause harm to those who may be liable under it is discussed *infra*, in text accompanying note 203.

the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed.<sup>103</sup>

Some of the tricky issues associated with indirect injury, especially through a regulation that governs the behavior of governmental actors, is discussed in subsequent sections of this Article, including the next one on redressability.

### 3. Redressability

The Court has described the third constitutional requirement of standing, redressability, as follows: “[I]t must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’”<sup>104</sup> The Court has noted that the “‘fairly traceable’ [i.e., causation] and ‘redressability’ components of the constitutional standing inquiry were initially articulated by this Court as ‘two facets of a single causation requirement.’”<sup>105</sup> The difference, the Court has explained, is that causation “examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas [redressability] examines the causal connection between the alleged injury and the judicial relief requested.”<sup>106</sup>

Thus, when privately enforceable tort laws are challenged, the cases have found a lack of redressability for more or less the same reasons that they have found a lack of causation. The remedy against the state officials, be it an injunction or a declaratory judgment, simply will not do the plaintiffs much good. It certainly will not prevent them from being sued in state court for violations of the underlying statutes. Thus, to the extent that the plaintiffs are injured by the chilling effect of the statutes, and the possibility of state court lawsuits for substantial liability against them, an injunction or declaratory judgment against, say, the attorney general of the state, will not prevent that harm.<sup>107</sup>

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<sup>103</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992).

<sup>104</sup> *Id.* at 561 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)).

<sup>105</sup> *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984) (quoting CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS, § 13 (4th ed. 1983)).

<sup>106</sup> *Id.*

<sup>107</sup> *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1158–59 (10th Cir. 2005) (“[T]he record cannot support a conclusion that a judgment enjoining *only these defendants* from filing suit to recover damages under § 1-740 would redress [plaintiff’s] injury [of turning away minor patients seeking abortions who could not obtain parental consent]. . . . Most significantly, a judgment in Nova’s favor would do nothing to prevent lawsuits against Nova by the minor patients who actually require subsequent medical care, or by any doctors or non-defendant hospitals and medical clinics who may treat them.”); *Hope Clinic v. Ryan*, 249 F.3d 603, 605 (7th Cir. 2001) (“An injunction prohibiting *these defendants* from enforcing the private-suit rules would be pointless; an injunction prohibiting *the world* from filing private suits would be a flagrant violation of both Article III and the due process clause (for putative private plaintiffs are entitled to be notified and heard before courts adjudicate their entitlements).”); *Okpalobi v. Foster*, 244 F.3d 405, 426–27 (5th Cir. 2001) (en banc) (holding that the redressability requirement was not met: “For all practical purposes, the injunction granted by the

The academic critics assert that declaratory judgments can, indeed, redress the injuries caused by privately-enforced statutes that are allegedly unconstitutional because a declaration of unconstitutionality would give comfort to those being chilled from exercising their constitutional rights, and thus give them the needed support to engage in protected conduct.<sup>108</sup> I believe they are wrong in this analysis, but an explanation of why they are wrong requires a digression into the nature of declaratory judgments and the relationship between federal and state courts.

Federal courts cannot erase state statutes (nor, for that matter, federal statutes).<sup>109</sup> A declaratory judgment is designed to adjudicate the rights of parties with adverse legal interests, i.e., where one side claims that *they* have a *legal* right to do something that may be affected by the other side, the other side disagrees about those legal rights, and might otherwise try to prevent the declaratory judgment plaintiffs from getting their way.<sup>110</sup> An adverse legal interest is more than just a different opinion about the law. A fairly typical situation for a declaratory judgment is where an insured is claiming that it is owed money on an insurance contract, and the insurer denies that it is liable. The insurer then brings an action for a declaratory judgment that it is not liable under the insurance contract.<sup>111</sup> In the context of a typical challenge to a state criminal law, the defendant is a state prosecutor who can bring a prosecution against a citizen for violating the law. A declaratory judgment would be binding against the state prosecutor pursuant to the principles of *res judicata*.<sup>112</sup>

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district court is utterly meaningless. The governor and attorney general have no power to redress the asserted injuries. In fact, under Act 825, no state official has any duty or ability to do *anything*.”(footnotes omitted)).

<sup>108</sup> *E.g.*, Borgmann, *supra* note 98, at 781 (“Even if a private lawsuit were brought, a declaratory judgment would help secure a quick victory for the defendants because a court would likely find the prior determination of unconstitutionality persuasive.”); Manian, *supra* note 97, at 142 (“[A declaratory judgment] could largely assure the doctors that they would not face liability under the law for a medically proper and consensual abortion procedure.”).

<sup>109</sup> *Steffel v. Thompson*, 415 U.S. 452, 469 (1974) (“Of course, a favorable declaratory judgment may nevertheless be valuable to the plaintiff though it cannot make even an unconstitutional statute disappear.” (quoting *Perez v. Ledesma*, 401 U.S. 82, 124 (1971) (Brennan, J., concurring in part and dissenting in part))); *Winsness v. Yocom*, 433 F.3d 727, 728 (10th Cir. 2006) (“There is no procedure in American law for courts or other agencies of government—other than the legislature itself—to purge from the statute books, laws that conflict with the Constitution as interpreted by the courts.”); *Buck & Rienzi*, *supra* note 71, at 425 (“Despite such language used by courts and commentators, there is no such thing as ‘striking down.’ A federal court has no power to erase a statute from a state’s lawbooks.”); *Shapiro*, *supra* note 71, at 767 (“No matter what language is used in a judicial opinion, a federal court cannot repeal a duly enacted statute of any legislative authority.”).

<sup>110</sup> *See Steffel*, 415 U.S. at 460.

<sup>111</sup> *See, e.g., Aetna Life Ins. v. Haworth*, 300 U.S. 227 (1937).

<sup>112</sup> It is fairly well-established that declaratory judgments do have *res judicata* effect for the parties to the case and their privies. *See, e.g., Samuels v. Mackell*, 401 U.S. 66, 72 (1971) (explaining that a declaratory judgment would have “virtually the same practical impact as a formal injunction would” because of its *res judicata* effect); RESTATEMENT (SECOND) OF

Cases for declaratory judgments in federal court, under the Federal Declaratory Judgment Act,<sup>113</sup> must still meet the requirement of Article III that limits federal courts to hearing cases and controversies, which means that a federal court can only hear declaratory judgment actions in which the plaintiff has standing.<sup>114</sup> What this means is that the judgment in the case will affect the behavior of the *defendants* in such a way that plaintiffs' injuries are "likely" to be redressed.<sup>115</sup> A declaration might, for example, identify certain conduct of the defendant that is illegal; the failure to acknowledge that ruling could lead to an injunction being issued precluding that behavior.<sup>116</sup> When the declaratory judgment action challenges a particular law that the defendants could enforce against the declaratory judgment plaintiff, it is the *res judicata* aspect of a declaratory judgment that provides the needed change in defendants' behavior required for the redressability component of Article III standing requirements: if the plaintiff is successful, the defendants can no longer pursue legal claims against the

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JUDGMENTS § 33 (1982); 10B CHARLES ALAN WRIGHT ET AL., *supra* note 97, § 2771; 22A AM. JUR. 2D *Declaratory Judgments* § 246 (2003). *But see Steffel*, 415 U.S. at 470–71 (“[T]he federal court judgment may have some *res judicata* effect, though this point is not free from difficulty and the governing rules remain to be developed with a view to the proper workings of a federal system. What is clear, however, is that . . . a declaratory judgment has the force and effect of a final judgment, 28 U.S.C. § 2201 . . . .” (quoting *Perez v. Ledesma*, 401 U.S. 82, 124–26 (1971) (Brennan, J., concurring in part and dissenting in part))); *cf.* Shapiro, *supra* note 71, at 763 (“Despite the doubts that have been expressed at the highest levels of the federal judiciary, I think the [declaratory judgment plaintiffs’] plea of *res judicata* . . . should be sustained.” (footnotes omitted)).

<sup>113</sup> 28 U.S.C. § 2201(a) (2006).

<sup>114</sup> *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 120 (2007) (referring to “Article III’s limitation of federal courts’ jurisdiction to ‘Cases’ and ‘Controversies,’ reflected in the ‘actual controversy’ requirement of the Declaratory Judgment Act”); *id.* at 126–27 (“Our opinion [in *Aetna Life Ins.*] explained that the phrase ‘case of actual controversy’ in the [Declaratory Judgment] Act refers to the type of ‘Cases’ and ‘Controversies’ that are justiciable under Article III.”); *Aetna Life Ins.*, 300 U.S. at 240 (describing the Declaratory Judgment Act as “operative only in respect to controversies which are such in the constitutional sense”).

<sup>115</sup> Thus, it is literally true, but somewhat incomplete, to assert that “[r]edressability concerns the *court’s* power, not the named defendants’ power, to redress the plaintiffs’ injury.” Jennifer L. Achilles, Comment, *Using Tort Law to Circumvent Roe v. Wade and Other Pesky Due Process Decisions: An Examination of Louisiana’s Act 825*, 78 TUL. L. REV. 853, 876 (2004). When the plaintiff is seeking forward-looking relief, the court’s power must be used in such a way that the defendant’s ability to harm plaintiff’s interest in the future is affected. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983) (“The plaintiff must show that he ‘has sustained or is immediately in danger of sustaining some direct injury’ . . . or threat of injury . . . [and it] must be both ‘real and immediate,’ not ‘conjectural’ or ‘hypothetical.’” (quoting *Golden v. Zwickler*, 349 U.S. 103, 109–10 (1969))).

<sup>116</sup> If a successful declaratory judgment does not, on its own, change the behavior of the defendant, a plaintiff can seek, and a court may order, injunctive relief. *See* 28 U.S.C. § 2201 (entitled to declaratory judgment “whether or not further relief is or could be sought”); *id.* § 2202 (“Further necessary or proper relief based on a declaratory judgment or decree may be granted . . . against any adverse party whose rights have been determined by such judgment.”).

plaintiff.<sup>117</sup> Without the possibility of *res judicata* (or the real possibility of the *res judicata* effect being asserted in an actual subsequent lawsuit), an action for a declaratory judgment that a state statute is unconstitutional would usually be just a request for an advisory opinion.<sup>118</sup>

In arguing that declaratory judgment actions can provide redressability, Professor Borgmann focuses on declaratory judgment cases that have recognized plaintiffs' standing where the defendants have not been the *ultimate* decision-maker, but have had an important, perhaps near-dispositive influence, on the ultimate decision-maker.<sup>119</sup> The most well-known of these cases involve the census, *Franklin v. Massachusetts*<sup>120</sup> and *Utah v. Evans*.<sup>121</sup> Under the statutes governing the taking of the census, the Secretary of Commerce sends a report to the President concerning the number of individuals in each state,<sup>122</sup> and the President then makes a report to the Congress.<sup>123</sup> In each of the census cases, a state objected to the method by which the Census

<sup>117</sup> See *Green v. Mansour*, 474 U.S. 64, 73 (1985) (stating that when a declaratory judgment granted in federal court has a *res judicata* effect on the issue of liability in subsequent state court proceedings, state courts are left only to determine restitution or damages).

<sup>118</sup> See, e.g., *id.* at 73 n.2 (holding that the Eleventh Amendment barred action for a declaratory judgment regarding past conduct “[i]f . . . [plaintiffs seeking declaration regarding the state’s improper calculations of earned income for purposes of calculating aid to families with dependent children] would make no claim that the federal declaratory judgment was *res judicata* in later commenced state proceedings, the declaratory judgment would serve no purpose whatever in resolving the remaining dispute between the parties, and is unavailable for that reason.” (citing *Pub. Serv. Comm’n of Utah v. Wycoff Co.*, 344 U.S. 237, 247 (1952)); *Samuels v. Mackell*, 401 U.S. 66, 72 (1971) (explaining that if the declaratory judgment has no *res judicata* effect, “the federal judgment serves no useful purpose as a final determination of rights” (quoting *Pub. Serv. Comm’n of Utah v. Wycoff Co.*, 344 U.S. 237, 247 (1952)); *Imperial Irrigation Dist. v. Nev.-Cal. Elec. Corp.*, 111 F.2d 319, 321 (9th Cir. 1940) (explaining that a court lacks jurisdiction where the parties have stipulated that the declaration of certain rights will not have *res judicata* effect); see also Shapiro, *supra* note 71, at 764 n.28 (“Professor Borchard, one of the fathers of the Federal Declaratory Judgment Act of 1934 . . . viewed the *res judicata* effect of a declaratory judgment as essential to its purpose and to its validity as a judgment. . . . Were a declaratory judgment not entitled to *res judicata* effect, its validity as an exercise of federal judicial power under article III of the Constitution might be suspect.”); Michael J. Edney, Comment, *Preclusive Abstention: Issue Preclusion and Jurisdictional Dismissals after Ruhrgas*, 68 U. CHI. L. REV. 193, 212–13 (2001) (“The ability to bar such a preclusive effect [of a judgment under the Declaratory Judgment Act] is in direct tension with the constitutional bar of the ‘case or controversy’ requirement of Article III against federal courts issuing purely advisory opinions. If declaratory judgments regarding the constitutionality of applying a state criminal law to certain future conduct had no preclusive effect, then the judgment would finally decide no controversy and be purely advisory.” (footnotes omitted)).

<sup>119</sup> Borgmann, *supra* note 98, at 780–82.

<sup>120</sup> 505 U.S. 788 (1992).

<sup>121</sup> 536 U.S. 452 (2002).

<sup>122</sup> See 13 U.S.C. § 141(b) (2006).

<sup>123</sup> See 2 U.S.C. § 2a(a) (2006).

Bureau counted people and sued (among others) the Secretary of Commerce.<sup>124</sup> In each case, the Court concluded that the state's "injury" was redressable by declaratory relief against the Secretary alone, even though the Secretary's decision was not final.<sup>125</sup> Similarly, the Court has determined that a plaintiff had standing to sue the Nuclear Regulatory Commission for a declaration that the Price-Anderson Act—which limits the liability of nuclear power companies<sup>126</sup>—was unconstitutional.<sup>127</sup> The plaintiffs presented evidence that the nuclear power plants in their area would likely no longer operate if the limits on liability from the Price-Anderson Act were unavailable.<sup>128</sup> In another case, plaintiffs challenging an opinion of the Fish and Wildlife Services that an endangered species would be jeopardized by continued operation of a water reclamation project operated by the Bureau of Reclamation had standing to challenge the legal propriety of that opinion even though it was not binding on the Bureau.<sup>129</sup> The Court found that the Fish and Wildlife Services' opinion had a "powerful coercive effect"<sup>130</sup> on the actions of the Bureau of Reclamation, and that the injury to the plaintiff irrigation districts and ranchers (a diminution of water for them) would likely be remedied by a declaration requiring withdrawal of the opinion.<sup>131</sup>

Two features of these cases deserve note. First, the cases seem to require a non-trivial amount of influence over the final decision-maker. The Court in *Bennett*

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<sup>124</sup> In *Franklin*, Massachusetts also sued the President. *Franklin*, 505 U.S. at 790. The Court concluded that the President was not an "agency" for purposes of the Administrative Procedure Act. *Id.* at 800–01. Although it held that that fact did not preclude the Court from reviewing the President's actions for constitutionality, it nonetheless expressed some doubt as to whether courts have any authority to enjoin the President in the performance of his duties, and chose not to reach that issue. *Id.* at 801–03; *see also Evans*, 536 U.S. at 459 ("Utah brought this lawsuit against the Secretary of Commerce and the Acting Director of the Census Bureau . . .").

<sup>125</sup> *Evans*, 536 U.S. at 463–64 ("Victory would mean a declaration leading, or an injunction requiring, the Secretary to substitute a new 'report' for the old one. Should the new report contain a different conclusion about the relative populations of North Carolina and Utah, the relevant calculations and consequent apportionment-related steps would be purely mechanical . . . [T]he practical consequence of that change [in the report to the President] would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered."); *Franklin*, 505 U.S. at 798, 803 (plurality opinion) (holding that although the Secretary's decision was not the final agency action because her report "serve[d] more like a tentative recommendation than a final and binding determination," declaratory relief against the Secretary would redress the State's injury because the Secretary "has an interest in defending her policy determinations," an "interest in litigating its accuracy," and because presumably it was "substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute"). Note that the Court in *Evans* seemed to have a considerably narrower interpretation of the President's discretion than the plurality in *Franklin*.

<sup>126</sup> 42 U.S.C. § 2210(c) (2000).

<sup>127</sup> *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 81 (1978).

<sup>128</sup> *Id.* at 77.

<sup>129</sup> *Bennett v. Spear*, 520 U.S. 154 (1997).

<sup>130</sup> *Id.* at 169.

<sup>131</sup> *Id.* at 170–71.

distinguished situations where the injury is a consequence of the *independent* action of some third party and an injury “produced by determinative or coercive effect upon the action of someone else.”<sup>132</sup> Of course, the distinction between the two types of cases then depends upon the difference between determinative and less-than-determinative effects, and that line will sometimes be less than clear. The Court has decided many cases in which the effect on third parties has been deemed inadequate, and the Court has held that plaintiffs lacked standing.<sup>133</sup> Second, it is the *defendant* who must have a “determinative or coercive” effect upon the ultimate decision-maker. An injunction or declaratory judgment is intended to affect the behavior of *someone* actually before the Court, even if that change in behavior will not necessarily be dispositive of whether plaintiffs’ alleged injuries can be prevented or remedied.<sup>134</sup> It is this second feature that distinguishes privately enforceable tort statutes, where, the cases have held, the defendants simply will have nothing to do with (and, thus, an inadequate connection to) the harm that is befalling the plaintiffs. Accordingly, they cannot have a “determinative or coercive” effect on those actually enforcing the statutes: state judges.

But even if we assume that “redressability” does not require that the *defendant* have a substantial effect on the ultimate decision-maker, but is met if a federal court judge (or a judgment one issues) has that kind of influence, that would hardly make

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<sup>132</sup> *Id.* at 169.

<sup>133</sup> *See, e.g.,* Lujan v. Defenders of Wildlife, 504 U.S. 555, 568–71 (1992) (plurality opinion) (stating that plaintiffs lacked standing to challenge an Endangered Species Act interpretation by the Secretary of the Interior that limited a provision requiring other federal agencies to consult with the Secretary to ensure that their actions would not be likely to jeopardize the continued existence of any endangered or threatened species to domestic projects, and not overseas projects, because (1) any determination by a district court would not be binding on the other agencies because they were not parties to the action and (2) the agencies themselves only supplied a small portion of the funding of the projects that allegedly would endanger species, and thus there was no guarantee that less harm to species would be done if the agencies’ contributions were withheld); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 42–43 (1976) (holding that where indigents alleged that changes in IRS policy allowed hospitals to maintain their advantageous non-profit, tax-exempt status without providing adequate medical services to the poor, plaintiffs lacked standing because they could not show that the desired change in IRS policy would lead to more medical services for indigents at tax-exempt hospitals); Linda R.S. v. Richard D., 410 U.S. 614, 618 (1973) (holding that, in a challenge by the mother of an illegitimate child to the failure of a prosecutor to seek criminal penalties against the child’s father for non-support, the injury was the non-payment of support by the father and that criminal prosecution of the father would not necessarily result in payment; it might result in the father’s jailing).

<sup>134</sup> *See, e.g.,* Nova Health Sys. v. Gandy, 416 F.3d 1149, 1158–59 (10th Cir. 2005) (stating “the principle that it must be the effect of the court’s judgment on the defendant that redresses the plaintiff’s injury, whether directly or indirectly,” and that “Article III . . . requires that the plaintiff demonstrate a *substantial likelihood* that the relief requested will redress its injury in fact” (citing Ash Creek Mining Co. v. Lujan, 969 F.2d 868, 875 (10th Cir. 1992) (emphasis added))).

the “redressability” inquiry easier. The injuries that federal court plaintiffs are suffering from privately-enforced statutes are caused by the threat of the civil lawsuits that might cause the plaintiffs to incur substantial liability (thus, creating the “chilling effect”).<sup>135</sup> The actors most immediately connected to that harm are private plaintiffs and state court judges.<sup>136</sup> It is unlikely that private plaintiffs will be much affected by a declaratory judgment in an action in which they were not parties.<sup>137</sup> And state judges are likely to give the opinions of lower federal courts as much weight as the arguments used by the lower federal courts to support those opinions deserve.<sup>138</sup> They have no obligation to follow them.<sup>139</sup>

This is a crucial point. State courts and lower federal courts are equal actors in the exposition of federal law, including interpretations of the United States Constitution.<sup>140</sup>

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<sup>135</sup> See Borgmann, *supra* note 98, at 755, 769–71 (legislatures create a “chilling effect” by “making it sufficiently costly to engage in targeted conduct . . . effectively suppress[ing] the conduct”).

<sup>136</sup> In abortion tort cases, “state courts stand in as a kind of shadow enforcer, because they are implicitly charged with hearing the private lawsuits authorized by the statute. Absent state court adjudication of these claims, the private lawsuits would carry no threat.” See *id.* at 778.

<sup>137</sup> Professor Borgmann suggests that private plaintiffs would be deterred, relying on Justice O’Connor’s plurality opinion in *Franklin* to the effect that a coercive judgment against a subordinate of the President’s (the Secretary of Commerce) and “an authoritative interpretation of the census statute and constitutional provision” likely would influence the President and other executive and congressional officials. *Id.* at 780–81 (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992)). Suffice it to note that I have some doubt about Justice O’Connor’s empirical observation and her characterization of *any* district court opinion as “authoritative”—which is directly contrary to an observation by the *Lujan* plurality on the same topic. *Lujan*, 504 U.S. at 569. In any event, the executive branch of government is likely to give more weight to the judiciary’s opinions than a private plaintiff (and/or a private lawyer on contingency) seeking to recover damages would. Cf. *Nova Health Sys.*, 416 F.3d at 1159–60 n.9 (“[T]here is . . . nothing in the record to suggest any significant likelihood that other potential litigants would consider themselves bound by a judgment to which they were not parties.”).

<sup>138</sup> See Buck & Rienzi, *supra* note 71, at 429–34 (citing cases asserting that the judgments of lower federal courts may be considered by or persuasive to state courts, but are not binding).

<sup>139</sup> See, e.g., *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) (“[N]either federal supremacy nor any other principle of federal law requires that a state court’s interpretation of federal law give way to a (lower) federal court’s interpretation.”).

<sup>140</sup> See, e.g., *id.* (“In our federal system, a state trial court’s interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located.”); *R.W.T. v. Dalton*, 712 F.2d 1225, 1233 (8th Cir.) (“Federal courts (except for the Supreme Court) are not superior to state courts, or higher in any theoretical order of precedence.” (quoting Richard S. Arnold, *State Power to Enjoin Federal Court Proceedings*, 51 VA. L. REV. 59, 71 (1965))), *cert. denied*, 464 U.S. 1009 (1983); *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075–76 (7th Cir. 1970) (citing various authorities to the effect that state courts are coordinate courts with lower federal courts, on an equal footing in their exposition of federal law), *cert. denied*, 402 U.S. 983 (1971); see also Shapiro, *supra* note 71, at 771 (“Other federal courts [aside from the Supreme Court] are no more than coordinate with the state courts on issues of federal law.”); *id.* at 774 (“The concept that state and

Accordingly, and although the matter has not been definitively ruled upon by the Supreme Court, the majority, and perhaps even consensus, rule seems to be that state courts are not bound by the holdings of lower federal courts.<sup>141</sup> Thus, even if we only consider the effect of a court's conclusion and the legal reasoning used to reach the result on those *not* parties to the case—aside from the absence of any effect on the defendants' behavior—redressability is at least questionable. The federal court judges before whom challenges to privately-enforced tort laws are brought were as powerless as the defendants to stop private tort suits from going forward.

Hence, a declaration that a state law is unconstitutional will not immunize the declaratory judgment plaintiff from liability for damages in state court. Indeed, the court in *Nova Health Systems* appeared to suggest that even if the state defendants *could* enforce the abortion tort statute (for example, by suing for damages in state court) it would not give plaintiffs standing because a declaration or injunction in plaintiffs' favor would not prevent others from suing them in state court.<sup>142</sup> As a

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lower federal courts are coordinate courts on issues of federal law is one that, in my view, is deeply rooted in the federal system.”).

<sup>141</sup> The Court has hinted at this rule several times, but has not made any explicit holding. In *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), for example, it characterized an opinion of the Ninth Circuit suggesting the opposite rule as “a remarkable passage.” *Id.* at 58 n.11 (citing *Yniquez v. Arizona*, 939 F.2d 727, 735–36 (9th Cir. 1991)). Several individual Supreme Court Justices have stated that state courts are not bound. See *Lockhart*, 506 U.S. at 376 (Thomas, J., concurring) (“The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court’s interpretation of federal law give way to a (lower) federal court’s interpretation.”); *id.* at 385 n.8 (Stevens, J., dissenting) (disagreeing with Justice Thomas’s interpretation of the Eighth Circuit opinion in the case and Thomas’s view that the opinion had suggested that state courts were bound); *Steffel v. Thomson*, 415 U.S. 452, 482 n.3 (1974) (Rehnquist, J., concurring) (explaining that a federal declaratory judgment would not have the same stare decisis effect in state court that it would have had in a subsequent case in the same federal jurisdiction). The federal circuit courts that have opined on the matter have expressed the same view. See, e.g., *Dyer v. Calderon*, 151 F.3d 970, 994 (9th Cir. 1997) (O’Scannlain, J., dissenting) (citing authorities).

Perhaps most importantly, especially in the absence of any Supreme Court holding to the contrary, the state courts themselves do not view themselves as bound. *Id.*; see *Buck & Rienzi*, *supra* note 71, at 428–34 (“Numerous state courts, in fact, have held that they are not bound by federal constitutional determinations except those of the Supreme Court.”); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 283–84 n.219 (1994) (collecting authorities); Shapiro, *supra* note 71, at 771 (“[T]he state courts generally believe, I think rightly, that the question whether to defer to lower federal court decisions continues to be a matter of choice . . .”).

<sup>142</sup> *Nova Health Sys.*, 416 F.3d at 1159 (“Even if these defendants were enjoined from seeking damages against Nova . . . there would still be a multitude of other prospective litigants who could potentially sue Nova under th[e] act. Most significantly, a judgment in Nova’s favor would do nothing to prevent lawsuits against Nova by the minor patients who actually require subsequent medical care, or by any doctors or non-defendant hospitals and medical

matter of common sense, if substantial liability has a significant chilling effect on the behavior of some actors, the fact that those actors have one additional non-binding authority to cite in a lawsuit against them, or that one of many potential litigants could not sue them, would not seem to provide much of a thaw.

Of course, one could argue that redressability can be met because any given federal lawsuit might be reviewed by the Supreme Court, and everyone agrees that Supreme Court decisions on federal law are binding. The Supreme Court plurality in *Lujan v. Defenders of Wildlife* rejected a very similar argument, however.<sup>143</sup> According to the plurality, standing must exist at the commencement of a lawsuit and “it could certainly not be known that the suit would reach this Court.”<sup>144</sup> At the very least, then, the argument that redressability is met because the possibility of a Supreme Court judgment would prevent plaintiffs’ injury is not an argument assured of success.

### *B. Eleventh Amendment Immunity*

The Eleventh Amendment precludes states from being sued without their consent in federal court, by any persons, except under limited circumstances.<sup>145</sup> One exception,

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clinics who may treat them.”). The argument in *Nova Health Systems* that the state defendants (the executives of various public medical institutions providing medical treatment) were potential state court plaintiffs under the statute revolved around the contention that they could incur unreimbursed medical costs as a consequence of an abortion performed on a minor in violation of the statute. *Id.* at 1152. The court rejected that causation analysis because it did not distinguish the hospital officials from anyone else who might sue under the statute. *Id.* at 1157. The important point here is that the Tenth Circuit concluded that there would *still* be a redressability problem even if it accepted plaintiffs’ causation theory. *Id.* at 1158–59.

<sup>143</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570–71 & 571 n.5 (1992) (plurality opinion) (stating that redressability cannot be premised on the chance that the case may reach the Supreme Court).

<sup>144</sup> *Id.* at 571 n.5. I am not totally convinced by this analysis. There are many things that are not known at the outset of a lawsuit, including whether the plaintiffs will win. Redressability analysis asks whether a “favorable decision” is substantially likely to remedy the injuries plaintiff has or will suffer. The Court has never really answered the question “favorable decision by whom?” presumably because the answer is along the lines of “the last court to rule after all appeals are waived or exhausted,” and no one has thought that it makes a difference whether that last court is a district or circuit court, or the Supreme Court. It makes sense to me to preclude the possibility of a Supreme Court opinion and judgment given the small likelihood in any given case that the Supreme Court will be involved, but that analysis is a bit different from the *Lujan* plurality’s analysis.

<sup>145</sup> U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”). Although the literal text would only prevent suits against a state by citizens from another state or aliens, the Court has long held that the Eleventh Amendment reflects a broader principle that also precludes citizens of a state from suing that state in federal court. *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 446 (2004); *Fed. Maritime Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 753 (2002).

derived from the Court's opinion in *Ex parte Young*,<sup>146</sup> permits certain suits seeking prospective relief only against state officers sued in their official capacity.<sup>147</sup>

In *Ex parte Young*, the Court upheld, against a challenge that the suit itself violated the Eleventh Amendment, a lawsuit against the Attorney General of the State of Minnesota seeking to enjoin him from enforcing certain railroad rates imposed by state laws that the suit alleged were unconstitutional for failing to provide an adequate return on capital.<sup>148</sup> Specifically, the Court, reviewing its past precedents, concluded that

individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings . . . to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.<sup>149</sup>

In so doing, the Court distinguished its earlier decision in *Fitts v. McGhee*,<sup>150</sup> which involved an Alabama statute providing for certain maximum rates to be charged on a certain bridge, wherein if a higher rate were charged or received, the person from whom the higher rate was extracted could seek \$20 from the person who violated the statute.<sup>151</sup> The Governor and Attorney General of Alabama were sued in *Fitts*, but the Court held that the suit against them violated the Eleventh Amendment because they did not "h[o]ld any special relation to the particular statute alleged to be unconstitutional."<sup>152</sup> In *Ex parte Young*, the Court reaffirmed the principle of *Fitts*, but found it inapplicable:

No officer of the State [in *Fitts*] had any official connection with the recovery of such penalties [for toll overcharging]. . . . The fact

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<sup>146</sup> 209 U.S. 123 (1908).

<sup>147</sup> *E.g.*, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997) (citing *Ex parte Young*, 209 U.S. 123).

<sup>148</sup> *See Ex parte Young*, 209 U.S. at 132, 167.

<sup>149</sup> *Id.* at 155–56.

<sup>150</sup> 172 U.S. 516 (1899).

<sup>151</sup> *Id.* at 516.

<sup>152</sup> *Id.* at 530.

If, because they were law officers of the State, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the Governor and the Attorney General, based upon the theory that the former as the executive of the State was, in a general sense, charged with the execution of all its laws, and the latter, as Attorney General might, represent the State in litigation involving the enforcement of the statutes. . . . [I]t is a mode which cannot be applied to the States of the Union. . . .

*Id.*

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.<sup>153</sup>

This requirement of *Ex parte Young*, that the defendant have “some connection” to the enforcement of the statute being challenged, is generally well accepted.<sup>154</sup> It has often been used simply to eliminate one or more, but fewer than all, defendants.<sup>155</sup> The Ninth Circuit has used this requirement in a number of cases to dismiss the entire lawsuit where it concluded that the defendant did not present and/or could not present any threat to the plaintiffs.<sup>156</sup>

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<sup>153</sup> *Ex parte Young*, 209 U.S. at 156–57. Thus, suing such representatives of the state was equivalent to suing the state itself. *Id.* at 157 (lacking some connection with the enforcement of the act, the defendant state officer is “merely [being made] a party as a representative of the State, and thereby attempting to make the State a party”); *cf.* Borgmann, *supra* note 98, at 777 (“The plaintiffs in *Okpalobi* did not sue the state officials because of anything they did as individuals. Rather, they sued them as representatives of the state itself.” (footnotes omitted) (discussing *Okpalobi v. Foster*, 981 F. Supp. 977 (E.D. La. 1998))).

<sup>154</sup> *See, e.g.*, *Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (“[A] plaintiff may not sue a state official who is without any power to enforce the complained-of statute.”); *1st Westco Corp. v. Sch. Dist. of Phila.*, 6 F.3d 108, 113, 116 (3d Cir. 1993) (holding that state officials must be dismissed from the suit where the school district and not the state officials enforced the provision).

<sup>155</sup> *See, e.g.*, *1st Westco Corp.*, 6 F.3d at 113–16 (relying on *Ex parte Young*, the court affirmed dismissal of school district’s third-party complaint against Pennsylvania officials on Article III grounds, because it was the school district, and not the state officials, who enforced the provision); *Harris v. Bailey*, 675 F.2d 614, 616–17 (4th Cir. 1982) (dismissing Attorney General in challenge to state garnishment proceedings where he “ha[d] no state constitutional or statutory obligation to defend a party, intervene in the action, or administer the procedure in question”); *McCrimmon v. Daley*, 418 F.2d 366, 368 (7th Cir. 1969) (ruling that a challenge to a law limiting employment of women as bartenders could not be maintained against the Illinois Attorney General even though Illinois state law explicitly permitted local jurisdictions to so limit the employment of women as bartenders—it was the local law that actually created these restrictions, and the Illinois Attorney General did not enforce them).

<sup>156</sup> *See, e.g.*, *Snoeck v. Brussa*, 153 F.3d 984, 987 (9th Cir. 1998) (dismissing suit against the Nevada Commission on Judicial Discipline challenging the Nevada Supreme Court’s rules requiring confidentiality on complaints filed against judges, with a sanction of contempt as the means to enforce that confidentiality rule, as a violation of the First Amendment, and stating that “[o]nly the Nevada Supreme Court, which authored the rules but is not a party to this suit, can do anything one way or the other about plaintiffs’ contempt chill”); *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992) (dismissing suit against California Attorney General challenging statute authorizing certain searches); *S. Pac. Transp. Co. v. Brown*, 651 F.2d 613, 614–15 (9th Cir. 1980) (dismissing suit against Oregon Attorney General challenging law restricting the negotiation of settlements with injured employees because, even though the Attorney General stipulated that he would advise local prosecutors that the law was constitutional and that they would enforce it, he lacked authority to prosecute himself).

The similarity between the constitutional standing elements and the “some connection” requirement of the *Ex parte Young* exception to Eleventh Amendment immunity is strong.<sup>157</sup> Most obviously, a state official who cannot enforce a statute in any meaningful sense both cannot cause any injury to plaintiff (and thus plaintiff’s injury is not traceable to his or her conduct as required under Article III) and lacks the “connection” requirement of *Ex parte Young*. Courts also have occasionally combined two of the elements of constitutional standing—the requirement that an injury be “imminent” and not conjectural, and the requirement that the injury be traceable to defendants’ conduct—into a sort of sliding scale in the *Ex parte Young* analysis: if clever plaintiffs can point to some less-than-obvious method by which a defendant might enforce the statute being challenged, courts sometimes require an indication that the defendant actually intends to do so.<sup>158</sup>

There are also a few cases that suggest, adopting the “threaten and are about to commence” language from *Ex parte Young* itself,<sup>159</sup> that there must be a fairly real threat of prosecution, and not merely the existence of a statute that could be the basis of a prosecution, for the *Ex parte Young* exception to apply.<sup>160</sup> If these cases are

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<sup>157</sup> Borgmann, *supra* note 98, at 791 (“[C]onnection appears to be subsumed by the elements required for Article III standing.”); Manian, *supra* note 97, at 171 (“‘some connection’ requirement of *Young* ‘mimics the causation element of Article III standing’ (quoting *Ex parte Young*, 209 U.S. at 157)).

<sup>158</sup> See, e.g., *Ist Westco Corp.*, 6 F.3d at 114–15 (“[A]lthough it is theoretically possible for the [Pennsylvania Attorney General and Secretary of Education] to have initiated suit against [plaintiffs’] interests, there is no evidence in the record to demonstrate that two of the state’s highest policy officials would have filed suit to rectify a statutory residency infraction by seven construction workers in connection with a contract with a local school district.”); *S. Pac. Transp. Co.*, 651 F.2d at 614 n.2 (referring to Attorney General’s common law power to sue for injunction, contention that Attorney General “could or would bring a civil suit to enjoin violations [was] wholly speculative”); *Shell Oil Co. v. Noel*, 608 F.2d 208, 213 (1st Cir. 1979) (“Since . . . there is no showing that defendants intend to enforce [the challenged statutes] . . . there is no actual controversy which this court is empowered by . . . Article III to adjudicate.”).

<sup>159</sup> See *supra* text accompanying note 149.

<sup>160</sup> See, e.g., *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region v. Nixon*, 428 F.3d 1139, 1147–48 (8th Cir. 2005) (Bye, J., dissenting) (“Nixon did not threaten and was not about to commence proceedings . . . nor did he have the ability to do so. . . . Because . . . there is no actual case or controversy . . . we lack jurisdiction to address the merits of this appeal.”), *vacated*, 550 U.S. 901 (2007); *Okpalobi v. Foster*, 244 F.3d 405, 414–15 (5th Cir. 2001) (plurality opinion) (explaining that *Ex parte Young* permits suits against state officers with a connection to the enforcement of, or a duty to enforce, a challenged act if they are “threatening to exercise that duty”); *Children’s Healthcare Is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1415 (6th Cir. 1996) (“Courts have not read *Young* expansively. *Young* does not apply when a defendant state official has neither enforced nor threatened to enforce the allegedly unconstitutional state statute.” (internal citations omitted)), *cert. denied sub nom. Children’s Healthcare Is a Legal Duty, Inc. v. Montgomery*, 519 U.S. 1149 (1997); *id.* at 1416 (“[T]he phrase ‘some connection with the enforcement of the act’ does not diminish the requirement that the official threaten and be about to commence proceedings.”); *Long*, 961 F.2d at 152 (“[U]nder *Ex parte Young* . . . there must be a threat of enforcement.”).

correct, it would be the case that the *Ex parte Young* exception requires a somewhat stronger showing of “imminence,” or perhaps likelihood of injury, than Article III does, although there is a question as to whether that somewhat stronger showing is actually compelled by the Eleventh Amendment or whether it applies only to a court’s authority to issue injunctive (as opposed to declaratory) relief.<sup>161</sup> As I discussed earlier, the “credible threat” requirement of Article III, especially with a recently enacted statute, essentially places the burden on a defendant responsible for enforcing a law to show that there is no likelihood of him or her prosecuting any violations by a plaintiff.

In the privately-enforced tort context, this possible distinction between the requirements of Article III and the requirements of the Eleventh Amendment have had little consequence because the defendants have had no ability to enforce the statute at all. The *Summit Medical Associates* decision in the Eleventh Circuit relied entirely on the Eleventh Amendment in holding that plaintiffs could not challenge the private civil enforcement provision of Alabama’s partial-birth abortion statute.<sup>162</sup> Relying heavily on *Fitts v. McGhee*, it held that the Eleventh Amendment barred that challenge because only a husband or a maternal grandparent could enforce that provision.<sup>163</sup> In *Okpalobi*, a plurality of seven (of fourteen) judges also concluded that (in addition to plaintiffs lacking standing) the defendants—the Governor and Attorney General of Louisiana—were immune from suit under the Eleventh Amendment because they did not enforce the tort law.<sup>164</sup>

#### IV.

We now are almost ready to consider the application of the justiciability and immunity principles to challenges to anti-preference laws. Before doing so, however,

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<sup>161</sup> *Cf.* *Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48, 65 (1st Cir. 2005) (“We have recognized an imminence requirement in *Ex parte Young* actions, though the extent to which it is *jurisdictional* (rather than just a substantive element of the action or a limit on equitable discretion) may be subject to debate.”); *cf.* *Nixon*, 428 F.3d at 1145 (holding that Attorney General was proper defendant under *Ex parte Young* in action challenging abortion regulation, but preliminary injunction should not have been entered against him where prerequisites to any enforcement by him, which were in the control of other actors, had not taken place); *Summit Med. Assocs. v. Pryor*, 180 F.3d 1326, 1340 n.11 (11th Cir. 1999) (noting that the Supreme Court’s decision in *Morales v. Trans World Airlines*, 504 U.S. 374, 381 (1992), discussed *Ex parte Young*’s “imminence” requirement “only in the context of determining whether there was sufficiently imminent and irreparable injury to support an award of *injunctive* relief” and “never discussed the Eleventh Amendment or the *Ex parte Young* exception because it was not at issue in the case”), *cert. denied*, 529 U.S. 1012 (2000).

<sup>162</sup> *Summit Med. Assocs.*, 180 F.3d at 1341–42. The Eleventh Circuit concluded that, because the appeal had come from a nonfinal order denying Eleventh Amendment immunity, it had no appellate jurisdiction over the question of whether plaintiffs had Article III standing. *Id.* at 1334–36.

<sup>163</sup> *Id.* at 1341–42.

<sup>164</sup> *Okpalobi*, 244 F.3d at 423–24 (plurality opinion).

I will briefly mention an obvious difference between anti-preference and some of the privately enforceable laws that have been discussed previously, and discuss an additional standing issue related to the anti-preference laws that needs to be explored in greater depth.

The difference between the pure tort statutes that are involved in many of the cases we have examined and the anti-preference laws is straightforward. Tort statutes of the kind we have examined purport to regulate the conduct of private persons, for the most part, and expose them to liability. The anti-preference laws regulate the conduct of government agencies and expose them to liability.<sup>165</sup> Private persons have constitutional rights; the extent to which government agencies do is less than clear.<sup>166</sup> As we shall see, this makes the standing calculation more complicated than in the context of other privately enforceable laws.

#### *A. Political Burdens and Procedural Rights*

As noted previously, the Supreme Court has permitted lawsuits to proceed even where the defendant cannot directly remedy the injury the plaintiff has or will suffer, provided that the defendant will have a substantial influence on the person who can provide that remedy.<sup>167</sup> Related to the indirect injury cases are the “procedural rights” cases. In these cases, the plaintiff alleges that a government decision-maker failed to follow the proper procedures in reaching a decision. With such allegations, a plaintiff is relieved of having to show that, had the decision-maker used proper procedures, it would have made the decision that would remedy plaintiff’s substantive injury (similar to the “substantial influence” cases, where plaintiff need not show that the ultimate decision by a non-party definitely will be different). The paradigmatic example is the requirement that an environmental impact statement be drafted; if plaintiffs have a concrete interest to protect, it does not matter that they cannot show that the drafting of the statement would produce a different substantive result from the agency.<sup>168</sup> In

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<sup>165</sup> See *infra* Part II.A.

<sup>166</sup> This has some relevance to the substantive arguments against the constitutionality of the anti-preference laws. In *Coalition to Defend Affirmative Action v. Granholm*, the court addressed the First Amendment argument as follows: “It is not clear, for example, how the Universities, as subordinate organs of the State, have First Amendment rights against the State or its voters.” 473 F.3d 237, 247 (6th Cir. 2006), *cert denied sub nom.* Mich. Civil Rights Comm. v. Coal. to Defend Affirmative Action, 129 S. Ct. 35 (2008).

<sup>167</sup> See *supra* notes 119-131 and accompanying text.

<sup>168</sup> *Lemon v. Geren*, 514 F.3d 1312, 1314–15 (D.C. Cir. 2008) (holding that a plaintiff who alleged that the Secretary of the Army failed to comply with certain provisions of the National Environmental Policy Act and National Historic Preservation Act that required him to consider the environmental and historic property impact before transferring certain property to developers had standing. “Preparation of an environmental impact statement will never ‘force’ an agency to change the course of action it proposes. The idea behind NEPA is that if the agency’s eyes are open to the environmental consequences of its actions and if it considers options that entail less environmental damage, it may be persuaded to alter what it proposed.”).

this context, the plurality in *Lujan v. Defenders of Wildlife* noted that “[t]here is . . . much truth to the assertion that ‘procedural rights’ are special.”<sup>169</sup> In that case, there were three links between the application of the requirement that federal agencies consult with the Secretary of the Interior and the actual survival of threatened species: (1) other federal agencies were not before the Court, and thus would not be bound by any holding that the Secretary’s U.S.-only interpretation of the law was incorrect,<sup>170</sup> (2) even if they were required to consult with the Secretary, they were not bound to adhere to the Secretary’s view of whether their funding threatened any species,<sup>171</sup> and (3) even if they agreed with the Secretary, and withdrew funding from foreign-based projects, it was no guarantee that the projects would not proceed or that endangered species would fare better.<sup>172</sup> As to the second link, though, the plurality concluded that plaintiffs were alleging the violation of a “procedural right” (i.e., the right to have federal agencies consult with the Secretary), and specifically disclaimed any reliance on the weakness of *that* link.<sup>173</sup> Although it never mentioned the phrase “procedural rights,” a majority of the Court appeared to adopt this view in *FEC v. Akins*.<sup>174</sup>

An analogy can be drawn between the “procedural rights” cases and cases alleging violations of the Equal Protection Clause.<sup>175</sup> At least since *Heckler v.*

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<sup>169</sup> 504 U.S. 555, 572 n.7 (1992). The caveat in *Lujan* was that the “procedural right” claimed had to be for the purpose of protecting a concrete interest. *Id.*; see *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009) (rejecting plaintiffs’ argument that they suffered a procedural injury from the Forest Service’s rule that precluded notice and comment for certain of their projects because there was no specific project on which they would be able to comment. “[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing.”).

<sup>170</sup> *Lujan*, 504 U.S. at 568–69.

<sup>171</sup> *Id.* at 569–71.

<sup>172</sup> *Id.* at 571.

<sup>173</sup> *Id.* at 572 n.7 (“[W]e do not rely, in the present case, upon the Government’s argument that, *even if* the other agencies were obliged to consult with the Secretary, they might not have followed his advice.”). Professor Sunstein’s discussion of *Lujan* in this regard is wrong. See Sunstein, *supra* note 73, at 651 (“The plurality noted that even if the plaintiffs prevailed, and the Secretary of the Interior determined that the funding was unlawful, the funding agencies might not change their behavior.”).

<sup>174</sup> 524 U.S. 11, 13–14 (1998) (holding that parties seeking information about a lobbying group, which FEC might seek if the group were a “political committee,” had standing to challenge FEC’s definition of “political committee,” which excluded lobbying group). Although the FEC still had the discretion not to seek the information even if the lobbying group were a “political committee,” the Court analogized the case to one where an administrative agency had reached a conclusion by using the wrong standards. *Id.* at 25.

<sup>175</sup> See Sunstein, *supra* note 73, at 652–53. Professor Sunstein argues that “procedural rights” are not “special,” as the plurality in *Lujan* stated, but rather that the cases in which so-called “procedural rights” are at issue are actually ones in which the injury itself needs to be defined by the relevant law. Thus, in his view, if the “governing law also creates a legally cognizable interest in the relevant structures and incentives,” then a decree requiring conformity with those structures and incentives remedies a real injury caused by the failure to conform. *Id.* at 652; *cf.* Achilles, *supra* note 115, at 873 & n.152 (“Constitutional scholars have

*Mathews*,<sup>176</sup> the Court has held that the Equal Protection Clause guarantees the right to be treated equally, regardless of whether the plaintiff will be able to procure a benefit from the equal treatment.<sup>177</sup> Thus, at least for those cases alleging an ongoing violation and for which prospective relief is sought, plaintiffs' standing does not depend upon their ability to obtain the ultimate relief sought.

As with the Equal Protection Clause generally, so too with the specific arguments used to challenge the anti-preference laws. As described earlier, the arguments on which we have focused do not challenge, for the most part, actual race-neutral conduct.<sup>178</sup> At least arguably, they challenge the process by which a state entity arrives at the decision to engage in race-neutral conduct. On this theory, and with some substantial oversimplification, the state entity is burdened by the obligations of state law in making its decision about whether to adopt a policy of race neutrality. That burden injures plaintiffs' "procedural right" to have the race-conscious versus race-neutral policy question decided on the lowest possible level of government, without the political burden imposed from higher levels.

While this characterization of the anti-preference arguments might be plausible, it is by no means guaranteed to provide standing. The Court simply has not been terribly clear about what rights can be "procedural rights," and whether they apply at all outside of specific contexts.<sup>179</sup> After all, *Linda R.S.* could also be described as a "procedural rights" case—in the specific instance, plaintiff's case would be about prosecutors making prosecutorial decisions about bringing criminal charges against deadbeat dads without interference from an unconstitutional interpretation of state

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often noted that redressability is highly dependent upon how the court defines the plaintiffs' injury."); Manian, *supra* note 97, at 166 ("[S]tanding doctrine is easily manipulated depending on how the injury is characterized.").

<sup>176</sup> 465 U.S. 728 (1984).

<sup>177</sup> *Id.* at 735, 739–40 (standing recognized for male plaintiff who challenged policy whereby widowed women, but not widowed men, were entitled to certain social security benefits even though Congress provided that, should the differential treatment be deemed unconstitutional, it should be remedied by elimination of the benefits to women and not extension of the benefits to men. The Court concluded that "discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, can cause serious noneconomic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." (internal citations omitted)); *see also* Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 658, 666 (1993) (standing existed for contractors' association to challenge "preferential treatment to certain minority-owned businesses in the award of city contracts" regardless of whether "one of its members would have received a contract absent the ordinance"; "[t]he 'injury in fact' . . . is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit").

<sup>178</sup> *See supra* Part I.

<sup>179</sup> As Professor Sunstein has noted, "it has yet to be explained why, in principle, there is no serious problem [of redressability] in conventional administrative law cases. We know that there is no such problem; we do not know why." Sunstein, *supra* note 73, at 648.

law.<sup>180</sup> Similarly, *Edwards v. Aguillard*<sup>181</sup> could be viewed as a case in which the State improperly imposed its view of proper teaching balance upon teachers, thus making the teachers' decisions as to what to teach procedurally improper. But the fact is that the courts do not generally recharacterize such cases as ones involving "procedural rights," and whether they would do so in a challenge to an anti-preference law cannot be predicted.

*B. Standing for the Anti-preference Law Challenges: Whom Do You Sue?*

This section considers the standing of possible plaintiffs in a federal lawsuit challenging an anti-preference law on one or more of the grounds suggested in Part I. Of course, the defendants who might be sued, and whether plaintiffs have standing to sue them, will depend to a certain degree on who the plaintiffs are and what they claim their injury to be. In the challenge to California Proposition 209, the plaintiffs were various entities and a few individuals.<sup>182</sup> They represented a certified class consisting of "all persons or entities who, on account of race, sex, color, ethnicity, or national origin, are or will be adversely affected by Proposition 209's prohibition of affirmative action programs operated by the State [or any of its subdivisions]."<sup>183</sup> The defendants were various officials of the State of California, including the Governor and Attorney General, the President of the University of California, and various cities and counties.<sup>184</sup>

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<sup>180</sup> "The Texas courts ha[d] consistently construed [the relevant criminal] statute to apply solely to the parents of legitimate children and to impose no duty of support on the parents of illegitimate children." *Linda R.S. v. Richard D.*, 410 U.S. 614, 615 (1973). The plaintiff sought an injunction precluding the prosecutor in question from declining to prosecute solely on the basis of that interpretation of state law. *Id.* at 616.

<sup>181</sup> 482 U.S. 578 (1987).

<sup>182</sup> *Coal. for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1490 n.5 (N.D. Cal. 1996) (listing various entities as plaintiffs, including the lead plaintiff Coalition for Economic Equity, California NAACP, AFL-CIO, Council of Asian American Business Associations, and La Voz Chicana, as well as "several named individuals"), *vacated*, 122 F.3d 1431 (9th Cir.), *cert. denied*, 522 U.S. 963 (1997).

<sup>183</sup> *Id.*

<sup>184</sup> *Coal. for Econ. Equity v. Wilson*, No. C 96-4024, 1996 WL 788376, at \*1 n.1, \*2 (N.D. Cal. Dec. 16, 1996). Not all the defendants put up a struggle against plaintiffs' claims. The City of San Francisco, for example, essentially agreed with plaintiffs that the constitutional amendment added by Proposition 209 was unconstitutional. *Id.* at \*2; *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (noting that the City and County of San Francisco, as well as Marin County, filed emergency motions for a stay of the mandate from the Ninth Circuit's conclusion that the challenged provision of the California Constitution was constitutional, despite the fact that they were "not parties to the appeal"); *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 697 n.2 (9th Cir. 1997) (noting that San Francisco and other defendants did not appeal preliminary injunction and filed briefs in favor of plaintiffs). "Other defendants expressed uncertainty and confusion regarding the appropriate response to the initiative." *Wilson*, 946 F. Supp. at 1495 (citing Response of Defendant City of Pasadena to Plaintiffs' Request for a Temporary Restraining Order at 2).

The court further certified a defendant class consisting of “all state officials, local government entities or other governmental instrumentalities bound by Proposition 209.”<sup>185</sup> In short, the lawsuit was a challenge to virtually every possible application of the constitutional amendment.

In contrast, the challenge to the anti-preference law in Michigan was much narrower. Two consolidated cases challenged the application of that law, article 1, section 26 of the Michigan Constitution, to three of Michigan’s universities.<sup>186</sup> The plaintiffs, for the most part, were individuals with some connection to one of the three universities, or groups that had such individuals, or those who wanted to support race-conscious policies at those universities, as members.<sup>187</sup> They wanted to represent classes of present and future students and faculty, or citizens who wanted to support race-conscious decision-making, at the three specific universities.<sup>188</sup> Plaintiffs in one case sued the Governor, the Attorney General, and various trustees and/or directors of the three universities,<sup>189</sup> although the Attorney General actually had entered the case through a motion to intervene.<sup>190</sup> Plaintiffs in the other case sued only the Governor and the Attorney General.<sup>191</sup> The Governor was subsequently dismissed from both actions pursuant to stipulations.<sup>192</sup>

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<sup>185</sup> *Wilson*, 946 F. Supp. at 1490 n.6. The class was certified pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. The propriety of certifying a defendant class pursuant to that rule is less than clear. Rule 23(b)(2) provides for certification when “the party opposing the class has acted or refused to act on grounds that apply generally to the class.” FED. R. CIV. P. 23(b)(2). Thus, for a defendant class to be certified pursuant to Rule 23(b)(2), one would have to show, somewhat counterintuitively, that the *plaintiff* has acted or refused to act on a ground generally applicable to the class of defendants. *See* 7AA CHARLES ALAN WRIGHT ET AL., *supra* note 97, at § 1775 (discussing split of authority and opining that the “better view” is that 23(b)(2) does not authorize certification of defendant classes).

<sup>186</sup> *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 539 F. Supp. 2d 924, 933–34 (E.D. Mich. 2008) (“The *Cantrell* plaintiffs exclusively challenge Proposal 2 as it is applied to Michigan’s public universities, and the University of Michigan in particular. . . . Like the *Cantrell* plaintiffs, the *Coalition* plaintiffs focus principally, if not exclusively, on Proposal 2’s impact on public universities.”).

<sup>187</sup> *Id.* at 947 (describing the organizational plaintiffs).

<sup>188</sup> *Id.* at 933–34. The court eventually denied the motions for class certification as moot. *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 539 F. Supp. 2d 960, 964, 974 (E.D. Mich. 2008).

<sup>189</sup> *See* Plaintiff Coalition to Defend Affirmative Action et al.’s (BAMN’s) Second Amended Class-Action Complaint for Injunctive and Declaratory Relief at 8, *Regents*, 539 F. Supp. 2d 924 (No. 06-15024), 2007 WL 1316641.

<sup>190</sup> *See* Order Granting Attorney General’s Motion to Intervene and Directing Response to Motion for Preliminary Injunction at 2–3, *Regents*, 539 F. Supp. 2d 924 (No. 06-15024).

<sup>191</sup> *See* First Amended Complaint at 11, *Regents*, 539 F. Supp. 2d 924 (No. 06-15637), 2007 WL 4594899. Although the Attorney General was not sued in the initial complaint in this action, or mentioned in the caption of the amended complaint, he was identified as a “Defendant Intervenor” in the amended complaint. *Id.* at 11 para. 29.

<sup>192</sup> Order Dismissing *Coalition* Plaintiffs’ Second Amended Complaint Against Governor Jennifer Granholm at 1, *Regents*, 539 F. Supp. 2d 924 (No. 06-15024); Order Dismissing

### 1. Injury in Fact and Threat of Enforcement

As described above in Part III.A.1, the requirement for an “imminent injury” when a plaintiff challenges the constitutionality of a new state law is fairly low. If plaintiffs allege that the law in question has precluded them from engaging in protected conduct, or otherwise affected their behavior, that should be enough short of a statement by defendants that they do not intend to utilize the law. Indeed, even if defendants were to make such a statement—altogether plausible if they actually have no ability to enforce the law—it is unclear whether that would be sufficient if the law provided for enforcement by private individuals. The challenges to tort statutes generally conclude that plaintiffs alleged an injury in fact, and the challenge to California’s and Michigan’s anti-preference laws reached a similar conclusion.<sup>193</sup> Injuries identified have included greater difficulty in gaining admissions to a university, heightened difficulty in securing legislation or policies that inure primarily to minorities, and hindrance of the right to full participation in the political life of the community.<sup>194</sup>

However, as also described above, while an “injury in fact” derived solely from the existence of an anti-preference law may be sufficient for Article III standing, there are other, related justiciability and remedial issues that might require a higher level of proof. Some cases interpreting the *Ex parte Young* exception to Eleventh Amendment immunity suggest that there needs to be an actual threat of enforcement by the defendant state official, and not merely the existence of a statute.<sup>195</sup> Other cases suggest a higher standard for the irreparable harm needed for injunctive relief, and it is not clear whether the inability to lobby a lower level governmental entity would constitute such irreparable harm.<sup>196</sup>

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*Cantrell* Plaintiffs’ First Amended Complaint Against Governor Jennifer Granholm Only at 1, *Regents*, 539 F. Supp. 2d 924 (No. 06-15637); Stipulation Dismissing Coalition to Defend Affirmative Action, et al.’s Second Amended Complaint Against Defendant Governor Granholm, *Regents*, 539 F. Supp. 2d 924 (Nos. 06-15024 and 06-15637), 2007 WL 4594859.

<sup>193</sup> *Regents*, 539 F. Supp. 2d at 946–47; *Coal. for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1491–92 (N.D. Cal. 1996), *vacated*, 122 F.3d 692 (9th Cir.), *cert. denied*, 522 U.S. 963 (1997). Only *Wilson* addressed whether the provision was being “enforced.” *Id.* at 1491–92 (“Proposition 209 . . . is virtually certain to be enforced. The amendment was recently enacted and is not a statute that has lain dormant for years and likely to remain moribund.”).

<sup>194</sup> *Regents*, 539 F. Supp. 2d at 924; *Wilson*, 946 F. Supp. at 1519. *Wilson*, curiously, did not identify any injuries during its discussion of standing, but only in describing the “irreparable injury” needed for a preliminary injunction. *Id.* at 1491–92.

<sup>195</sup> See *supra* note 160 and accompanying text.

<sup>196</sup> See *supra* notes 84–93 and accompanying text. One could argue that petitioning government is a constitutionally-protected right, protected by the First Amendment. Indeed, it is. But the anti-preference laws do not preclude anyone from exercising that right in the same sense that a law criminalizing certain kinds of protected speech precludes those who would engage in the speech from exercising their right to free speech.

## 2. Causation/Traceability

In determining whether a plaintiff can meet its obligation to show a causal relationship between defendants' conduct and the injury that the plaintiff will suffer, I will approach the problem by considering the various possible defendants in a lawsuit challenging an anti-preference law. Since it is related, I will also consider whether the particular defendant's ability to "enforce" a state statute meets the requirements of *Ex parte Young* and the Eleventh Amendment. The discussion here will have to be broad: whether there is causation or enforcement ability will depend upon the nature of the suit and the specifics of state law (that is, what powers various state officials have).

### *a. Governor*

Starting at the top, plaintiffs might sue the state's governor. A governor is frequently said to be the state's chief law enforcement officer, and usually has some general obligation to enforce state law.<sup>197</sup> But, as we have seen previously, the general obligation to enforce state law, without some particular connection to the enforcement of the specific law being challenged, is usually not enough.<sup>198</sup>

Governors may have other relevant powers. For example, they are the chief officers of a branch of government and may have direct control over the employees of that branch. An order requiring all subordinates of the governor to act in a racially-neutral way might indeed be "enforcing" an anti-preference law in some way. With respect to this kind of "enforcement," one suspects that the more serious problem is whether the *Hunter-Seattle* argument, or the Title VII preemption argument, can really be extended to branches of the executive department of the state government that are subject to the governor's authority.<sup>199</sup>

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<sup>197</sup> See, e.g., *Harris v. Bush*, 106 F. Supp. 2d 1272, 1276–77 (N.D. Fla. 2000) ("Article IV, § 1 of the Florida Constitution vests Governor Bush with executive power to enforce the laws.").

<sup>198</sup> See, e.g., *Women's Emergency Network v. Bush*, 323 F.3d 937, 949 (11th Cir. 2003) ("A governor's 'general executive power' is not a basis for jurisdiction in most circumstances. If a governor's general executive power provided a sufficient connection to a state law to permit jurisdiction over him, any state statute could be challenged simply by naming the governor as a defendant."); *Rode v. Dellarciprete*, 845 F.2d 1195, 1208 (3d Cir. 1988) (dismissing Governor from lawsuit was proper because there was no "realistic potential" that his "general power to enforce the law would have been applied" in this case (internal citations omitted)); *Gras v. Stevens*, 415 F. Supp. 1148, 1151–52 (S.D.N.Y. 1976) (holding insufficient Governor's authority under state law "to 'take care that the laws are faithfully executed'" to render him an appropriate defendant in a case challenging a state law governing divorce procedures (citing N.Y. CONST. art. IV, § 3). "[T]his would extend *Ex parte Young* beyond anything which the Supreme Court intended or has subsequently held.").

<sup>199</sup> An executive order in Florida precluding the use of race-conscious decision-making for state universities apparently has never been challenged in court. See generally TERRY H. ANDERSON, *THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION* 261–62 (2004) (describing the history of the "One Florida" plan).

Finally, a governor may have some authority as a litigant to seek conformity with the state law. The district court in the litigation over California's anti-preference law relied to a significant degree on Governor Wilson's litigation position against agencies subject to the anti-preference law.<sup>200</sup> Whether other states' governors (or, for that matter, California's) have such litigating authority will depend solely on state law. As noted previously, the Governor of Michigan was dismissed by stipulation in the action governing that state's anti-preference law.<sup>201</sup>

*b. Attorney General*

Just as the position of a governor as the state's nominal chief law enforcer is inadequate to meet the justiciability requirements we have encountered, so, too, the general authority of a state attorney general to enforce the state's law is usually deemed inadequate.<sup>202</sup> The fact that an attorney general is obligated to defend the

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<sup>200</sup> The district court did not assess whether the Governor actually had any litigating authority, or merely professed to have such authority. *Compare* *Coal. for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1495 n.13 (N.D. Cal. 1996) (referring to state court litigation in which the Governor intended to invoke Proposition 209 against the programs of certain state agencies), *with* *People ex rel. Dep't of Conservation v. El Dorado County*, 116 P.3d 567, 573 (Cal. 2005) (noting that a state official needed to have some "special interest" to have standing to seek a writ of mandate). *But cf.* *Connerly v. State Pers. Bd.*, 112 Cal. Rptr. 2d 5, 15–16 (Cal. Ct. App. 2001) (describing litigation that challenged various California laws as violative of equal protection and Proposition 209 that was commenced by Governor Wilson and taken over by taxpayers after Wilson left office).

<sup>201</sup> *See supra* note 192 and accompanying text.

<sup>202</sup> *See* *Children's Healthcare Is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1413, 1416, 1418 (6th Cir. 1996) (dismissing Attorney General on Eleventh Amendment grounds from an Establishment Clause challenge to state law permitting parents to seek care for their children through "spiritual means," and concluding that "[h]olding . . . a state official's obligation to execute the laws [as] a sufficient connection to the enforcement of a challenged statute would extend *Young* beyond what the Supreme Court has intended and held"), *cert. denied sub nom.* *Children's Healthcare Is a Legal Duty, Inc. v. Montgomery*, 519 U.S. 1149 (1997); *1st Westco Corp. v. Sch. Dist. of Phila.*, 6 F.3d 108, 113–14 (3d Cir. 1993) (dismissing school district's third-party claim against state Secretary of Education and Attorney General where construction company sued local school district for enforcing a state statute requiring school districts to ensure that all laborers on public construction projects be residents of Pennsylvania. "[A]lthough *Ex Parte Young* allows a party to be joined to a lawsuit based solely on his or her general obligation to uphold the law, it is appropriate only in cases in which there is a 'real, not ephemeral, likelihood or realistic potential that the connection will be employed against the plaintiff's interests.'" (quoting *Rode*, 845 F.2d at 1208)); *Mendez v. Heller*, 530 F.2d 457, 460 (2d Cir. 1976) (dismissing Attorney General as a party and holding that, "[a]lthough he has a duty to support the constitutionality of challenged state statutes and to defend actions in which the state is 'interested', the Attorney General does so, not as an adverse party, but as a representative of the State's interest in asserting the validity of its statutes" (internal citations omitted)); *Gras*, 415 F. Supp. at 1151 (dismissing Attorney General in challenge to the state law that permitted wife to seek interim fees from husband during a divorce litigation, but had no analogous

constitutionality of a state law, or even has given an opinion upholding its constitutionality, is not sufficient to say that he or she is enforcing the law.<sup>203</sup> Indeed, even the possibility that the attorney general *could* enforce the law directly in litigation has been held insufficient if the method of litigation is either contingent or uncertain.<sup>204</sup>

This last point might be relevant in states such as Michigan, where the Attorney General has some litigating authority, but it is entirely dependent on another person or entity: in the case of Michigan, upon the decisions of the Michigan Department of Civil Rights or the Michigan Civil Rights Commission.<sup>205</sup> That is, the Article III causation requirement and the “some connection” requirement of *Ex parte Young* are usually found to have been met where a prosecutor or Attorney General can make his or her own decision to litigate. Even if the contingent nature of the Attorney General’s authority is not sufficient to render him or her an inappropriate defendant, it might affect the nature of relief that can be afforded.<sup>206</sup>

### c. State Judges

At first glance, suing state judges might seem like a waste of time because of judicial immunity. But the Supreme Court held in *Pulliam v. Allen* that judicial

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provision for husband to seek interim fees from wife, holding that “[t]he Attorney General has no interest in the outcome of a divorce suit and no duty to enforce any order made in it”).

<sup>203</sup> *Ex parte Young*, 209 U.S. 123, 157 (1908) (holding the fact that “attorney general might represent the State in litigation involving the enforcement of its statutes” was insufficient to overcome bar of Eleventh Amendment (quoting *Fitts v. McGhee*, 172 U.S. 516, 530 (1899))); *1st Westco Corp.*, 6 F.3d at 114 (noting that because the Attorney General had opined to Secretary of Education that law requiring employees of contractors of school districts to be residents should be enforced did not make him a proper defendant, and explaining that “the act of issuing an opinion about an abstract constitutional issue falls far short of enforcing, or threatening to enforce, a statute against a specific party”); *S. Pac. Transp. Co. v. Brown*, 651 F.2d 613, 614 (9th Cir. 1980) (deciding that in a challenge to a law limiting employers’ ability to negotiate settlements with injured employees, the fact that the Attorney General would advise district attorneys to presume the act constitutional and his stipulation that the district attorneys would enforce the act unless constrained, was insufficient to maintain a claim against him); *Mendez*, 530 F.2d at 460 (holding Attorney General’s “duty to support the constitutionality of challenged state statutes” and “to defend actions in which the state is ‘interested’” was insufficient to make him a proper defendant in an action challenging the residency requirement for divorce); *Gras*, 415 F. Supp. at 1151.

<sup>204</sup> See *supra* note 158 and accompanying text.

<sup>205</sup> See *supra* notes 47–49 and accompanying text.

<sup>206</sup> *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Nixon*, 428 F.3d 1139, 1145 (8th Cir. 2005) (holding, in a challenge to an “informed consent” law for abortion services, that where the Attorney General could aid prosecutors only when directed by the Governor and could sign indictments only when directed by the trial court, he was a proper defendant under *Ex parte Young*; without any indication that the Governor or trial court had taken any action that would lead to enforcement action on his part, the preliminary injunction issued against him was vacated), *vacated on other grounds*, 550 U.S. 901 (2007).

immunity does not apply to claims for prospective injunctive relief.<sup>207</sup> While Congress reacted to *Pulliam* by amending § 1983<sup>208</sup> (albeit some twelve years later), it only limited the availability of injunctive relief against judges in § 1983 claims, not declaratory relief.<sup>209</sup>

Nor have the federal courts precluded suits against state court judges by citing *Ex parte Young*, although that case surely laid the groundwork for such a limit when it stated:

[T]he right to enjoin an individual, even though a state official, from commencing suits . . . does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature . . . [A]n injunction against a state court would be a violation of the whole scheme of our Government.<sup>210</sup>

Rather, the lower courts have come to the rescue of their state court compatriots by interpreting § 1983 as precluding claims against state court judges in their “adjudicative” capacities. Then-Judge Breyer’s 1982 opinion for the First Circuit in *In re The Justices of the Supreme Court of Puerto Rico*<sup>211</sup> is considered the leading authority.<sup>212</sup> The question in the underlying lawsuit was whether various requirements of the integrated bar in Puerto Rico (e.g., the fact that lawyers had to join the bar association and give it financial support to practice in Puerto Rico) violated the United States Constitution.<sup>213</sup> The Puerto Rico Bar Association, a related foundation, and the Justices of the Supreme Court of Puerto Rico were named as defendants.<sup>214</sup> The First Circuit granted a mandamus petition by the judges arguing that the district court had no jurisdiction over them.<sup>215</sup> The factors set forth by Judge Breyer were

<sup>207</sup> *Pulliam v. Allen*, 466 U.S. 522, 541–42 (1984). *But see* Borgmann, *supra* note 98, at 778 (“[J]udges are immune from suit.”).

<sup>208</sup> *Nollet v. Justices of the Trial Court of Mass.*, 83 F. Supp. 2d 204, 210 (D. Mass. 2000).

<sup>209</sup> 42 U.S.C. § 1983 (2006) (“[I]n any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.”); *see also* *Brandon E. v. Reynolds*, 201 F.3d 194, 197–98 (3d Cir. 2000) (describing the amendments to § 1983 in the Federal Courts Improvement Act of 1996).

<sup>210</sup> *Ex parte Young*, 209 U.S. 123, 163 (1908).

<sup>211</sup> 695 F.2d 17 (1st Cir. 1982).

<sup>212</sup> *See, e.g., Brandon E.*, 201 F.3d at 198 (“The seminal case on the subject is *In re Justices of The Supreme Court of Puerto Rico*.”); *Grant v. Johnson*, 15 F.3d 146, 147–48 (9th Cir. 1994) (“The leading authority is *In re Justices of Supreme Court of Puerto Rico*”). It is not entirely clear why *In re Justices* is considered the “leading” authority since it relied upon two earlier decisions, *Mendez v. Heller*, 530 F.2d 457 (2d Cir. 1976), and *Gras v. Stevens*, 415 F. Supp. 1148 (S.D.N.Y. 1976). *In re Justices*, 695 F.2d at 22.

<sup>213</sup> *In re Justices*, 695 F.2d at 18–19.

<sup>214</sup> *Id.* at 18.

<sup>215</sup> *Id.* at 25.

the facts that judges sit as arbiters without a personal or institutional stake on either side of the constitutional controversy (and are sworn to uphold the United States Constitution); that they have played no role in the statute's enactment; that they have not initiated its enforcement; and that they do not have an institutional interest in following their own precedents if a contrary authoritative legal determination has been made.<sup>216</sup>

All of that sounds like the absence of a case or controversy.<sup>217</sup> To allow litigants to sue state court judges on the ground that they will enforce a state law violative of the United States Constitution suggests that the state court judges have prejudged the constitutional question.<sup>218</sup> Since their obligation to apply the United States Constitution is no less than that of federal court judges, the likelihood of them enforcing the statute against the federal court plaintiff is at best unclear, and likely inadequate.

Unfortunately for the clarity of the law, Judge Breyer did not rely upon Article III. Rather, in order to avoid any constitutional issues and a finding that would have precluded Congress from authorizing a suit against state judges, the First Circuit relied upon an interpretation of § 1983.<sup>219</sup> (The court nonetheless invoked its mandamus jurisdiction: "Our decision here, while formally resting on the plaintiffs' failure to state a claim, is so influenced by Article III-type jurisdictional considerations that it falls within the scope of our traditional mandamus authority.")<sup>220</sup> Other circuit courts

<sup>216</sup> *Id.* at 21; *see also* *Bauer v. Texas*, 341 F.3d 352, 361 (5th Cir. 2003) (listing the factors from *In re Justices*).

<sup>217</sup> *See* Manian, *supra* note 97, at 170 n.243 ("The reason [for dismissal of state court judges] is not because of judicial immunity, but because of standing."). Alas, it would be more accurate to say that standing *should be* the reason.

<sup>218</sup> *Cf.* *Boumediene v. Bush*, 128 S. Ct. 2229, 2269 (2008) ("A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence.").

<sup>219</sup> *In re Justices*, 695 F.2d at 22–23 ("[L]ike the Second Circuit [in *Mendez v. Heller*] and Judge Friendly [in *Gras v. Stevens*], we are reluctant to rest our decision directly on Article III when the case can be resolved on a nonconstitutional basis. . . . By joining in this interpretation of § 1983, we avoid the constitutional problems that might be raised by a more expansive application of the statute. We avoid explicitly finding that Congress could not make judges proper parties in cases such as this one should it choose to do so, and we avoid the constitutional snares that might otherwise be posed by similar, but distinguishable, cases." (internal citations omitted)). Judge Breyer's reliance on earlier precedents is questionable. The court in *Mendez v. Heller* concluded that "as between appellant and [state court judge], this case does not present the 'honest and actual antagonistic assertion of rights' 'indispensable to adjudication of constitutional questions.'" 530 F.2d 457, 460 (2d Cir. 1976) (citing two Supreme Court cases regarding collusive lawsuits) (internal citations omitted). Although the First Circuit "interpret[ed] *Mendez* . . . as holding that under the circumstances present in th[at] case[ ], judges were not proper party defendants in § 1983 actions challenging the constitutionality of state statutes," *In re Justices*, 695 F.2d at 22, the foregoing quote from *Mendez* does not, in my view, compel that interpretation, and is more readily interpreted as a holding that there was no case or controversy.

<sup>220</sup> *In re Justices*, 695 F.2d at 25.

have followed suit in eschewing Article III as a basis for dismissing judges acting in their adjudicative capacities.<sup>221</sup> I deem this unfortunate because Judge Breyer never pointed to anything in the text or history of § 1983 that precludes a suit against state judges acting in their adjudicative capacities,<sup>222</sup> and that glaring absence has led to some unusual holdings by those courts that have followed *In re Justices*.<sup>223</sup>

Certainly, there is a strong reluctance to drag state court judges into federal court, the limits of judicial immunity notwithstanding.<sup>224</sup> It cuts against the general belief of equivalence between state courts and lower federal courts in interpreting federal law and the respect that each owes the other.<sup>225</sup> When the challenge is to a law that has just been passed, there is the additional question of whether any particular judge will even be assigned a lawsuit in which a litigant seeks to enforce the law.<sup>226</sup>

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<sup>221</sup> See, e.g., *Brandon E. v. Reynolds*, 201 F.3d 194, 200 (3d Cir. 2000); *Grant v. Johnson*, 15 F.3d 146, 148 (9th Cir. 1994); *R.W.T. v. Dalton*, 712 F.2d 1225, 1232 & n.10 (8th Cir.), cert. denied, 464 U.S. 1009 (1983). But see *Bauer*, 341 F.3d at 361 (dismissing state court judge because “there [was] no case or controversy under Article III and [state judge was] not a proper party under section 1983”). See also Manian, *supra* note 97, at 170 n.243.

<sup>222</sup> Subsequently, the 1996 amendments to § 1983 suggest that judges “in [their] judicial capacity” can be sued for declaratory relief. 42 U.S.C. § 1983 (2006). Presumably, “judicial” capacity is a category broader than “adjudicative” role; otherwise, the logic of *In re Justices* and its progeny would essentially preclude the possibility of declaratory relief against judges and render the amendment in 1996 meaningless.

<sup>223</sup> See, e.g., *Nollet v. Justices of the Trial Court of Mass.*, 83 F. Supp. 2d 204, 211 (D. Mass. 2000) (concluding that state judges acting in their adjudicative capacity could not be sued under § 1983 because their conduct was not state action). This is almost certainly wrong. See, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 432 n.1 (1984) (“The actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the Fourteenth Amendment.”).

<sup>224</sup> Shapiro, *supra* note 71, at 762 n.22 (“Injunctions against state judicial officers are not unknown. But they are certainly not the norm.” (internal citation omitted)).

<sup>225</sup> See, e.g., *Younger v. Harris*, 401 U.S. 37, 44 (1971) (“[R]estraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of ‘comity,’ that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.”).

Professor Shapiro has argued persuasively that both the doctrines of offensive collateral estoppel and the use of class actions must be tempered by the need to allow state courts to fulfill their functions as coordinate expositors of federal law. Shapiro, *supra* note 71, at 773–74, 778–79. Similarly, suits against state judges might be disfavored for precisely the same reason.

<sup>226</sup> Cf. *Bauer*, 341 F.3d at 358 (holding that an individual for whom defendant judge had appointed a temporary guardian did not have standing to challenge the Texas law permitting such appointments in a lawsuit against the judge. Because “there have been no such proceedings since November 2001, and [the state guardianship proceeding] was transferred from [defendant judge] to Judge Wood, there does not exist a ‘substantial likelihood’ and a ‘real and immediate’ threat that [plaintiff] will face injury from [defendant judge] in the future.”).

But it is still not completely clear why a judge who *has already* opined on the federal constitutional question, rejected any constitutional infirmity in the state law, has enforced it in the past, and has jurisdiction to enforce it in the future would not be an appropriate defendant simply because he will act in his adjudicative capacity in the future. One can only assume that some or all of the factors mentioned in the last paragraph have something to do with the fact that courts do not seem favorably disposed to such lawsuits.

*d. Civil Rights Executives and/or Commissioners*

Many states have executive branch agencies and/or special commissions designed to accept complaints, investigate whether there has been a violation of civil rights laws, and either seek voluntary compliance or authorize lawsuits for enforcement.<sup>227</sup> Whether they “enforce” an anti-preference law may depend on a number of factors that can only be answered by a review of state law. Can they initiate their own investigations, or must they receive complaints before commencing an investigation? Do they hold hearings in which each side is given an opportunity to present evidence? Can they go into court to enforce orders? In short, are they more like a prosecutor or more like a judge?

In answering that last question, one might take a step back and ask exactly what the differences are between judges and prosecutors in assessing the validity of the laws they enforce. A prosecutor, after all, is an attorney with special duties. “The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.”<sup>228</sup> Yet, this duty to seek justice, and the presumption that prosecutors are sworn to uphold the United States Constitution,<sup>229</sup> is insufficient to treat them like judges for purposes of their willingness to enforce a state criminal law that might violate the United States Constitution. That is, their membership in the executive branch, and their general task to enforce a set of state laws, apparently renders them appropriate defendants in a suit challenging a state criminal law. One normally does not think of a prosecutor’s duty to do justice as the equivalent of an obligation to resolve all factual and legal disputes in an even-handed way.<sup>230</sup> Whether a member of a civil rights department or commission is an appropriate defendant in a claim challenging an anti-preference law may depend upon whether they are deemed to have such an obligation.

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<sup>227</sup> See *supra* Part II.A.

<sup>228</sup> MODEL CODE OF PROF’L RESPONSIBILITY EC 7–13 (1982).

<sup>229</sup> See, e.g., *Benn v. Lambert*, 283 F.3d 1040, 1063 (9th Cir.) (“Prosecutors routinely take an oath of office when they become stewards of the executive power of government. That oath uniformly includes a promise at all times to support and defend the Constitution of the United States.”), *cert. denied*, 537 U.S. 942 (2002).

<sup>230</sup> Cf. *Gerstein v. Pugh*, 420 U.S. 103, 116–19 (1975) (holding a prosecutor’s finding of probable cause to issue an information and detain the accused until trial could not substitute for a probable cause finding from a neutral magistrate for Fourth Amendment purposes).

One other consideration merits attention. A department or commission may have been initially created to enforce other civil rights laws; the enforcement of an anti-preference law may have been foisted upon them by the “remedies” provision in such law.<sup>231</sup> The department officials or commissioners may be very reluctant to enforce that law in its intended form. Michigan again provides an interesting example. The Michigan Civil Rights Commission was a vigorous opponent of Proposal 2 from the outset.<sup>232</sup> It subsequently conducted extensive hearings into the manner in which signatures were collected to place the initiative on the ballot and concluded that massive fraud had been used to collect those signatures.<sup>233</sup> When these efforts proved inadequate to have the initiative removed from the ballot, or to defeat it, the Commission was tasked by Michigan Governor Granholm to report on its effects.<sup>234</sup> This report, citing *Hunter* and *Seattle School Dist. No. 1*, concluded that the amendment was “in direct conflict with existing federal law.”<sup>235</sup> All of this might be relevant to whether individual commissioners in Michigan presented a “credible threat” of enforcing the Michigan anti-preference law against anyone. At the very least, it would be ironic if the commissioners were the only state actors capable of being sued in a challenge to the law.

*e. State Legislators*

Professor Manian suggests that the problem of standing in the abortion tort cases could be resolved by permitting suits for declaratory judgments against the state leg-

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<sup>231</sup> See *supra* Part II.A (describing the enforcement scheme established in Michigan).

<sup>232</sup> See MICH. CIVIL RIGHTS COMM’N, RESOLUTION ON THE MICH. CIVIL RIGHTS INITIATIVE (2004), available at [http://www.michigan.gov/documents/aarelease3\\_86196\\_7.pdf](http://www.michigan.gov/documents/aarelease3_86196_7.pdf) (announcing the Commission’s opposition to the Michigan Civil Rights Initiative and characterizing it as “an attempt to mislead Michigan voters regarding the issue of discrimination by state entities”). The press release accompanying the resolution contained a quote from Commissioner Mark Bernstein to the effect that the initiative “is a shameful attempt to confuse and manipulate unsuspecting Michigan voters. Ward Connelly’s initiative is to civil rights what an ax is to a tree. Don’t let these extremists tear down our state’s great tradition of enabling and protecting diversity.” Press Release, Mich. Dep’t of Civil Rights, Mich. Civil Rights Comm’n Adopts Resolution Opposing Mich. Civil Rights Initiative (Mar. 11, 2004), available at [http://www.michigan.gov/documents/aarelease3\\_86196\\_7.pdf](http://www.michigan.gov/documents/aarelease3_86196_7.pdf).

<sup>233</sup> *Mich. Civil Rights Commission Releases Report on MCRI Signature Gathering Deception*, MEDIAMOUSE, June 13, 2006, <http://www.mediamouse.org/news/2006/06/michigan-civil-1.php>.

<sup>234</sup> See Mich. Exec. Directive No. 2006-7 (Nov. 9, 2006), available at [http://www.michigan.gov/gov/0,1607,7-168-36898\\_40426-155895--,00.html](http://www.michigan.gov/gov/0,1607,7-168-36898_40426-155895--,00.html).

<sup>235</sup> MICH. CIVIL RIGHTS COMM’N, “ONE MICHIGAN” AT THE CROSSROADS: AN ASSESSMENT OF THE IMPACT OF PROPOSAL 06-02, at 16 (2007), available at [http://www.michigan.gov/documents/mdcr/FinalCommissionReport3-07\\_1\\_189266\\_7.pdf](http://www.michigan.gov/documents/mdcr/FinalCommissionReport3-07_1_189266_7.pdf). The Commission also concluded that a government-run program for after-school tutoring only for girls did not violate Proposal 2 because it was not “public education.” *Id.* at 45.

islators that passed the laws.<sup>236</sup> Her basic rationale is that the abortion tort cases involve “self-enforcing tort laws,” and therefore, that the legislators who pass them are acting in both a legislative and executive capacity.<sup>237</sup>

One obvious problem with this solution is that it very well may be ineffective for laws passed through other means, like ballot initiatives or through development of the common law.<sup>238</sup> (Anti-preference laws have been, to date, enacted by ballot initiatives.)<sup>239</sup> Nonetheless, it is certainly possible for a legislature to enact an anti-preference law, so some attention should be paid to Manian’s proposal.

The first problem, of course, is legislative immunity. Professor Manian is correct in noting that courts have examined the dual or multiple roles that legislators can have in taking various actions, and have provided legislative immunity only for those acts that are truly legislative in nature.<sup>240</sup> But she cites no case (and I am unaware of any) in which the *same act* is deemed to be both legislative and executive in nature (and that same act is voting for a law). At the very least, Professor Manian’s suggestion would require a significant step (and limitation) in the law of legislative immunity.

Second, Professor Manian argues only for a declaratory judgment action against state legislators, recognizing that an injunction requiring a vote to repeal a law might be an ineffective and/or improperly intrusive solution.<sup>241</sup> But then the only relief remaining is unlikely to be anything more than an advisory opinion. State legislators are not going to sue the federal plaintiffs (be they local municipalities or others) in state court if the federal plaintiffs violate the state law, and, as noted earlier, without any *res judicata* value, or some possibility of changing defendants’ behavior, such that defendants will have a coercive or determinative effect on the ultimate decision-maker (*viz.*, state judges), a declaratory judgment does not provide any remedy to the plaintiff.<sup>242</sup> Not only are the state legislators unlikely to *sue* a federal plaintiff in the future; they are unlikely to do *anything* in the future that will harm the federal plaintiff’s rights. What they have done to the federal plaintiff they did by passing the law, and that, under this scenario, already has taken place. A declaratory judgment is a pro-

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<sup>236</sup> Manian, *supra* note 97, at 165–70. Manian also suggests that governors might be sued for signing such bills into law. *Id.* at 197–98. She believes the same rationales that should overcome justiciability and immunity problems for legislators would work for overcoming the same problems for governors.

<sup>237</sup> *Id.* at 168 (“[T]he mere enactment of such [self-enforcing tort law] is an enforcement action, so to speak.”). Professor Manian defines a “self-enforcing tort law” as one that “impose[s] such a high risk of a draconian penalty on [certain] conduct that it essentially bans that conduct.” *Id.* at 158.

<sup>238</sup> It is equally unclear whom one should sue if one wished to challenge an older “self-enforcing tort law,” where the legislators who passed it might be retired or dead. Or what would happen if the initial defendants retired during the lawsuit.

<sup>239</sup> See *supra* notes 1–5 and accompanying text.

<sup>240</sup> *Id.* at 190–96 (describing a “dual function” approach to legislative immunity).

<sup>241</sup> *Id.* at 178–79.

<sup>242</sup> See *supra* note 118 and accompanying text.

spective remedy.<sup>243</sup> Accordingly, courts have expressed grave doubts about the propriety of actions seeking a declaratory judgment concerning past actions.<sup>244</sup> Suing legislators does not appear like a successful litigation strategy.

*f. State Court Plaintiffs*

At least one court and one judge have suggested that the problem of finding an appropriate federal court defendant can be fixed by finding a person or entity who is likely to sue in state court under the statute being challenged.<sup>245</sup>

Two problems suggest themselves. First, it may not be so easy to predict (much less prove) who is going to sue in state court. Unless the federal court plaintiff can find a person likely to sue in state court, the case will lack the “credible threat” needed for federal jurisdiction.<sup>246</sup>

Second, even if such a person can be found, the modern understanding of the well-pleaded complaint rule has the following corollary:

Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court.<sup>247</sup>

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<sup>243</sup> 10B CHARLES ALAN WRIGHT ET AL., *supra* note 97, at § 2751 (declaratory judgment “permits actual controversies to be settled *before* they ripen into violations of law” (emphasis added)).

<sup>244</sup> *See, e.g.*, Fed. Commc’ns Comm’n v. ITT World Commc’ns, Inc., 466 U.S. 463, 468 n.5 (1984) (“[I]t seems questionable whether a complaint that sought only a declaration that past conduct was unlawful would present to the District Court a case or controversy over which it could exercise subject-matter jurisdiction.”).

<sup>245</sup> *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1162–63 (10th Cir. 2005) (Briscoe, J., dissenting) (opining that in a challenge to a statute that imposed liability on anyone who performed an abortion on a minor without parental consent or knowledge, state officials who operated medical institutions were proper defendants because they might, in the future, sue on behalf of their institutions to recover under the statute); *Grant v. Johnson*, 15 F.3d 146, 147–49 (9th Cir. 1994) (concluding that a state judge was not a proper defendant in a case challenging a state law for the appointment of a temporary guardian and stating that plaintiff could have sued her ex-husband, who had previously sought a receiver for her, or her mother, who had previously been appointed a receiver).

<sup>246</sup> *Cf.* Borgmann, *supra* note 98, at 779 (“Because the ability to sue for damages under the statute [in *Nova Health Systems*] depends upon unpredictable events, abortion providers cannot know in advance who will sue them.”); Manian, *supra* note 97, at 141 (“The plaintiff doctors [in *Okpalobi*] had no way of knowing which, if any, of their patients would eventually enforce Act 825.”).

<sup>247</sup> *Public Serv. Comm’n of Utah v. Wycoff Co.*, 344 U.S. 237, 248 (1952). The well-pleaded complaint rule is the Court’s interpretation of federal “arising under” jurisdiction

That is, an assertion by a declaratory judgment plaintiff that he is about to be sued under a state law that itself violates federal law is not a basis for federal jurisdiction. A person about to be sued in state court for defamation cannot file a declaratory judgment action in federal court seeking a judgment that the alleged defamatory statements were protected by the First Amendment.<sup>248</sup>

So for both practical and legal reasons, federal declaratory judgment suits against potential state court plaintiffs remain problematic.

*g. Universities/Municipalities*

One last possibility we must consider is whether those who have to *comply* with an anti-preference law might be possible defendants. I will use universities and municipalities as examples of these government compliers, but the discussion should be applicable to others as well.

At first glance, the notion that a municipality could be a *defendant* in a lawsuit based upon *Washington v. Seattle School Dist. No. 1*<sup>249</sup> seems counterintuitive. After all, a municipality-like entity (a school district) was the *plaintiff* in that case, and, indeed, won attorneys' fees *against* the state.<sup>250</sup> The lesson, one would think, is that lower-level state entities have the right to be free from improper state regulation and can sue for that kind of relief.

But things have not been that simple. As noted earlier, in the challenge to California's anti-preference law, the court certified a defendant class that included all local government entities or other governmental instrumentalities bound by the law.<sup>251</sup> In the challenge to Michigan's anti-preference law, the members of the governing boards of three universities were sued.<sup>252</sup> They filed cross-claims themselves against

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pursuant to 28 U.S.C. § 1331 (2006).

<sup>248</sup> *Monks v. Hetherington*, 573 F.2d 1164, 1166 (10th Cir. 1978) (dismissing challenge by TV broadcaster to Oklahoma statute, requiring retraction and acknowledgment of falsity of certain statements, as violative of broadcaster's First Amendment rights. Federal action was brought against state court defamation plaintiff and federal courts lacked subject matter jurisdiction because "[t]he underlying controversy [t]here [was] the defamation action.").

<sup>249</sup> 458 U.S. 457 (1982).

<sup>250</sup> *Id.* at 487 n.31.

<sup>251</sup> *See supra* note 54 and accompanying text. Curiously, though, prior to granting the motion for class certification, the court granted a temporary restraining order against the Governor and Attorney General of the state in part because of those officials' "refusal . . . to agree to a moratorium on enforcement actions against municipalities, agencies, and other state entities." *Coal. for Econ. Equity v. Wilson*, No. C 96 4024, 1996 WL 691962, at \*3 (N.D. Cal. Nov. 27, 1996).

<sup>252</sup> *Coal. to Defend Affirmative Action v. Granholm*, No. 06-15024, 2006 WL 3953321, at \*1 (E.D. Mich. Dec. 19, 2006), *stay pending appeal granted*, 473 F.3d 237, 253 (6th Cir. 2006).

the Governor seeking declaratory and injunctive relief.<sup>253</sup> But after those cross-claims were dismissed, they sought to be dismissed from the case themselves, arguing that they did not “enforce” the Michigan anti-preference law, but only complied with it.<sup>254</sup> Plaintiff in that case, in turn, argued that “[t]he defendant Universities may not have written, supported or passed Proposal 2. But they have implemented it.”<sup>255</sup> The court’s resolution of these competing claims side-stepped the issue.<sup>256</sup> So, too, the court in the challenge to California’s anti-preference law gave little analysis in rejecting the claim of the defendants that they were “bystanders” to “any political process burden imposed on plaintiffs.”<sup>257</sup>

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<sup>253</sup> *Id.*

<sup>254</sup> See The University Defendants’ Motion to Dismiss at 2, *Coal. to Defend Affirmative Action*, 2006 WL 3953321 (No. 06-15024) (arguing that they were unnecessary parties, and should be dropped pursuant to Federal Rule of Civil Procedure 21); see also *id.* (“The University Defendants did not write Proposal 2; they did not pass Proposal 2; they cannot change Proposal 2; they are not executive branch entities charged with the responsibility of enforcing Proposal 2. The only role of the Universities is that they—like every other public body affected by this constitutional amendment—must follow Proposal 2.”); *id.* (“[Plaintiff] seeks a declaration that Proposal 2 is unconstitutional and an injunction against its enforcement. . . . If this claim . . . has merit, then [plaintiff] can obtain all the relief it seeks from the Defendant Attorney General. The University Defendants, however, are powerless to afford [plaintiff] the relief they demand.”).

On appeal, the Universities continued with their theme, arguing that “a party who has no connection with a law beyond the obligation to *follow it* is [not] a proper defendant in a lawsuit challenging that law.” Defendants/Cross-Appellants’ Second Cross-Appeal Brief at 7, *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, No. 08-1534 (6th Cir. filed June 12, 2009).

<sup>255</sup> See Plaintiff Coalition to Defend Affirmative Action et al.’s (BAMN’s) Brief in Opposition to the University Defendants’ Motion to Dismiss at 2, *Coal. to Defend Affirmative Action*, 2006 WL 3953321 (No. 06-15024).

<sup>256</sup> *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 539 F. Supp. 2d 924, 941 (E.D. Mich. 2008). The court’s discussion is a bit confusing, but it seems to have essentially relied on the traditional equal protection claims brought by the plaintiff—i.e., that the elimination of any race-conscious decision-making itself violated the Equal Protection Clause regardless of the ultimate source of that decision to eliminate—and concluded that those claims were sufficiently related to the “political burden” claims that it was appropriate to keep the universities as defendants.

The court’s discussion is confusing because it *also* agreed with the University defendants that a finding of unconstitutionality would not automatically restore race-conscious admissions decisions at the universities; “[r]ather, the universities would have to choose to do so on their own.” *Id.* It then concluded by asserting that the universities’ “undeniable stake . . . in all these issues” made it “inappropriate to cast them aside.” *Id.* One might think that the court’s inability to force the universities to do what plaintiff wanted—that the universities retained an independent capacity to refuse to do it—would cut against plaintiffs’ standing (and, specifically, their attempt to show redressability) to sue the universities.

<sup>257</sup> *Coal. for Econ. Equity v. Wilson*, No. C 96 4024, 1996 WL 691962, at \*3 n.7 (N.D. Cal. Nov. 27, 1996). Judge Henderson’s one-sentence rejoinder was that “[t]he Court cannot accept

Can those who implement a law, or comply with it, be considered “enforcers” of the statute? Under some circumstances, one would think that they can. If the underlying conduct is itself unconstitutional, one would think that those carrying out the law’s requirements can be enjoined. But the arguments set forth in Part I of this Article assume that the problem is not the underlying conduct of eschewing all race-conscious decision-making, but the process by which the decision to engage in that underlying conduct was made.

Two possibilities need consideration. First, as noted above, courts have permitted suit where the relief the court could provide would have a coercive influence on the chances that the ultimate decision-maker would issue a favorable decision.<sup>258</sup> That may be the case with anti-preference laws. In many instances, universities and municipalities engaged in race-conscious decision-making prior to the enactment of anti-preference laws. It is easy to conclude that a judgment precluding someone else from enforcing it against those entities would likely change their decision. But the problem with using the “coercive influence” cases is that those cases only explain why it is acceptable to sue the “influencing” party. They do not explain why it is acceptable to sue the ultimate decision-maker if one does not have a legal right to any particular decision.<sup>259</sup>

The second possibility is that plaintiffs have suffered an injury to their “procedural rights,” and the universities and municipalities are causing that injury by considering a state anti-preference law to be dispositive.<sup>260</sup> Thus, just like an administrative agency that has failed to properly consider a required factor in making a decision, the “compliers” like universities and municipalities can be told (by a court) that they must reconsider their decision to be race neutral in the absence of any influence by the anti-preference law.

Of course, this possibility is subject to all the concerns that were discussed when the possibility of an analogue to an injury to “procedural rights” was first broached in this Article.<sup>261</sup> Second, the difficulties of enforcement are much greater than in the typical “procedural rights” case. Whether a specific federal agency issued an environmental impact statement is fairly straightforward. Most administrative agencies have

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defendants’ contention that victims of this sort of political process harm are necessarily precluded from preliminary relief simply because the enactment in question is denominated as ‘self-executing.’” *Id.*

<sup>258</sup> See *supra* notes 119–31 and accompanying text.

<sup>259</sup> Thus, although the Duke Power Company was obviously a party to the case that bears its name, the Court specifically declined to address whether it was a proper party. *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 72 n.16 (1978). So, too, in *Ex parte Young*; the railroads subject to the Minnesota statute were sued by their shareholders, but the propriety of their joinder was never really discussed. 209 U.S. 123, 129 (1908). Arguably, under the Court’s later decision in *Adickes v. S. H. Kress & Co.*, the railroads (unlike Duke Power) may have been acting under color of state authority. 398 U.S. 144, 170–71 (1970).

<sup>260</sup> See *supra* note 168 and accompanying text.

<sup>261</sup> See *supra* Part IV.A.

to give reasons for their decisions, and the factors that influenced them; a failure to consider a factor required by law is relatively easy to determine.<sup>262</sup> But universities, municipalities, and other state agencies need not give any reasons at all for their decisions. An order requiring them *not* to consider a particular factor (an anti-preference law) might prove very difficult to police.

### 3. Redressability

The problem with redressability in a challenge to an anti-preference law is the one hinted at in our review of the two injunctions issued by federal courts against anti-preference laws<sup>263</sup> and the same one that the Tenth Circuit noted in *Nova Health Systems*.<sup>264</sup> Even if one enjoins the Governor, the Attorney General, or a civil rights commission from enforcing the civil provisions of an anti-preference law, that injunction would have no effect when a private plaintiff sues a state agency in state court for violating it.<sup>265</sup> So, too, a declaratory judgment against any of those possible “enforcers” would not bind anyone else. A state agency relying solely on the judgment of a lower federal court, in a case in which it was not a party, would be taking a substantial risk in taking race-conscious measures in violation of an anti-preference law. Accordingly, it is less than clear that an injunction or declaratory judgment against a few state “enforcement” officials would really change the behavior of most state agencies. Those with good legal advice likely would still continue to comply with the law until a dispositive opinion of the state supreme court or the United States Supreme Court suggested otherwise.

The only alternative would be to sue the state agencies that are *complying* with the anti-preference law. The problems here are equally troubling. First, as already discussed, it is not clear that a state agency simply complying with an anti-preference

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<sup>262</sup> See *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998) (discussing the general ability of those adversely affected to challenge legal bases of administrative agency decisions); *Citizens to Preserve Overton Park, Inc. v. Valpe*, 401 U.S. 402, 410 (1971); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967).

<sup>263</sup> See *supra* Part II.B.

<sup>264</sup> See *supra* note 142 and accompanying text.

<sup>265</sup> For this reason, Professor Borgmann agrees that the Fifth Circuit correctly dismissed claims for injunctive relief against the Governor and Attorney General in *Okpalobi*. Borgmann, *supra* note 98, at 772–73.

I think that a different situation is presented by laws that have both criminal and privately-enforceable civil provisions. The kinds of liability involved with criminal law—jail terms, specifically—deter on a different order of magnitude than damages, no matter how large. Thus, an injunction against a prosecutor precluding enforcement of the law’s criminal provision would be of substantial benefit to a litigant even if, as in several of the abortion tort cases, a court were powerless to protect the plaintiff from civil lawsuits under the same provision.

law is really enforcing it or has “some connection” with its enforcement (as required by *Ex parte Young*).<sup>266</sup>

In addition, even if a court could gain jurisdiction over all state agencies, it is not as clear that an injunction could necessarily be issued against them. Again, the degree of threat and harm necessary to obtain injunctive relief is often deemed higher than that simply needed to establish a case or controversy with a particular defendant. Yet without the possibility of injunctive relief, a declaratory judgment against any state agency may have very little effect. It is only binding in a subsequent litigation against the same plaintiff, and, more specifically, would not be binding in any state court litigation where someone else seeks to enforce the anti-preference law *against* a state agency.<sup>267</sup>

Moreover, as we saw back in Part II.B, the possibility of an injunction may not suffice for redressability. All of this suggests that, even if causation can properly be found between one of the defendants and the injury that the plaintiffs challenging an anti-preference law claim to be suffering, substantial questions of redressability would remain. And aside and apart from Article III considerations, there is simply great doubt about the effectiveness of any lower federal court judgment about the constitutionality of an anti-preference law.

## V.

In this section, I examine whether one obvious solution to the justiciability problems would actually fix the “problem.” I then discuss whether, in fact, it is a problem.

### A. A Congressional Fix?

Congress might try to fix the problems associated with privately-enforced tort laws that create constitutional problems by eliminating a state’s Eleventh Amendment immunity for any violations of the Fourteenth Amendment. To keep things simple, we can assume that Congress will only eliminate Eleventh Amendment immunity for forward-looking relief. (This is obviously a solution for which there has been little need in the past since the *Ex parte Young* doctrine has been deemed to have “fixed” the problem for most claims of forward-looking relief.)<sup>268</sup>

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<sup>266</sup> *Ex parte Young*, 209 U.S. 123, 157 (1908).

<sup>267</sup> *See Martin v. Wilks*, 490 U.S. 755, 761-62 (1989) (holding that nonparties to litigation cannot be bound by any judgment in it).

<sup>268</sup> Ann Althouse, *Why Talking about “States’ Rights” Cannot Avoid the Need for Normative Federalism Analysis: A Response to Professors Baker and Young*, 51 DUKE L.J. 363, 374 n.41 (2000). *But see* John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989, 1008–10 (2008) (arguing that *Ex parte Young*, properly understood, permitted a lawsuit in only a limited number of cases where asserting a federal constitutional defense in an enforcement action in state court was an inadequate remedy).

Congress surely has this authority under Section 5 of the Fourteenth Amendment.<sup>269</sup> Just as certainly, this will eliminate any Eleventh Amendment problem under *Ex parte Young*.

The harder question is whether the “causation” and “redressability” problem can be fixed in this fashion. Again, there does not seem to be any substantial case law on this question, but I tend to think that the answer is at least unclear, and may be “no.” The enforcers of the state law still will be state judges, and the problems of justiciability in suing state judges discussed previously would be just as relevant to any standing analysis.<sup>270</sup> Calling the defendant “State” instead of “State Judge Smith” does not really change the underlying reality. Moreover, a declaration against the State, for example, is usually addressed to the executive branch of the state and would not appear to be binding on state judges, if for no other reason than it would undermine the equality of lower federal court and state judges in the interpretation of federal law.

### *B. How Big a Problem?*

What, then, if a pre-enforcement constitutional challenge to a particular privately-enforced state law could not be heard in federal court for the reasons I have outlined? That is, a challenge to such a law could only be asserted by a defendant accused in court of having violated it. Or, if it could be heard in a pre-enforcement challenge, the judgment would have very little effect in actually settling the issue of constitutionality.

Private lawsuits are intended to, and can, deter the kind of conduct that is their subject. If there is a substantial amount of liability involved, they can deter that conduct even if it is, at least arguably, constitutionally protected. Pre-enforcement challenges to privately enforceable laws—challenges by those who want to engage in the arguably protected activity, but do not want to risk being sued and finding that the conduct is not constitutionally protected—are, as we have seen, difficult.

All of this is true, and it might indeed deter some constitutionally protected conduct. My only point in this section is a modest one: this is hardly a new state of affairs brought about by legislatures hostile to abortion rights or free speech rights, or by state populations opposed to race-conscious decision-making. We have had to live with this state of affairs (and situations even more problematic) for quite a while now, and the republic has survived.<sup>271</sup>

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<sup>269</sup> U.S. CONST. amend. XIV, § 5; *see* *United States v. Georgia*, 546 U.S. 151, 158 (2006) (“[N]o one doubts that § 5 grants Congress the power to ‘enforce . . . the provisions’ of the Amendment by creating private remedies against the States for *actual* violations of those provisions.” (second alteration in original)).

<sup>270</sup> *See supra* notes 207–23 and accompanying text.

<sup>271</sup> The “state of affairs” to which I refer is the inability to seek a ruling regarding the constitutionality of a statute prior to violating its provisions. The critics occasionally refer to the problem as one of unreviewability in federal court. *See, e.g.,* Manian, *supra* note 97, at 153 (describing tort statutes as “categorically unreviewable in federal court”). This is either an overstatement or an understatement of the problem. If the problem is that no one will ever

Federal courts did not have general “arising under” jurisdiction until 1875.<sup>272</sup> Prior to that time, rights under the Constitution, including the Bill of Rights, had to be enforced in state courts, subject only to the Supreme Court’s appellate review.<sup>273</sup> The notion of pre-enforcement review may not have been invented by *Ex parte Young*, but it was certainly novel.

Tort law frequently has implications for constitutional rights. Most prominently, defamation,<sup>274</sup> intentional infliction of emotional distress,<sup>275</sup> and invasion of privacy<sup>276</sup> torts frequently implicate rights under the First Amendment. Most of the limitations that the Court has identified in these areas have come through review of money judgments in tort cases.<sup>277</sup>

Similarly, in the 1990s, a number of states passed so-called “agricultural disparagement” laws.<sup>278</sup> Designed to protect the agricultural sector of these states’ economies, these laws give the producers of agricultural products (and sometimes others, like shippers and sellers) a right to sue for damages against those who promulgate disparaging statements or false information about the safety of the consumption of food

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risk violating the laws, then they are unreviewable in federal, state, and any other court. If people are willing to violate the law in order to test its validity, but cannot maintain a pre-enforcement challenge that the law violates some federal right, then the state law can be challenged in federal court if federal courts have jurisdiction (for example, by reason of diversity or supplemental jurisdiction) over a damages lawsuit brought by a plaintiff, and thus would not be “categorically unreviewable” in federal court. *See, e.g., Bruesewitz v. Wyeth, Inc.*, 561 F.3d 233, 237, 253 (3d Cir. 2009) (holding that the National Childhood Vaccine Injury Act preempted certain of plaintiffs’ tort claims after defendant-vaccine manufacturer removed the tort damages claims to federal court), *petition for cert. filed*, 78 U.S.L.W. 3082 (U.S. Aug. 4, 2009) (No. 09-152).

<sup>272</sup> Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 (providing federal courts with jurisdiction for claims “arising under” federal law).

<sup>273</sup> *Zwickler v. Koota*, 389 U.S. 241, 245 (1967) (“During most of the Nation’s first century, Congress relied on the state courts to vindicate essential rights arising under the Constitution and federal laws. The only exception was [a statute] providing for review in this Court when a claim of federal right was denied by a state court.”).

<sup>274</sup> RESTATEMENT (SECOND) OF TORTS §§ 558–59, 565–66 (1977).

<sup>275</sup> *Id.* at §§ 46–48.

<sup>276</sup> *Id.* at § 652A.

<sup>277</sup> *See, e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56–57 (1988) (reversing monetary awards in tort action alleging intentional infliction of emotional distress); *N.Y. Times v. Sullivan*, 376 U.S. 254, 292 (1964) (reversing money judgment awarded to public official in a state court libel action against his critics).

<sup>278</sup> The passage of these state statutes is often attributed to a 1989 episode of the television show “60 Minutes,” which reported on the use of a chemical (commonly known as Alar) on apples in Washington state. David J. Bederman et al., *Of Banana Bills and Veggie Hate Crimes: The Constitutionality of Agricultural Disparagement Statutes*, 34 HARV. J. ON LEGIS. 135, 135 (1997); *see also* Eileen Gay Jones, *Forbidden Fruit: Talking About Pesticides and Food Safety in the Era of Agricultural Product Disparagement Laws*, 66 BROOK. L. REV. 823, 827–33 (2001). There appears to be twelve states with such laws. *Id.* at 833.

products.<sup>279</sup> For a variety of reasons, academic writers have contended that these laws are unconstitutional as violations of the First Amendment.<sup>280</sup> But no court has so held, and the one effort at a pre-enforcement challenge (in state court) failed due to the lack of a justiciable controversy.<sup>281</sup> Those who wish to comment about the safety of food products in those states are taking their chances that they could be sued in state court, and only then can they assert their constitutional challenges to the law.

Other constitutionally debatable components of state tort law are created by the state judiciaries themselves as part of their role in developing the common law. Take the so-called “fair reporting” or “neutral reportage” privilege in defamation cases, where re-publication of libelous statements of public importance is deemed privileged regardless of whether the re-publication was made with “actual malice” or any other relevant scienter standard.<sup>282</sup> Some courts have held and/or suggested that this privilege is mandated by the First Amendment.<sup>283</sup> Other courts have rejected the privilege and, obviously, any suggestion that it is mandated by the United States Constitution.<sup>284</sup> As far as I can tell, no cases have permitted potential speakers or writers to test the absence of a “fair report privilege” in any state in some pre-enforcement proceeding challenging that absence as a violation of the First Amendment. Those who publish—bloggers and newspapers alike—have to take their chances that they might be sued for reporting on defamatory statements made by others.

Moving from the First Amendment to the Second, this last decade has seen increasingly aggressive use of tort law against gun manufacturers. Specifically, a concerted effort by mayors of major cities has led to tort law suits being lodged against major gun manufacturers, alleging that their system of distributing and marketing guns constitutes a nuisance.<sup>285</sup> Some, including one of the lawyers for the landmark case *District of Columbia v. Heller*,<sup>286</sup> have argued that such lawsuits infringe upon Second

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<sup>279</sup> Bederman et al., *supra* note 278, at 145–46.

<sup>280</sup> *See, e.g., id.* at 149–56; Jones, *supra* note 278, at 833–42.

<sup>281</sup> *Action for a Clean Env. v. State*, 457 S.E.2d 273, 273–74 (Ga. Ct. App. 1995).

<sup>282</sup> RESTATEMENT (SECOND) OF TORTS § 611 (1977). Precisely what statements may be re-published pursuant to this privilege is subject to debate. The Pennsylvania Supreme Court, for example, distinguishes between the “fair report privilege,” permitting re-publication of government proceedings, and the “neutral reportage privilege,” covering statements made outside those proceedings. *Norton v. Glenn*, 860 A.2d 48, 52–53 n.6 (Pa. 2004), *cert. denied sub nom* *Troy Pub. Co. v. Norton*, 544 U.S. 956 (2005).

<sup>283</sup> *See, e.g., Edwards v. Nat’l Audubon Soc’y, Inc.*, 556 F.2d 113, 120 (2d Cir.), *cert. denied sub nom.* *Edwards v. N.Y. Times Co.*, 434 U.S. 1002 (1977); *Trainor v. Standard Times*, 924 A.2d 766, 770 n.4 (R.I. 2007).

<sup>284</sup> *Norton*, 860 A.2d at 57.

<sup>285</sup> *See, e.g., City of Chicago v. Beretta U.S.A. Corp.*, 785 N.E.2d 16, 20 (Ill. App. Ct. 2002), *rev’d*, 821 N.E.2d 1099 (Ill. 2004); *James v. Arms Tech., Inc.*, 820 A.2d 27, 33–34 (N.J. Super. Ct. App. Div. 2003); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1140 (Ohio 2002).

<sup>286</sup> 554 U.S. \_\_\_, 128 S. Ct. 2783 (2008).

Amendment rights.<sup>287</sup> But the gun manufacturers will have to present those arguments in the tort cases that have been filed against them. Gun owners' efforts to preempt the lawsuits and obtain a declaratory judgment that such suits would violate their constitutional rights failed on jurisdictional (albeit, not justiciability) grounds.<sup>288</sup>

One could provide other examples as well, especially if we recognize that federal statutes can also extend protection to conduct arguably subject to state tort law. The "Good Samaritan" provision of the Communications Decency Act<sup>289</sup> and, more generally, any federal law which preempts state tort law will have this effect.<sup>290</sup> The important fact is that the challenges to state tort law generally take place in the tort cases themselves, not in any declaratory judgment action against the state tort law.

Is this state of affairs a bad thing? Some privately enforceable rules will deter people from engaging in conduct that is arguably protected by the Constitution or other law. (That certainly seems to be the objective of the gun nuisance suits.) To the extent that *Ex parte Young* expressed the view that no one should be forced into choosing between the abandonment of constitutional rights or risking the imposition of substantial liability, these laws certainly are inconsistent with that sentiment. But, the Court has not always adhered to that sentiment. *Fitts*<sup>291</sup> has never been overruled. Several Justices have even expressed the view (clearly, a minority view) that federal courts should never opine on the constitutionality of a state law prior to the state courts having interpreted that provision.<sup>292</sup>

Perhaps they had a point. There are some advantages in allowing the court before which an actual lawsuit for violation of a state law is pending to have the first crack at interpreting that law and determining its constitutionality. State courts are the

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<sup>287</sup> See generally ROBERT A. LEVY, SHAKEDOWN: HOW CORPORATIONS, GOVERNMENT, AND TRIAL LAWYERS ABUSE THE JUDICIAL PROCESS 55–87 (2004) (describing the recent flood of litigation against gun manufacturers and the reasons why such lawsuits are illegitimate).

<sup>288</sup> *Second Amendment Found. v. U.S. Conference of Mayors*, 274 F.3d 521, 522 (D.C. Cir. 2001) (affirming dismissal on grounds that court lacked personal jurisdiction over defendant mayors).

<sup>289</sup> 47 U.S.C. § 230(c) (2006). This provision states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another," and that no cause of action may be brought under any state or local law inconsistent with that standard. *Id.*

<sup>290</sup> See, e.g., *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1010–11 (2008).

<sup>291</sup> *Fitts v. McGhee*, 172 U.S. 516 (1899).

<sup>292</sup> *Brockett v. Spokane Arcades, Inc.*, 454 U.S. 1022, 1023 (1981) (Burger, C.J., dissenting) ("This Court—and all federal courts—have enough to do without 'pre-empting' state courts on matters initially of state concern. . . . The policies of federalism and comity militate in favor of affording state judges—who are as capable as are federal judges of enforcing the Constitution of the United States, and have taken the same oath to do so—the initial opportunity to consider the scope and validity of state statutes."). Chief Justice Burger's dissent was joined by then-Associate Justice Rehnquist. *Id.* at 1022.

ultimate arbiters of state law, and they may interpret the state statutes so as to avoid any constitutional problems.<sup>293</sup>

In one of the recent appellate court cases, for example, the defendants had argued that the Louisiana statute providing for damages against certain abortion providers, Act 825, was just designed to enhance Louisiana's "informed consent" statutes related to abortion.<sup>294</sup> The initial panel decision rejected that interpretation, but ultimately, the question of what obligations Act 825 imposed would be a matter of state law. While it is certainly possible to envision interpretations of Act 825 that would be inconsistent with the Supreme Court's jurisprudence on abortion, one can also imagine a very narrow interpretation of the statute that might perhaps save it, or at least certain applications of it.<sup>295</sup>

Of course, this advantage is of no use if a case raising the question is never filed. I tend to think that tort law, though, is generally less deterring than criminal law. A damage award is particularly less important than imprisonment for the very rich, the very poor, and (assuming an important constitutional right may be at stake) the ideologically committed. At the very least, before abandoning the traditional method of assessing the constitutionality of privately enforceable laws, we might try to determine whether substantial amounts (and not just "any") valuable, arguably protected, conduct is being deterred, be it abortions in Louisiana, discussions of food safety in South Dakota, or race-conscious decision-making in public education in California. If it is, then perhaps some adjustment in our traditional methods of adjudication might be appropriate.

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<sup>293</sup> *Id.* at 1024 ("Even a cursory examination of the lengthy statute . . . discloses that the state courts might well have construed the law so as to avoid each of the[] perceived deficiencies [identified by the lower courts]."); *see also* *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 99–101 (1976) (White, J., dissenting) (castigating majority for misinterpreting state law).

<sup>294</sup> *Okpalobi v. Foster*, 190 F.3d 337, 356–57 (5th Cir. 1999), *rehearing en banc granted*, 201 F.3d 353 (5th Cir. 2000), *rev'd on rehearing en banc*, 244 F.3d 405 (5th Cir. 2001).

<sup>295</sup> For example, Professor Borgmann posits a hypothetical under which a former abortion patient sues under Act 825, claiming damages based upon the fact that she did not know that abortion constituted "killing a child." Borgmann, *supra* note 98, at 764; *see also* Achilles, *supra* note 115, at 859 ("[T]he statute permits a woman to recover for the wrongful death of her fetus simply by proving that her fetus was aborted."). One could just as easily imagine a state court rejecting such a lawsuit on the ground that disclosure to plaintiff that she was undergoing an abortion was sufficient to put her on notice that the procedure would result in "killing a child," and that plaintiff's damages for that harm are thus reduced to zero under the statute's "damages are reduced for disclosed harms" provision. LA. REV. STAT. ANN. § 9:2800.12(C)(1) (2009). (Indeed, federal constitutional considerations might militate in favor of such an interpretation.) The point is not that Professor Borgmann's interpretation of Act 825 is incorrect, or that mine is correct; rather, it is that neither of us can provide authoritative interpretations of Act 825—and neither can federal courts. *See* Buck & Rienzi, *supra* note 71, at 423–24 (noting the "ambitious exercise of judicial interpretation" by Missouri courts in interpreting Missouri partial-birth abortion law).

## CONCLUSION

Unlike many other laws and rules that affect constitutional rights, anti-preference laws to date have been the direct product of state-wide elections. Like some other laws and rules, they are laws whose enforcement against violators are provided primarily by courts, with only modest (or, depending on the state, no) assistance or involvement from the executive branch of state government. In the case of anti-preference laws, because federal jurisdiction over a lawsuit seeking damages for violation of the law may be difficult to obtain, such enforcement is most likely going to be provided by state courts.<sup>296</sup>

This creates a problem for any pre-enforcement challenge brought in federal court. As we have seen, depending upon state law, the existence of federal jurisdiction might very well be able to be challenged. Just as importantly, even where jurisdiction exists, a lower federal court likely will be impotent to substantially change the overall incentives for compliance with the law. They cannot, at least pursuant to the arguments that have been examined in this Article, *require* state agencies to make race-conscious decisions. And, if they cannot do that, there is probably little help that a lower federal court can provide to a state agency subject to an anti-preference law. A state agency that is told by a lower federal court judge (or judges) that it can ignore an anti-preference law would follow that advice at its peril.

Thus, the best bet for a state agency who wishes to launch an effective challenge to an anti-preference law will be to wait to be sued in state court, and then to assert the challenge as a federal defense. Of course, state agencies may not want to intentionally violate the law in order to test its constitutionality, and the course of action for those individuals or groups who claim that the anti-preference laws impose a political burden on them is less clear. A mere declaration by a lower court in federal court that the law is unconstitutional may have little value—it is unclear whether they are entitled to an injunction against a state agency—and they are certainly only entitled to an injunction against those they have sued. Unlike state agencies, they cannot themselves violate the law and cannot thus set up a test case in state court through their own actions. Their best bet may be to file a declaratory judgment action against someone with actual enforcement powers, hope for a win in a federal circuit court, and—unlike most court of appeals winners—join the law’s defenders in asking the Supreme Court to take the case. Only the agreement of the Supreme Court on the law’s unconstitutionality can really provide them with the relief that they actually need—a federal court judgment that state courts will be bound to accept.

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<sup>296</sup> Even if federal jurisdiction might otherwise exist (because of diversity or supplemental jurisdiction) in a tort suit brought against a state agency for violation of an anti-preference law, the Eleventh Amendment would present a barrier to bringing a claim under state law in federal court. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 120 (1984).