NORTH CAROLINA CIVIL RIGHTS LAW REVIEW

Volume 3 | Issue 1 Article 4

4-1-2023

The Enduring Protection of Prospective Relief

Georgina Yeomans

THE ENDURING PROTECTION OF PROSPECTIVE RELIEF*

GEORGINA YEOMANS**

The 2021 and 2022 state legislative sessions across the United States saw a flurry of proposed and enacted legislation that used the threat of civil or criminal sanctions to dissuade individuals from engaging in arguably constitutionally protected conduct. From restrictions on abortion to heightened penalties for certain expressive conduct, some state legislatures acted to discourage individuals from engaging in conduct disfavored by a majority of the legislature but protected by federal law.

The proliferation of coercive laws that test constitutional boundaries accompanies an effort to subvert federal judicial review. Most prominently, the litigation over Texas's Heartbeat Act saw the courts collectively acquiesce in the subversion of federal judicial review of a blatantly unlawful statute. The result was nullification of federally-protected rights by the confluence of a punitive statute deterring protected conduct and the impotence of federal courts to vindicate the supremacy of federal law.

But even had the statute been effectively challenged in federal court, and its enforcement enjoined, the statute purported to nonetheless be able to punish its violation, and thus continue to deter constitutionally protected conduct. A provision of the Heartbeat Act codified a theory embraced by its author, Jonathan Mitchell, in the pages of the Virginia Law Review *that any conduct engaged in while a state statute is enjoined is nonetheless subject to retroactive prosecution or civil liability if the court's injunction is later lifted. Under this theory, state or other enforcing officials can induce compliance with punitive state statutes, even if their enforcement has been enjoined, by threatening to retroactively enforce the law should the injunction ever dissolve.*

** Appellate Attorney, Office of General Counsel, Equal Employment Opportunity Commission. The views expressed in this article are solely my views and do not express the views of the EEOC. Thank you, Gillian Metzger, Olatunde Johnson, Jonathan Gould, Michael Skocpol, Eric Konopka, William Yeomans, Margaret Hay, Sara Margolis, and the editors at the *North Carolina Civil Rights Law Review* for your thoughtful comments and suggestions on this piece.

Precedent leaves open whether enforcing authorities can retroactively punish conduct engaged in while a statute's enforcement was enjoined. The Supreme Court has confronted the question of an injunction's power to immunize conduct, but not resolved it. As Justice Kavanaugh acknowledged in his concurring opinion in Dobbs v. Jackson Women's Health Organization*, courts may grapple with the question in the aftermath of the Supreme Court's decision overturning* Roe v. Wade*, as state and local law enforcement test the bounds of the decision's impact.*

This piece examines the question of retroactive enforceability in the context of laws that deter federally-protected conduct through the threat of sanctions and argues that federal courts have the authority to immunize conduct undertaken while federal-court prospective relief is in place, even if that relief is later vacated. Longstanding precedent holds that a plaintiff who has refrained from engaging in constitutionally protected conduct for fear of civil or criminal punishment under an arguably unlawful statute states an Article III injury. That injury can be redressed by prospective relief—a declaration of the statute's unlawfulness that could later be summarily enforced by an injunction, or the entry of an injunction precluding its enforcement. If state and other enforcing officials can threaten to punish behavior untaken under the cover of prospective relief, thereby inducing immediate compliance with the offending statute, the courts would lack Article III jurisdiction over coerced restraint injuries because they would be powerless to remedy the plaintiff's harm. Moreover, state legislatures would be able to thwart the supremacy of federal law by forcing individuals to choose between refraining from exercising their rights or facing potential punishment. State legislatures would be left with the final say on which rights people may safely exercise, a result directly contrary to the supremacy of federal law.

INTRODUCTION

The 2021 and 2022 state legislative sessions saw multiple efforts by state legislatures to test the bounds of their ability to restrain the exercise of constitutional rights.[1] Often, this bounds-testing legislation invoked the specter of punishment.[2] The laws were geared specifically to eliminate behavior that, although constitutionally protected, was disfavored by the state legislature. For ease of reference, I refer to this dynamic, wherein a law deters the exercise of federally-protected rights through the threat of civil or criminal penalties as "coerced restraint."

The most infamous example of this type of state lawmaking is Texas's Heartbeat Act, Senate Bill 8 ("SB 8"), which prohibits physicians from performing abortions if fetal cardiac activity could be detected.[3] When passed, the law violated then-valid Supreme Court precedent in *Roe v. Wade*[4] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[5] The law, which attaches harsh penalties—a minimum statutory damages award of $10,000 for each violation[6]—and assigns enforcement to anyone and everyone,[7] was clearly designed to discourage the provision and procurement

1. *See infra* Section I.

2. *See* Jon D. Michaels & David Noll, *Vigilante Federalism*, 107 CORNELL L. REV. (forthcoming 2023) (manuscript at 14), https://ssrn.com/abstract=3915944; *see also* TEX. HEALTH & SAFETY CODE ANN. § 171.208(b) (West 2021).

3. HEALTH & SAFETY CODE § 171.204(a)–(b).

4. 410 U.S. 113 (1973). *But see* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (overruling *Roe*).

5. 505 U.S. 883 (1992). *But see* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (overruling *Casey*).

6. HEALTH & SAFETY CODE § 171.208(a)–(b).

7. *Id*. § 171.207(a).

of abortions.[8] The fear of incurring the law's penalties caused a steep decrease in abortions in the state at a time when the right to a pre-viability abortion was constitutionally protected nationwide.[9]

As Professors Jon Michaels and David Noll catalogue, the Heartbeat Act inspired a wave of copycat laws that were passed or proposed during 2021 legislative sessions in the states.[10] The laws span from abortion restrictions copying the Heartbeat Act's model, to laws that forbid the teaching of certain subjects in public schools, to prohibitions on providing access to appropriate bathrooms for transgender children.[11] These "rights suppressing laws," as Professors Michaels and Noll call them, rely on private enforcement of civil penalties to achieve their aim of restraining behavior disfavored by the legislature, but often protected by the Constitution or other federal law.[12]

The 2021 and 2022 state legislative sessions also saw prolific enactment of state-enforced[13] regulations that impose civil or criminal

---

8. The law was also clearly designed to evade pre-enforcement review in federal courts. *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 543 (2021) (Roberts, C.J., concurring in judgment in part and dissenting in part); Georgina Yeomans, *Ordering Conduct Yet Evading Review: A Simple Step Toward Preserving Federal Supremacy*, 131 YALE L.J.F. 513, 525–26 (2021). With the help of the Supreme Court, Fifth Circuit Court of Appeals, and Supreme Court of Texas, it achieved its aim. *See* Whole Woman's Health v. Jackson, 141 S. Ct. 2494 (2021); 142 S. Ct. 522 (2021); 23 F.4th 380 (5th Cir. 2022); 642 S.W. 3d 569 (Tex. 2022); 31 F.4th 1004 (5th Cir. 2022).

9. Rachel K. Jones, Jesse Philbin, Marielle Kirstein, & Elizabeth Nash, *New Evidence: Texas Residents Have Obtained Abortions in at Least 12 States That Do Not Border Texas*, GUTTMACHER INST. (Nov. 9, 2021), https://www.guttmacher.org/article/2021/11/new-evidence-texas-residents-have-obtained-abortions-least-12-states-do-not-border (noting a 50% decline in abortions after the law went into effect); *Whole Woman's Health*, 142 S. Ct. at 544 (Roberts, C.J., concurring in the judgment in part and dissenting in part) (noting that the Heartbeat Act "effectively chill[s] the provision of abortions in Texas").

10. Michaels & Noll, *supra* note 2 (manuscript at 6).

11. *Id*. at 8, 13–16, 28.

12. *See id*. at 8. As noted, the abortion restrictions were passed at a time when such lawmaking was blatantly unconstitutional. *See* Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992). *But see* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (overruling *Roe* and *Casey*). Laws censoring public education have been challenged as violative of the First and Fourteenth Amendments. *See* Complaint at 9, Equality Fla. v. DeSantis, No. 4:22-cv-00134-AW-MJF (N.D. Fla. filed Mar. 31, 2022), 2022 WL 974108. Transgender exclusion laws have been challenged as violative of the equal protection clause of the Fourteenth Amendment and Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681. *See* Complaint for Declaratory and Injunctive Relief at 28, L.E., *ex rel.* Shelley Esquivel & Mario Esquivel v. Lee, No. 3:21-cv-00835 (M.D. Tenn. filed Nov. 4, 2021).

13. I use the term "state" to refer to governmental actors, including local and state. The use of the term "state" is meant to roughly approximate the universe of government

penalties and rely at least in part on dissuading, through penalty, the exercise of constitutional rights to achieve their aims. For instance, some thirty states proposed or enacted legislation that broadened prohibitions or enhanced penalties associated with protest-related behavior.[14] From the beginning of 2021 through October 2022, state lawmakers in twenty-one states passed forty-two restrictive voting laws.[15] Some of these enacted or proposed laws include provisions that penalize expressive activity related to voting.[16]

The proliferation of laws that rely at least in part on coerced restraint for their effectiveness accompanies the legal theory that prosecutors or civil law enforcement vigilantes may be able to retroactively punish individuals for conduct engaged in while the enforcement of the statute was enjoined, if that injunction is later vacated.

In 2018, Jonathan Mitchell, the purported author of Texas's Heartbeat Act,[17] published an article in the *Virginia Law Review* that argued that the popular conception—which has captivated judges and the public alike—that courts "strike down" or "invalidate" unconstitutional laws is inaccurate and

---

officials who are held accountable to the Constitution's mandates through the Supreme Court's state-action doctrine. *See, e.g.*, Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001). For an argument that vigilantes who enforce the type of rights-suppressing laws that Michaels & Noll discuss can be considered state actors, *see* Ashok Chandran & Georgina Yeomans, *Countersuing Litigants Under the Texas Anti-Abortion Act*, BLOOMBERG LAW (Sept. 14, 2021), https://news.bloomberglaw.com/us-law-week/countersuing-litigants-under-the-texas-anti-abortion-law (arguing that anyone who enforces rights-suppressing laws stands in the shoes of state law enforcement and should be subject to counter-suit under 42 U.S.C. § 1983).

14. *See* ARMED CONFLICT LOCATION & EVENT DATA PROJECT, A YEAR OF RACIAL JUSTICE PROTESTS: KEY TRENDS IN DEMONSTRATIONS SUPPORTING THE BLM MOVEMENT 1 (2021), https://acleddata.com/2021/05/25/a-year-of-racial-justice-protests-key-trends-in-demonstrations-supporting-the-blm-movement/; *see also* Nora Benavidez, James Tager, & Andy Gottlieb, *Closing Ranks: State Legislators Deepen Assaults on the Right to Protest*, PEN AMERICA, https://pen.org/closing-ranks-state-legislators-deepen-assaults-on-the-right-to-protest/ (last visited Mar. 26, 2023).

15. *Voting Laws Roundup: October 2022*, BRENNAN CTR. FOR JUST., (Oct. 6, 2022), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2022?_ga=2.83508950.1731384452.1675436816-912665924.1675436815.

16. *See, e.g.*, League of Women Voters of Fla., Inc. v. Lee, 595 F. Supp. 3d 1042, 1127-40 (N.D. Fla. 2022); *see also* Longoria v. Paxton, 585 F. Supp. 3d 907, 931 (W.D. Tex. 2022), vacated and remanded on other grounds, No. 22-50110, 2022 WL 2208519 (5th Cir. June 21, 2022).

17. Michael S. Schmidt, *Behind the Texas Abortion Law, a Persevering Conservative Lawyer*, N.Y. TIMES (Sept. 12, 2021), https://www.nytimes.com/2021/09/12/us/politics/texas-abortion-lawyer-jonathan-mitchell.html.

mistaken.[18] Mitchell argues that courts have "no power to veto or suspend a statute."[19] When a federal court declares a statute unconstitutional and enjoins its enforcement, the court merely "decline[s] to enforce a statute in a particular case or controversy" and "enjoin[s] executive officials from taking steps to enforce a statute—though only while the court's injunction remains in effect."[20]

The implication of Mitchell's argument is that if a court enters an injunction, and that injunction is later lifted, any party who violated the law *while its enforcement was enjoined* is subject to prosecution or civil penalties for that behavior. Mitchell therefore recommends to executive officials that, if the enforcement of their favored policy is enjoined by a federal court, they can simply threaten to retroactively enforce the statute's penalties "against anyone who violates the statute while" a preliminary or permanent injunction is in effect, should the injunction later be dissolved.[21] Mitchell assures that doing so will "induce immediate compliance with the statute" even while it is enjoined.[22] What is more, "[t]he government can make this threat even if its appeal [of a permanent injunction] fails . . . because a future court might undermine or repudiate the decisions or doctrines that led the district court to 'permanently' enjoin the statute's enforcement."[23] In other words, because an en banc appellate court or the Supreme Court may one day overrule precedent, undermining the legal basis for a given injunction, under Mitchell's theory, it is almost never safe to violate a punitive law, even if the law has been found unconstitutional. The state legislatures, aided by enforcing officials, thereby become the final arbiters of whether individuals can safely exercise their constitutional and other federal rights.

The theory that behavior undertaken in violation of an enjoined statute should be fair game for punishment should the injunction be vacated made its way into Texas's Heartbeat Act.[24] The statute explicitly precludes reliance

18. Jonathan Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 934–37 (2018).

19. *Id*. at 936.

20. *Id*.

21. *See id.* at 988–89.

22. *See id*. at 988.

23. *Id*. at 989.

24. This should not be surprising given that Jonathan Mitchell is the purported author of the statute. *See* Schmidt, *supra* note 17.

on any court decision that has been overruled, even if the decision has not been overruled when the reliance was undertaken.[25]

The federal litigation challenging Texas's Heartbeat Act did not implicate this provision of the law because the parties were never able to successfully enjoin its enforcement for any meaningful period of time.[26] But the confluence of state lawmaking that relies in part on discouraging protected behavior, with the promotion of the theory that federal-court injunctions offer no retrospective reliance protection, makes it likely that courts will have to confront this issue in the near future.[27] Moreover, the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*,[28] overruling *Roe v. Wade*[29] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[30] and leaving the question of abortion restriction to the states, opens up a new context in which this question might arise.[31] When the Supreme Court decided *Dobbs*, seven states had laws on the books that were passed before the Supreme Court's decision in *Roe* restricting abortion.[32] Two were formally enjoined and the others were rendered practically unenforceable by the decision in *Roe*, but none were

25. TEX. HEALTH & SAFETY CODE ANN. § 171.208 (e)(3) (West 2021). Since then, identical language has shown up in other abortion bans. *See, e.g.*, Okla. Stat. tit. 63, § 1-745.55(E)(3).

26. The private plaintiffs challenging the Act in the *Whole Woman's Health v. Jackson* litigation requested a preliminary injunction, but, because the case was dismissed on the defendants' motion to dismiss, the motion was not adjudicated. *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021); 23 F.4th 380 (5th Cir. 2022); 642 S.W.3d 569 (Tex. 2022); 31 F.4th 1004 (5th Cir. 2022). The United States briefly won a preliminary injunction, but it was stayed eight days later. *See* United States v. Texas*,* No. 1:21-CV-796-RP, 2021 WL 4593319 (W.D. Tex. Oct. 6, 2021)*, cert. granted before judgment,* 142 S. Ct. 14 (2021); United States v. Texas, No. 21-50949, 2021 WL 4786458, at *1 (5th Cir. Oct. 14, 2021), *cert. dismissed,* 142 S. Ct. 522 (2021).

27. As I will discuss *infra* Section V, the Texas Attorney General took this argument for a test drive in opposing a motion for preliminary injunction brought by a county election official challenging a criminal prohibition on proactively providing voters with applications for a mail ballot. The Attorney General argued that a preliminary injunction could not remedy the administrator's alleged harm—refraining from otherwise protected conduct—because a preliminary injunction would not immunize her behavior against prosecution should the injunction not be made permanent. Longoria v. Paxton, No. SA:21-CV-1223-XR, 2022 WL 447573, at *17 (W.D. Tex. Feb. 11, 2022).

28. 142 S. Ct. 2228 (2022).

29. 410 U.S. 113 (1973). *But see Dobbs*, 142 S. Ct. 2228 (overruling *Roe*).

30. 505 U.S. 883 (1992). *But see Dobbs*, 142 S. Ct. 2228 (overruling *Casey*).

31. Richard H. Fallon, Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611, 620–21 (2007).

32. *Abortion Policy in the Absence of* Roe, GUTTMACHER INST. (June 1, 2022), https://web.archive.org/web/20220601135737/https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe.

formally repealed.[33] Nine more states passed abortion restrictions after *Roe* was decided and, because they violated *Roe*, their enforcement was enjoined.[34] Now that *Roe* has been reversed, what is the status of any intervening conduct? As Professor Richard Fallon, Jr., explained in 2007, this is "a question of surprising intricacy."[35]

The Supreme Court explicitly confronted the question of an injunction's scope of protection once, in the context of preliminary injunctive relief, and left it unresolved.[36] In the forty years since that opinion, the question of what protection an injunction provides after it has been dissolved has vexed scholars.[37] Some have argued that the limited view of an injunction's protective power is inconsistent with the Supreme Court's equity jurisprudence.[38] Others have pondered the problem without reaching a conclusion.[39] And of course Mitchell embraced the theory as an avenue toward inducing compliance with unconstitutional laws.[40]

This piece draws on the Supreme Court's precedent regarding Article III standing in the context of laws that deter the exercise of protected conduct (coerced restraint). Reexamining the question in this context shows that the Court's Article III jurisprudence relies on the federal courts' authority to protect behavior undertaken during an injunction. The Court has long recognized that a plaintiff who alleges they have refrained from engaging in constitutionally protected activity because of a reasonable fear they might be prosecuted for engaging in the activity under an arguably unconstitutional state law alleges a cognizable injury under Article III.[41] The Court views a person's refraining from constitutionally protected conduct because of the specter of punishment to be a harm in and of itself that merits access to federal court.[42] And, typically, if the Court agrees with the plaintiff that the statute is unlawful, the Court will redress the plaintiff's harm by declaring the law

33. *Id*.

34. *Id*.

35. Fallon, *supra* note 31, at 616.

36. *See* Edgar v. MITE Corp., 457 U.S. 624 (1982).

37. *See infra* Section IV.b.

38. Michael T. Morley, *Erroneous Injunctions*, 71 EMORY L.J. 1137, 1195 (2022); *see also* Patrick T. Gillen, *Preliminary Injunctive Relief Against Governmental Defendants: Trustworthy Shield or Sword of Damocles?*, 8 DREXEL L. REV. 269, 310 (2016).

39. Vikram David Amar, *How Much Protection Do Injunctions Against Enforcement of Allegedly Unconstitutional Statutes Provide?*, 31 FORDHAM URB. L.J. 657, 664 (2004); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 883 (1991); Fallon, *supra* note 31, at 620.

40. *See infra* Section IV; Mitchell, *supra* note 18, at 988.

41. *See infra* Section II.

42. *See id*.

unconstitutional, enjoining its enforcement, or both.[43] This result allows the plaintiff to engage in their preferred and protected conduct without fear of reprisal, redressing their harm.[44] Put another way, if federal-court prospective relief could not promise to insulate conduct from punishment, then it also could not alleviate the plaintiff's cognizable Article III coerced restraint injury.[45] And a court powerless to remedy the plaintiff's harm has no jurisdiction to act.[46] Accepting the theory that Mitchell sets forth would upend this unbroken Article III precedent. It would also invert the supremacy of federal law that underlies our federalist structure of government.[47] If a state legislature can pass laws that discourage the exercise of federally-protected rights, and state officials can threaten retroactive punishment even in the face of federal-court prospective relief, states become the final arbiters of which federal rights are protected in practice, thus arrogating themselves as superior to federal law.[48]

This piece proceeds in five parts. Taken together, its parts establish that Supreme Court jurisprudence has long recognized that forgoing the exercise of rights for fear of punishment is a cognizable Article III injury, remediable by federal-court prospective relief. This precedent suggests that federal courts have the authority to protect conduct engaged in under the cover of prospective relief; if federal courts lacked this protective power, they would be powerless to meaningfully remedy coerced restraint, leaving them without the authority to adjudicate such controversies in the first place. Part I introduces the concept of coerced restraint by discussing recent, illustrative legislation.[49] Part II establishes that coerced restraint has long been recognized as an injury-in-fact in the federal courts. Part III explains that coerced restraint is remediable by prospective relief. Part IV surveys the case

---

43. *See infra* Section III.

44. *Id*.

45. *See infra* Section V.

46. *Id*.

47. *See* U.S. CONST. art. VI.

48. *See* Caitlin E. Borgmann, *Legislative Arrogance and Constitutional Accountability*, 79 S. CAL. L. REV. 753, 799 (2006) (discussing the disruption to supremacy when states effectively nullify federal rights).

49. I often refer to conduct as protected throughout this piece. It is worth noting that the coerced restraint Article III injury requires only a showing that the plaintiff's forgone conduct is arguably affected with a constitutional interest. Susan B. Anthony List v. Driehaus, 573 U.S. 149, 159 (2014) ("[W]e have held that a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" (quoting Babbitt v. Farm Workers, 442 U.S. 289, 298 (1979)).

law and legal scholarship addressing the question of the scope of protection prospective relief provides, specifically analyzing the question of whether conduct undertaken while prospective relief is in place could nonetheless be retroactively punished. Part V fills a gap in the previous literature, explaining that the federal courts' ability to remedy the cognizable coerced restraint injury is inextricable from the authority to offer protection against retroactive liability. Moreover, the section explains that, without the capacity to provide enduring protection, the federal courts would lose a significant source of power to enforce the supremacy of federal law, leaving the states with the upper hand in deciding what rights are protected.

I. LAWS COERCING RESTRAINT

Laws that coerce restraint are laws that attach penalties—civil or criminal—to conduct that is arguably protected by federal law, whether by the Constitution or by federal statute. The specter of punishment discourages individuals from engaging in the arguably protected conduct, thereby restraining that behavior.[50] Such lawmaking can happen at the federal or state level, though this piece focuses on state lawmaking. Under our system of judicial review, if challenged in federal court, the enforcement of laws that infringe on the exercise of federally-protected rights without sufficient justification should be enjoined. Nonetheless, legislatures, and, for purposes of this piece, specifically state legislatures, inevitably test the bounds of federally-protected rights by passing laws that burden the exercise of those rights.[51] This section explores illustrative legislation that restrains the exercise of protected rights, focusing on contemporary state lawmaking, and thus on contexts that may come before the courts in the near-term.

A. *Abortion*

The reproductive rights space provides a historically consistent and concrete example of state legislatures' propensity to test the bounds of constitutional rights, and to explicitly violate those bounds, through coercive lawmaking.

Texas's near-total ban on abortion, passed before the Supreme Court overruled *Roe v. Wade*, is perhaps the most evocative example of a law that

50. Sections I.a and I.b offer illustrative examples of these types of laws.

51. *See, e.g.*, Borgmann, *supra* note 48, at 758–62 (discussing legislation aimed to suppress the exercise of rights that rely on private enforcement mechanisms and therefore evade judicial review).

coerces restraint. As discussed above, the law prohibits providing or aiding the procurement of an abortion after a fetal heartbeat could be detected.[52] It is privately enforceable through civil action and guarantees a statutory minimum of $10,000 in damages.[53] The law resulted in the immediate restraint of abortions in the state, despite the continuing federal constitutional protection of the practice pre-viability.[54] The Heartbeat Act is one entry in a trend of states experimenting with abortion restrictions that crowd-source their enforcement in order to burden a constitutional right without an easy path for individuals to vindicate their rights in federal court.[55] The Act's high-profile successful evasion of pre-enforcement federal-court review inspired copycat legislation in other states.[56]

But the Texas Heartbeat Act, while distinguishable from many other abortion restrictions in its overt subversion of judicial review, was merely the latest entry in a long line of laws that attempt to coerce restraint in the reproductive rights space, including laws that rely on traditional state enforcement. After the Supreme Court decided *Roe v. Wade*,[57] states legislated in direct violation of the constitutional right recognized in *Roe* by passing pre-viability abortion restrictions whose enforcement was enjoined based on *Roe*.[58]

This post-*Roe* lawmaking sought to restrain individuals from engaging in behavior that was, at the time the laws were passed, constitutionally protected. This dynamic represents quintessential coerced restraint lawmaking, wherein the legislature targets a certain right, attaches penalties to its exercise, and thereby attempts to dissuade individuals from disfavored conduct.

---

52. *See* TEX. HEALTH & SAFETY CODE ANN. § 171.204(a) (West 2021).

53. *See id*. §§ 171.208(a)–(b), 171.207(a).

54. *See* Jones et al., *supra* note 9.

55. *See* Michaels & Noll, *supra* note 2 and accompanying text.

56. *E.g.*, H.B. 4327, 8th Leg., 2d Regular Sess. (Okla. 2022); S.B. 1503, 8th Leg., 2d Regular Sess. (Okla. 2022); S.B. 1309, 6th Leg., 2d Regular Sess. (Idaho 2022). Other states proposed similar legislation. *See* Alison Durkee, *Idaho Enacts Law Copying Texas' Abortion Ban—And These States Might Be Next*, FORBES (Apr. 14, 2022), https://www.forbes.com/sites/alisondurkee/2022/03/23/idaho-enacts-law-copying-texas-abortion-ban---and-these-states-might-be-next/?sh=4f66d53725c0.

57. 410 U.S. 113 (1973).

58. *Abortion Policy in the Absence of* Roe, GUTTMACHER INST. (June 1, 2022), https://web.archive.org/web/20220601135737/https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe.

B. *Expression*

The First Amendment offers another illustrative context in which state lawmaking has pushed the bounds of constitutionality, forcing individuals to choose between forgoing rights and facing severe penalties. The 2021 and 2022 legislative sessions included lawmaking targeting free expression in at least two contexts fundamental to democratic governance: the right to protest and the right to vote.

1. Protest

The summer of 2020 saw the largest protest movement in the history of the United States.[59] Twenty-six million people took to the streets to demand structural reform in the name of racial justice, motivated by the high-profile killing of George Floyd by Minneapolis police officer Derek Chauvin.[60] The protests, which were overwhelmingly peaceful,[61] led to a number of important police reforms, largely on a local level.[62]

The protests also faced significant backlash. In the 2021 legislative session, lawmakers in 30 states proposed or enacted bills that increased the criminal penalties for protesting and, in some instances, empowered counter-protesters to engage in violence.[63] PEN America identified "efforts to redefine acceptable protest by expanding the scope of illegality for protest-

---

59. *10 Largest Protests in the History of America*, WORLD ATLAS, https://www.worldatlas.com/articles/10-largest-protests-in-the-history-of-america.html (Mar. 26, 2023).

60. *Id.*; *A Year of Racial Justice Protests*, *supra* note 14.

61. *A Year of Racial Justice Protests*, *supra* note 14; Erica Chenoweth & Jeremy Pressman, *Black Lives Matter Protesters Were Overwhelmingly Peaceful, Our Research Finds*, THE SPOKESMAN-REV. (Oct. 20, 2020), https://www.spokesman.com/stories/2020/oct/20/erica-chenoweth-and-jeremy-pressman-black-lives-ma/. Some protests saw violence initiated by counter-protesters or law enforcement. *Id*. Overall, however, "[t]he protests were extraordinarily nonviolent, and extraordinarily nondestructive, given the unprecedented size of the movement's participation and geographic scope." *Id*.

62. *See* Orion Rummler, *The Major Police Reforms Enacted Since George Floyd's Death*, AXIOS (Sept. 30, 2020), https://www.axios.com/2020/06/10/police-reform-george-floyd-protest (listing examples of major police reforms enacted since George Floyd's death); *see also After George Floyd The Changing Landscape of Policing*, LEGAL DEF. FUND, JUST. IN PUB. SAFETY PROJECT, https://www.naacpldf.org/george-floyd-anniversary/ (last visited Mar. 26, 2023) (listing police accountability bills enacted by states and cities and systemic changes to public safety enacted).

63. *A Year of Racial Justice Protests*, *supra* note 14; *see* Benavidez et al., *supra* note 14 (stating that anti-protest bills were introduced across 33 states since George Floyd's murder).

related activity" as an "overarching theme of anti-protest proposals."[64] The result was a chilling of the exercise of First Amendment rights for fear of punishment.[65]

2. Voting

The right to protest was not the only constitutional right that flourished, despite all odds, in 2020 and then became a target of state legislatures. In the aftermath of a presidential election unlike any other, state legislatures in 2021 passed myriad election laws that created or heightened civil and criminal penalties associated with activity meant to ease access to the franchise. In doing so, the legislatures relied in part on coerced restraint to achieve their desired ends.[66] The pattern has continued into 2022.[67]

One example from Texas highlights this pattern. The 2020 election took place during a global pandemic that left many voters afraid to vote in-person for fear of contracting COVID-19.[68] Many states took measures to expand eligibility to vote by mail in order to ensure voters had a method to exercise the franchise safely.[69] The State of Texas largely did not.[70] Texas limits vote by mail to registered voters who will be out of their county on Election Day, voters who have a physical condition that prohibits them from appearing at the polls on election day, voters 65 years or older, and voters in jail on Election Day.[71] In May 2020, the Texas Supreme Court held that "lack

64. Benavidez et al., *supra* note 14.

65. *E.g.*, Dream Defs. v. DeSantis, 559 F. Supp. 3d 1238, 1267 (N.D. Fla. 2021).

66. *Voting Laws Roundup: December 2021*, BRENNAN CTR. FOR JUST. (Jan. 12, 2022), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021.

67. *Voting Laws Roundup: February 2022*, BRENNAN CTR. FOR JUST. (Feb. 9, 2022) https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2022.

68. *See* Yelena Dzhanova, *Some Voters Are Scared the Coronavirus Will Stop Them from Casting a Ballot*, CNBC (June 1, 2020), https://www.cnbc.com/2020/06/01/some-voters-are-scared-coronavirus-will-stop-them-from-casting-ballot.html.

69. Matt Vasilogambros & Lindsey Van Ness, *States Expanded Voting Access for the Pandemic. The Changes Might Stick.*, PEW (Nov. 6, 2020), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/11/06/states-expanded-voting-access-for-the-pandemic-the-changes-might-stick.

70. The only state-level action to expand access to voting during the 2020 general election was the expansion of early voting by one week. *See* The Governor of the State of Texas, Proclamation No. 41-3720, 45 Tex. Reg. 2087, 2094–95 (2020).

71. TEX. ELEC. CODE ANN. § 82.001-004 (West 2021).

of immunity to COVID-19 is not itself a 'physical condition' for being eligible to vote by mail within the meaning" of the Texas Election Code.[72]

In an effort to provide mail ballots to all who were eligible, Chris Hollins, the clerk of Harris County, Texas,[73] sent an application for a mail ballot to every registered voter over the age of 65 prior to a July 2020 runoff in the county.[74] Then, in August, he announced his plan to mail every registered voter in his county an application to vote by mail for the general election.[75] The announcement, made via Tweet, also informed voters of the limited eligibility to vote by mail under the Texas Election Code.[76]

The Texas Attorney General sued Hollins six days later to stop him from carrying out his plan to proactively send registered voters an application to vote by mail.[77] The suit was unsuccessful in the state trial court and the court of appeals.[78] But the Texas Supreme Court agreed with the Attorney General that Hollins was acting outside the authority granted to him by the State and instructed the trial court to enjoin the practice.[79]

Despite this setback, and despite the general uncertainty and community anxiety around COVID-19, Harris County saw record turnout in the 2020 general election.[80] The turnout was likely due in part to other creative methods Hollins employed during the 2020 election to make voting accessible, including offering a day of 24-hour early voting, allowing voters to vote from their cars, and operating voting mega-centers.[81]

---

72. *In re* State, 602 S.W.3d 549, 560 (Tex. 2020).

73. Harris County houses the City of Houston.

74. Patrick Svitek, *Texas Supreme Court Temporarily Blocks Harris County from Sending Mail-In Ballot Applications to All Its Voters*, TEX. TRIB. (Sept. 2, 2020), https://www.texastribune.org/2020/09/02/Harris-County-absentee-ballott/.

75. Harris County Votes (@HarrisVotes), TWITTER (Aug. 25, 2020, 5:32 PM), https://twitter.com/HarrisVotes/status/1298372637912072193.

76. Harris County Votes (@HarrisVotes), TWITTER (Aug. 25, 2020, 5:32 PM), https://twitter.com/HarrisVotes/status/1298372639229186049.

77. State v. Hollins, 607 S.W.3d 923, 925 (Tex. App. 2020).

78. *Id*. at 930; State v. Hollins, 620 S.W.3d 400, 405 (Tex. 2020).

79. 620 S.W.3d at 403.

80. Texas Secretary of State, *Harris County Voter Registration Figures*, https://www.sos.state.tx.us/elections/historical/harris.shtml (last visited May 14, 2022). 2020 saw an increase of more than 7% over the 2016 general election. Turnout was numerically higher than any year reflected on the Secretary of State's website, which goes back until 1988. *Id*.

81. *See* Adam Bennett, *Harris County Clerk Plans to Open a Record 122 Early Voting Centers*, KHOU 11 (Oct. 8, 2020), https://www.khou.com/article/news/politics/elections/harris-county-to-open-record-122-early-voting-centers/285-b0e44d68-2a3b-4249-b76f-afb1113e0744.

Hollins's efforts prompted immediate backlash from the Texas Legislature, which spent nearly six months considering and ultimately passing an omnibus election reform bill that appeared targeted, at least in part, at Hollins's creativity.[82] Among the bill's provisions was a section attaching civil and criminal liability to any election official who "solicits the submission of an application to vote by mail from a person who did not request an application."[83] The law discouraged not only the proactive mailing of vote by mail applications, but also restrained elections officials from engaging in voter outreach efforts, arguably in violation of the officials' First Amendment rights.[84]

Texas was not the only state to toe the First Amendment line when regulating its elections in 2021. For instance, Florida and Georgia both passed election reform laws that prohibited or arguably prohibited "line warming" activities—i.e., "non-partisan provision of aid to voters waiting in line to vote, such as giving out water, fans, snacks, chairs, ponchos, and

82. Alexa Ura, *The Hard-Fought Texas Voting Law Is Poised to Become Law. Here's What It Does*., TEX. TRIB. (Aug. 30, 2021), https://www.texastribune.org/2021/08/30/texas-voting-restrictions-bill/ ("They are setting new rules for voting by mail, boosting the role of partisan poll watchers and rolling back local initiatives meant to make it easier to vote—specifically those championed by Harris County that were disproportionately used by voters of color—while expanding access in more conservative, rural areas."). Texas Senate Bill 7, a precursor to SB1, was filed on March 11, 2021. *See* S.B. 7, 87th Leg., Reg. Sess. (Tex. 2021).

The author was formerly counsel of record in a separate suit challenging Texas's SB 1. *See* La Unión del Pueblo Entero v. Abbott, No. 5:21-cv-00844 (W.D. Tex. 2021); *see also* 2022 WL 3973834 (W.D. Tex. Aug. 2, 2022) (granting in part and denying in part defendants' motion to dismiss).

83. TEX. ELEC. CODE ANN. § 276.016(a)(1) (West 2021). Section 276.016(a)(1) attaches criminal penalties to any violation by an election official. Section 31.129(b)(1)–(2) of the code also attaches civil penalties to any violation of the Election Code by an election official. TEX. ELEC. CODE ANN. § 31.129(b)(1)–(2).

84. Isabel Longoria, who succeeded Hollins as administrator of Harris County elections (in the newly created role of Elections Administrator), sued to enjoin the enforcement of this section, alleging a coerced restraint injury. Longoria v. Paxton, 585 F. Supp. 3d 907 (W.D. Tex. 2022). Longoria alleged that before Texas enacted the anti-solicitation and civil enforcement provisions, she engaged in public outreach and in-person communications to encourage eligible voters to vote by mail, including at "senior citizen homes and residential facilities," but the law "chilled [her] from using print and electronic communications with information about eligibility to vote by mail, bringing vote-by-mail applications to voter-outreach events, and highlighting the benefits of voting by mail in her communications with voters." *Id*. at 917. Her suit was eventually dismissed as barred by sovereign immunity because the state official she sued, the attorney general, did not have the authority to enforce the provision she challenged. *See* Longoria v. Paxton, 2022 WL 2208519, at *1 (5th Cir. 2022).

umbrellas."[85] Both laws discouraged people from engaging in arguably protected First Amendment activity for fear of incurring penalties.[86]

Like the abortion and protest legislation discussed above, these restrictions on election-related conduct rely in part on inducing compliance with restrictions of questionable constitutionality by attaching serious penalties to violations.

II. FEDERAL COURTS' ROLE IN REDRESSING COERCED RESTRAINT

Article VI of the Constitution enshrines a commitment to the supremacy of federal law,[87] with the judiciary as a committed guardian.[88] In that tradition, the Court has a long history of recognizing coerced restraint as an injury remediable by the federal judiciary. By doing so, it serves at least two related ends: (1) offering a forum for individuals to seek redress for the cognizable Article III injury arising when a plaintiff can establish that the threatened enforcement of a statute deters the exercise of the plaintiff's

85. League of Women Voters of Fla., Inc. v. Lee, 595 F. Supp. 3d at 1065 (citing FLA. STAT. § 102.031(4)(a)–(b)(2021)); S.B. 202 § 33(a), 156th Gen. Assemb., Reg. Sess. (Ga. 2021) ("No person shall solicit votes in any manner or by any means or method, nor shall any person distribute or display any campaign material, nor shall any person give, offer to give, or participate in the giving of any money or gifts, including, but not limited to, food and drink, to an elector[.]").

86. *League of Women Voters of Fla., Inc.*, 595 F. Supp. 3d at 1073 (local NAACP president "warned the Florida NAACP members that they could no longer conduct their 'line warming' activities because 'there could be fines and penalties if [they] are doing that'"); *id*. at 1131 ("Plaintiffs' 'line warming' activities are expressive activities protected by the First Amendment."); Sixth Dist. of the Afr. Methodist Episcopal Church v. Kemp, 574 F. Supp. 3d 1260, 1279 (N.D. Ga. 2021) ("Plaintiffs have plausibly alleged that SB 202's restrictions on line relief impinge on speech and/or expressive conduct in some way.").

87. U.S. CONST. art. VI, cl. 2.

88. Marbury v. Madison, 5 U.S. 137, 177 (1803); Shelley v. Kraemer, 334 U.S. 1, 23 (1948) ("Where, however, it is clear that the action of the State violates the terms of the fundamental charter, it is the obligation of this Court so to declare."); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1353–54 (2001) (quoting James. S. Liebman & William F. Ryan*, "Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 730 (1998)); *see also* Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1036–37 (1995).

constitutional rights[89] and (2) safeguarding the supremacy of federal law against state legislative encroachment.[90]

A. *Tracing the Roots of the Harm*

The idea that coerced restraint is a cognizable injury finds its roots in the Supreme Court's equity jurisprudence, which marries a concern for preventing or immediately remedying otherwise irreparable injuries with a commitment to safeguarding federal supremacy.

Before the Supreme Court's development of modern standing doctrine, which is a relatively recent phenomenon,[91] the Court recognized that the coerced restraint of constitutional rights can be an irreparable injury warranting the federal courts' use of equity powers to enjoin enforcement of the offending state law.[92] In the early nineteenth century, the Court held that federal courts may decide the constitutionality of state law and may enjoin[93] the enforcement of unconstitutional state civil laws.[94] Then, in the late nineteenth century, the Court began to recognize circumstances in which federal courts could also enjoin the enforcement of state criminal laws.[95] It

89. Susan B. Anthony List v. Driehaus, 573 U.S. 149, 159 (2014) ("Specifically, we have held that a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" (quoting Babbitt v. Farm Workers, 442 U.S. 289, 298 (1979))).

90. *Ex parte* Young, 209 U.S. 123, 160, 167 (1908); *see also* Green v. Mansour, 474 U.S. 64, 68 (1985) ("[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause."); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984) ("Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights." (citing Quern v. Jordan, 440 U.S. 332, 337 (1979))); Scheuer v. Rhodes, 416 U.S. 232, 237 (1974); Ga. R.R. & Banking Co. v. Redwine, 342 U.S. 299, 304 (1952)); United States v. Peters, 9 U.S. 115, 136 (1809).

91. *See infra* note 142.

92. *E.g.*, Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 336–37 (2015) (Sotomayor, J., dissenting) ("Suits in federal court to restrain state officials from executing laws that assertedly conflict with the Constitution or with a federal statute are not novel. To the contrary, this court has adjudicated such requests for equitable relief since the early days of the Republic.").

93. A request for injunctive relief requires the plaintiff to show that he will suffer irreparable harm absent such relief and that he lacks an adequate remedy at law. *E.g.*, Dows v. City of Chicago, 78 U.S. 108, 110 (1870).

94. Burton D. Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U. L. REV. 740, 744 (1974) (citing Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810); Osborn v. Bank of the U.S., 22 U.S. (9 Wheat) 738 (1824)).

95. *In re* Sawyer, 124 U.S. 200 (1888). There was thus quite a lag between the resolution of the federal courts' authority as to state civil statutes and their authority as to

did so incrementally, beginning with circumstances in which the enforcement of a state criminal law would cause the plaintiff irreparable harm arising from the invasion of his property rights.[96] The property-interference exception applied regardless of whether a criminal prosecution was pending and therefore regardless of whether the law had actively been enforced.[97] Indeed, because of the concerns later reflected in the Court's decision in *Younger v. Harris*,[98] which will be discussed in Part II.B, plaintiffs bringing a pre-enforcement challenge, and thus who had refrained from engaging in some economically advantageous activity for fear of prosecution, were better situated to invoke the Court's equity power.[99]

The Court famously enjoined the Attorney General of Minnesota from enforcing a law regulating railroad fares in *Ex parte Young* on the theory that the plaintiff faced an irreparable property-rights injury.[100] The facts and

---

state criminal statutes. Professor Wechsler offers a persuasive theory for why. The second founding saw a fundamental shift in the relationship between the state and federal government. The Civil War, followed by the Reconstruction Amendments, followed by "seven civil rights acts and federal question jurisdiction all fused to work a massive shift of the locus of political power from state to nation." Wechsler, *supra* note 94, at 810. The 1871 Civil Rights Act provided a vehicle for private actions to hold state actors accountable to the Constitution. 42 U.S.C. § 1983. The Judiciary Act of 1875 expanded the federal court's jurisdiction to hear cases not only based on diversity of citizenship of the parties, but also when the case arose under federal law. 28 U.S.C. § 1331. The federal courts took on a new primacy in holding the states accountable to the Constitution, Wechsler, *supra* note 94, at 745, 810–11, including in intrastate controversies. Before federal courts gained diversity jurisdiction, as Professor Wechsler points out, most challenges to the enforcement of state criminal laws would not have made it into federal court because they would almost certainly have been brought by a citizen of the state against an officer of the same state. *Id*. at 744–45.

96. Davis & Farnum Mfg. Co. v. City of Los Angeles, 189 U.S. 207, 217–18 (1903) (citing *In re* Sawyer, 124 U.S. 200); Hygrade Provision Co. v. Sherman, 266 U.S. 497, 500 (1925); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 536 (1925) (listing cases where "injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers"); *see also* Note, *Implications of the* Younger *Cases for the Availability of Federal Equitable Relief when No State Prosecution Is Pending*, 72 COLUM. L. REV. 874, 877 (1972) [hereinafter *Implications of* Younger].

97. *Implications of* Younger, *supra* note 96, at 877.

98. 401 U.S. 37 (1971).

99. *Implications of* Younger, *supra* note 96, at 877.

100. 209 U.S. 123, 161–62 (1908). The Court later described *Ex parte Young* as the "fountainhead of federal injunctions against state prosecutions." Dombrowski v. Pfister, 380 U.S. 479, 483 (1965). But "*Ex parte Young* did not spring like Minerva full grown from Zeus's head." Wechsler, *supra* note 94, at 759. Indeed, its holding regarding the Eleventh Amendment was a logical extension of the Court's tradition of entertaining officer suits. *See, e.g.*, Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738 (1824); *see also* John Harrison, Ex Parte Young, 60 STAN. L. REV. 989, 990 (2008) (explaining that *Ex parte Young* is an example of anti-suit injunction litigation, in which "a party who would be the defendant in a corresponding lawsuit can enforce in equity a legal position that would be a defense at law").

holding of *Ex parte Young* merit review here because they exemplify the Court's commitment to federal-court pre-enforcement review of the constitutionality of a state statute that would be thoroughly undermined were litigants unable to rely on federal-court prospective relief to insulate their conduct.

In *Ex parte Young*, the Court upheld an injunction prohibiting the Attorney General of Minnesota from enforcing Minnesota laws fixing the rates railroad companies could charge at an objectionably low amount.[101] The challenged laws carried both civil and criminal penalties for their violation.[102] The plaintiffs in the underlying action sought to enjoin the Attorney General from enforcing the laws through a pre-enforcement federal action; the only other option for obtaining judicial review would have been to violate the laws and risk severe penalties.[103] The lower federal court temporarily enjoined the Attorney General from enforcing one of the challenged acts; an injunction he then violated by filing a petition in state court for a writ to command one of the plaintiffs to comply with the enjoined act.[104]

In entertaining the pre-enforcement challenge, the Court rejected the argument that a federal court, exercising its equity power, could not enjoin the enforcement of state criminal law.[105] It recognized a background rule that federal equity courts cannot enjoin ongoing state criminal proceedings, but explained the prohibition did not apply to the case at hand because the federal proceeding was commenced first, and where property rights will be destroyed by the enforcement of an unlawful state law, the federal courts may maintain jurisdiction and resolve the suit, notwithstanding later-filed state criminal proceedings.[106]

The Court explicitly opened the door to pre-enforcement challenges to state punitive laws, explaining that a party seeking to challenge an allegedly unconstitutional state prohibition on the basis that it violates federal law need not subject itself to the risk of penalties by violating the law and

---

And its refusal to abstain stemmed from the line of abstention cases beginning with *In re Sawyer*, *supra* note 95, and continued unabated for twenty years. Wechsler, *supra* note 94, at 759, 766.

101. 209 U.S. at 127–34.

102. *Id*. at 145.

103. *Id*. at 145–46.

104. *Id*. at 132–33.

105. *Id*. at 161–62.

106. *Id*. (citing Davis & Farnum Mfg. Co. v. City of Los Angeles, 189 U.S. 207 (1903), and *In re* Sawyer, 124 U.S. 200, 211 (1888)).

then contesting its lawfulness in the state proceedings.[107] The Court unequivocally rejected the notion that a party should be required to violate a punitive statute, and thus risk the prospect of imprisonment, fees, or both, in order to challenge the statute's compatibility with federal law.[108] Providing this access to pre-enforcement review was essential to both insulating plaintiffs from irreparable harm and to preserving the supremacy of federal rights.[109]

B. *Beyond Property Rights*

In the mid-twentieth century, the Supreme Court recognized that irreparable injury warranting federal equity's restraint of state punitive proceedings could arise outside the property context, including in the illustrative First Amendment context.[110] Animating this evolving doctrine was the notion that the loss of First Amendment freedoms, even temporarily, is an irreparable harm meriting immediate federal-court action.[111]

By that time, the Court had recognized several distinct abstention concepts and articulated them as such, including the general rule that federal

---

107. *Id.* at 165. Throughout these cases, the Court discussed its authority in terms of jurisdiction. *See* In re *Sawyer*, 124 U.S. at 210–11. But the more appropriate framing, which the Court would later adopt, is abstention. Wechsler, *supra* note 94, at 750. In other words, the essential question in these cases was not whether the parties had properly invoked the federal courts' jurisdiction by, for instance, satisfying diversity jurisdiction requirements or presenting a case arising under federal law. Rather, the question was whether the federal court should grant the type of relief that the complaining party requested. *Id*. at 750 n.37 (citing Di Giovanni v. Camden Fire Ins. Ass'n, 296 U.S. 64, 69 (1935)).

108. Ex parte *Young*, 2019 U.S. at 147–48.

109. *Id*. at 160, 167; *see also* Green v. Mansour, 474 U.S. 64, 68 (1985) ("[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause."); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984) ("Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights." (citing Quern v. Jordan, 440 U.S. 332, 337 (1979); Scheuer v. Rhodes, 416 U.S. 232, 237 (1974); Ga. R.R. & Banking Co. v. Redwine, 342 U.S. 299, 304 (1952)).

110. *See, e.g.*, Am. Fed'n of Lab. v. Watson, 327 U.S. 582, 593 (1946) ("Where a federal court of equity is asked to interfere with the enforcement of state laws, it should do so only 'to prevent irreparable injury which is clear and imminent.'" (quoting Douglas v. City of Jeannette, 319 U.S. 157, 163 (1943))).

111. For discussion of the development of First Amendment doctrine and the courts' new willingness to protect its guarantees during the 20th century, *see, e.g.*, David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205 (1983); G. Edward White, *The First Amendment Comes of Age: The Emergency of Free Speech in Twentieth Century America*, 95 MICH. L. REV. 299 (1996).

courts should give state courts the first chance to clarify state law,[112] and the notion, though less clearly articulated, that federal courts should generally not interfere in ongoing state criminal proceedings.[113] In adjudicating challenges to state punitive laws infringing on constitutional rights, the Court therefore had to address not only whether the plaintiff had shown an irreparable harm warranting an injunction, but also whether the harm was severe enough to require immediate federal-court adjudication, overcoming any applicable abstention principles.[114] In many instances, the First Amendment coerced restraint injury was sufficiently irreparable to satisfy both inquiries.[115]

Baggett v. Bullitt, where the First Amendment exception to abstention made its most prominent debut, was a challenge to a pair of Washington state statutes enacted in 1931 and 1955 requiring loyalty oaths from state employees.[116] The Court found both oath requirements unconstitutionally vague, reversing a three-judge district court that upheld the 1955 requirement on its merits and abstained from ruling on the constitutionality of the 1931 requirement on the grounds that the state courts should be given an opportunity to weigh in on the statute first.[117] The Court rejected the argument that it should abstain to allow the Washington courts to weigh in

112. R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500 (1941).

113. *See* Douglas v. City of Jeannette, 319 U.S. 157 (1943). This type of abstention is now commonly referred to as *Younger* abstention, after *Younger v. Harris*, 401 U.S. 37 (1971), but the principles solidified in *Younger* existed in the case law well before that decision.

114. *E.g.*, Baggett v. Bullitt, 377 U.S. 360, 371–73, 375–79 (1964) (evaluating constitutionality of state statute and its censorious effect, then declining to abstain to allow state court the first opportunity interpret state statute); Dombrowski v. Pfister, 380 U.S. 479, 489–90 (1965) (finding sufficient irreparable injury to justify equitable relief and to overcome abstention).

115. *Baggett*, 377 U.S. at 371–73, 375–79; *Dombrowski*, 380 U.S. at 489–90.

116. *Baggett*, 377 U.S. at 361–62; *see also* Frank L. Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 TEX. L. REV. 535, 540 (1970). The Court had already enjoined the enforcement of state criminal laws to safeguard First Amendments rights, but it did so without articulating an exception to abstention specific to the First Amendment. *See* Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 536 (1925); Grosjean v. Am. Press. Co., 297 U.S. 233 (1936); Hague v. Comm. for Indus. Orgs., 307 U.S. 496, 501 (1939) (plurality). *Hague* enjoined enforcement of a state criminal statute in the face of a First Amendment challenge but had no controlling opinion..

117. *Id*. at 366. Because there was no controlling opinion, the district court thus did not apply *Younger* abstention, but instead applied the type of abstention articulated in *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941). Under *Pullman* abstention, federal courts will abstain from construing state or local laws where the state or local tribunals may more appropriately do so. *Baggett*, 377 U.S. at 375.

on the 1931 law, basing its refusal on three considerations: (1) the Court considered the statute irremediably vague, meaning a state court construction would not cure the constitutional infirmity; (2) a declaratory judgment action before a state court would, in the Court's view, raise other complicated constitutional issues; and (3) most importantly for purposes of this article, abstaining would mean delay, which in turn would mean an intolerable inhibition of First Amendment freedoms in the interim period.[118] The Court considered delay "quite costly" where the exercise of First Amendment rights were at stake.[119]

The Court then invoked *Baggett* the following year when it entertained a request for declaratory and injunctive relief on First Amendment grounds in the face of a pending state prosecution.[120] In *Dombrowski v. Pfister*, a civil rights advocacy organization and its leadership brought suit to enjoin enforcement of Louisiana's laws criminalizing subversive and communist activities.[121] They alleged that the laws were facially invalid because they were overbroad and that the laws had been invoked to harass the civil rights activists.[122] At the time they filed suit, the plaintiffs had been indicted by a grand jury.[123] The three-judge district court that initially heard the case concluded that abstention was appropriate to allow the state court to offer a narrowing interpretation of the statutes in the course of pending criminal proceedings.[124]

The Court noted probable jurisdiction over the panel's decision in order to "settle important questions concerning federal injunctions against state criminal prosecutions threatening constitutionally protected expression."[125] It held on the merits that declaratory relief was appropriate to protect the plaintiffs' First Amendment rights, notwithstanding the pending criminal charges.[126] It began by invoking the *Ex parte Young* decision, in which the Court described in broad terms its authority to enjoin state

---

118. *Id*. at 377–79.

119. *Id*.

120. Dombrowski v. Pfister, 380 U.S. 479 (1965).

121. *Id*. at 481–82.

122. *Id*. at 482.

123. *Id*. at 488.

124. *Id*. at 482–83. At that time, 28 U.S.C. § 2281 required actions to enjoin state law to be heard by a three-judge panel. That statute was Congress's effort to "lessen the impact" of *Ex parte Young*; Congress also provided for direct appeal to the Supreme Court from the three-judge panel's decision. 28 U.S.C. § 1253 (1964); Maraist, *supra* note 116, at 544; Wechsler, *supra* note 94, at 778; Steffel v. Thompson, 415 U.S. 452, 465 (1974).

125. *Dombrowski*, 380 U.S. at 483.

126. *Id*. at 489–90.

prosecutions.[127] It then acknowledged a judicial retreat from the broad language of the decision, recognizing "considerations of federalism" had led to the general rule, later cemented in *Younger v. Harris*, but in existence in the case law well before then,[128] that federal courts should not enjoin pending state criminal proceedings.[129] That rule is based in part on the assumption that the criminal defendant's rights will be asserted and ultimately vindicated in the state court proceedings.[130] Having surveyed the legal backdrop, the Court declined to abstain in the case before it, explaining that "a substantial loss or impairment of freedoms of expression will occur if appellants must await" the ultimate disposition of the state criminal process.[131] The Court described the loss of freedom of expression, even if temporary, as irreparable.[132]

Six years later, the Court in *Younger v. Harris* limited *Dombroski*'s abstention exception to cases with a demonstrated pattern of bad-faith prosecutions.[133] It rejected the notion, which some courts had gleaned from *Dombrowski*, that the coerced restraint from First Amendment expression created a blanket justification for federal intervention in pending state criminal prosecutions.[134] But the concept that refraining from First Amendment activity for fear of state-sanctioned punishment constitutes a serious injury meriting a federal-court remedy found continued life in the Court's Article III standing case law.[135]

---

127. *Id*. at 483–84 (citing *Ex parte* Young, 209 U.S. 123 (1908)).

128. *See* Douglas v. City of Jeannette, 319 U.S. 157 (1943); *see also supra* note 113.

129. *Dombrowski*, 380 U.S. at 484.

130. *Id.* at 483–85. As discussed above, the Court recognized an exception to that rule of abstention where the proceedings would interfere with property rights. *See supra* Section II.a. The Court had said in other cases that federal interference in state criminal proceedings is appropriate only to prevent clear and imminent irreparable injury. *See, e.g.*, *Douglas*, 319 U.S. at 163.

131. 380 U.S. at 485–86.

132. *Id*. at 486; *see also* Zwickler v. Koota, 389 U.S. 391, 397–98 (1967) (*Pullman* abstention is inappropriate when a statute is alleged to facially violate the First Amendment because "the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect"); Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

133. Younger v. Harris, 401 U.S. 37, 54 (1971).

134. *Id*. at 50–53.

135. The Court also invoked the loss of First Amendment freedoms as an irreparable injury in its plurality decision in *Elrod*. 427 U.S. at 373 ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Though a majority of the Court only recently adopted *Elrod*'s rule, in a case decided on the shadow docket, *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020), the principle has been firmly embraced by the lower courts for years. *See, e.g.*, 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948.1 Grounds for Granting

C. *From Abstention to Standing*

The Supreme Court's articulation of coerced restraint as a cognizable Article III injury emerged alongside the Court's adoption in earnest of modern standing doctrine.

Under the Court's modern doctrine, Article III of the Constitution requires a plaintiff to have standing in order to properly invoke federal-court jurisdiction.[136] Standing boils down to three elements: First, the plaintiff must have suffered a concrete and particularized injury.[137] Second, the plaintiff's injury must be "fairly traceable" to, or caused by, the defendant's conduct.[138] And third, the injury must be likely to be redressed by a favorable court opinion.[139]

While references to a concept of standing can be traced to 1944, it was not until the 1970s that the doctrine was applied with regularity.[140] Concurrently with its articulation of modern standing doctrine, the Court decided *Steffel v. Thompson*.[141] The plaintiff in *Steffel* brought an as-applied challenge to Georgia's criminal trespass law after he had twice been threatened with arrest for handbilling in protest of the Vietnam War outside

---

or Denying a Preliminary Injunction—Irreparable Harm, (3d ed.) ("When an alleged deprivation of a constitutional right is involved, such as the right to free speech or freedom of religion, most courts hold that no further showing of irreparable injury is necessary."); Opulent Life Church v. City of Holly Springs, 697 F.3d 279, 295 (5th Cir. 2012); Pac. Frontier v. Pleasant Grove City, 414 F.3d 1221, 1235 (10th Cir. 2005); Tucker v. City of Fairfield, 398 F.3d 457, 464 (6th Cir. 2005); Joelner v. Village of Washington Park, 378 F.3d 613, 620 (7th Cir. 2004); Newsom v. Albemarle County Sch. Bd., 354 F.3d 249, 261 (4th Cir. 2003); Brown v. Cal. Dep't of Transp., 321 F.3d 1217, 1226 (9th Cir. 2003); Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 178 (3d Cir. 2002); Iowa Right to Life Comm., Inc. v. Williams, 187 F.3d 963, 970 (8th Cir. 1999); Bery v. City of New York, 97 F.3d 689, 693–94 (2d Cir. 1996); Miss. Women's Med. Clinic v. McMillan, 866 F.2d 788, 795 (5th Cir. 1989); Romero Feliciano v. Torres Gaztambide, 836 F.2d 1, 4 (1st Cir. 1987); Cate v. Oldham, 707 F.2d 1176, 1188 (11th Cir. 1983).

136. The Supreme Court began to regularly articulate standing principles in the 1970s, cementing the now well-worn three-part test in *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). *See infra* note 138.

137. *Lujan*, 504 U.S. at 560. If the injury has not yet accrued, it must be imminent. *Id.*; *see also* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013).

138. *Lujan*, 504 U.S. at 560.

139. *Id*. at 561.

140. *See* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 169 (1992) (tracing the emergence of standing doctrine). Professor Sunstein demarcates the *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970), case as the point at which the doctrine began appearing in "a large number of cases." 91 MICH. L. REV. at 169.

141. 415 U.S. 452 (1974).

a shopping center.[142] The core of the *Steffel* holding is that federal courts need not abstain from adjudicating challenges to state criminal laws when there are no pending state criminal proceedings.[143] *Steffel* also articulated an early version of what would become the coerced restraint injury test.

The Court began its analysis by asking whether the case presented an "actual controversy" within the meaning of Article III.[144] The Court acknowledged that Steffel, who had twice been threatened with prosecution for engaging in conduct that he claimed was constitutionally protected, was entitled to challenge the law "that he claims deters the exercise of constitutional rights" without having to expose himself to arrest and prosecution.[145] In the Court's view, Steffel stated a cognizable coerced restraint injury arising from the prospect of enforcement of the challenged law.[146] But because Steffel's protest activities were tied to the United States' involvement in the Vietnam War, and geopolitical circumstances had changed since he filed suit, the Court could not be sure that Steffel still wished to engage in the arguably protected conduct.[147] The Court therefore remanded to the district court to weigh in on the question of mootness.[148]

The next significant entry in the coerced restraint line of cases is *Babbitt v. United Farm Workers National Union*,[149] which is notable for at least three reasons. First, in *Babbitt*, the Court set forth the coerced restraint injury formula as it is currently applied: A plaintiff presents a justiciable case or controversy "[w]hen the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder."[150] Second, *Babbitt* relaxed the showing required to establish a genuine threat of prosecution, finding standing on behalf of plaintiffs who had not personally been subjected to past enforcement or specific threats of

142. *Id*. at 454–55.
143. *Id*. at 462–63.
144. *Id*. at 458.
145. *Id*. at 459.
146. *Id*.
147. *Id*. at 459–60.
148. *Id*. at 460. The next year, in *Ellis v. Dyson*, 421 U.S. 426 (1975), the Court reiterated that a plaintiff could demonstrate a case or controversy by establishing a credible threat of enforcement of a state or local law that coerced the plaintiff from engaging in otherwise protected behavior. *Id*. at 432–33. That case had to do with a challenge to a Dallas City loitering ordinance. As in *Steffel*, the Court remanded for factfinding to ensure that the plaintiffs suffered ongoing harm, including confirmation that the plaintiffs still frequented Dallas, and thus actually were subject to enforcement. *Id*. at 434.
149. 442 U.S. 289 (1979).
150. *Id*. at 297–98.

enforcement and in the absence of a background of regular enforcement.[151] Finally, *Babbitt* explicitly disentangled the coerced restraint Article III analysis from abstention considerations by finding the plaintiffs had standing but abstaining on the question of the state law's constitutionality.[152]

Applying its newly-minted Article III coerced restraint injury test, the Court in *Babbitt* held that the United Farm Workers union and its affiliated individual plaintiffs had standing to challenge a provision of Arizona's 1972 farm labor statute that limited the content of any boycott campaign to "truthful, honest and nondeceptive publicity" and enacted a broad criminal provision that penalized any violation of the Act.[153] The union had engaged in boycott campaigns in the past and intended to do so in the future, but it curtailed its consumer campaigns in order to avoid criminal prosecution under the challenged statute.[154] While the union did not intend to engage in dishonest advocacy, the risk of punishment for an erroneous statement led it to self-censor.[155] On that record, the plaintiffs stated a justiciable controversy.[156]

The government defendants argued that the plaintiffs did not have standing because the law had not been enforced and "may never be applied" in the manner the plaintiffs feared.[157] The Court rejected that argument, reiterating that unless a plaintiff's fear of prosecution is "imaginary or wholly speculative," a pre-enforcement challenge is appropriate.[158] The Act on its face arguably applied to the conduct the plaintiffs wished to engage in, and the state had "not disavowed" enforcing the statute, leaving the union with "some reason in fearing prosecution."[159]

---

151. *Id*. at 302.
152. *Id*. at 308–09.
153. *Id*. at 295 n.6 (quoting ARIZ. REV. STAT. ANN. § 23-1385(B)(8) (2023)).
154. *Id*. at 301.
155. *Id*.
156. *Id*. at 302.
157. *Id*. at 301–02.
158. *Id*. at 301 (citing Steffel v. Thompson, 415 U.S. 452, 459 (1974)).
159. *Id*. at 302. The Court demonstrated a similar willingness to entertain pre-enforcement challenges merely on the record that the challenged law was recently enacted and the defendants had not disavowed enforcement in *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, *certified question answered sub nom. Commonwealth v. Am. Booksellers Ass'n, Inc.*, 236 Va. 168, 372 S.E.2d 618 (1988). In that case, a bookseller argued that a Virginia statute prohibiting display of obscene materials harmful to juveniles would require it to remove sixteen books from its shelves, in violation of the First Amendment. *Id*. at 390–91. The Court held that it had jurisdiction to entertain a pre-enforcement challenge to the Virginia statute, given the plaintiffs' well-founded fear of enforcement, the enforcing officials' failure to disavow enforcement, and the self-censorial nature of the plaintiffs' harm. *Id.* at 393. The Court explained it was "not troubled by the pre-enforcement nature of this

After having assured itself of the plaintiffs' standing, and thus its jurisdiction, the Court held that the district court should have abstained from deciding the constitutionality of the boycott and criminal penalty provisions.[160] The Court's explanation for why abstention was appropriate, despite the demonstrable chill on the plaintiffs' First Amendment activities, boils down to its view that the statute was best read to touch only unprotected expression. The Court explained that a construction of the boycott provision that punished only knowing or reckless falsehoods was "reasonably arguable" and, in fact, the better reading.[161] As to the criminal penalty provision, the Court thought the Arizona courts could "determine [the scope of the provision] in a single proceeding."[162] Notably, the Court left it up to the district court on remand to decide whether to reduce "the impact of abstention on appellees' pursuit of constitutionally protected activities" by protecting them "against enforcement of the state statute pending a definitive resolution of issues of state law by the Arizona courts."[163]

Since *Babbitt*, the Court has consistently recognized coerced restraint as an Article III injury.[164] It arises when a plaintiff can establish that the threatened enforcement of a statute deters the exercise of the plaintiff's constitutional rights.[165] Under the coerced restraint doctrine, a plaintiff may

---

suit," because the "State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise." *Id*. at 393. *American Booksellers* is also another example of the Court declining to interpret a state criminal prohibition in the first instance, despite the coerced restraint injury. But in *American Booksellers*, the Court directly certified the question of the statute's interpretation to the Virginia Supreme Court rather than abstaining. *Id*. at 398.

160. *Id*. at 307–08.

161. *Id*. at 309.

162. *Id*. at 308.

163. *Id*. at 312 n.18. Justices Brennan and Marshall argued that abstention was entirely inappropriate in *Babbitt* "because the provision impacts so directly on precious First Amendment rights." *Id*. at 316 (Brennan, J., dissenting).

164. *See* Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158 (2014) (describing as a "recurring issue . . . determining when the threatened enforcement of a law creates an Article III injury"); Holder v. Humanitarian L. Project, 561 U.S. 1, 15 (2010) (holding, without trouble, that nonprofit organizations had standing to challenge federal criminal prohibition on providing material support to foreign terrorist organizations). In *Driehaus*, the Court signaled that the coerced restraint injury may be even more salient in the context of a statute that is publicly enforceable, as many of the "rights suppressing" laws discussed *supra* at n.10–12 and accompanying text, are. The statute at issue was enforceable by a government commission, but proceedings could be initiated by private complaint. The Court viewed that dynamic as "bolster[ing]" the plaintiff's credible threat of enforcement. 573 U.S. at 164.

165. *Driehaus*, 573 U.S. at 159 ("Specifically, we have held that a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct

challenge a state punitive statute, before it has been enforced, to enjoin its enforcement or declare it unlawful or both, because the prospect of that statute's enforcement has coerced the plaintiff into forgoing the exercise of constitutional rights. While the coerced restraint doctrine got its start in the context of state criminal laws, plaintiffs fearful of civil sanctions have successfully invoked the injury as a basis for standing.[166]

To determine whether a plaintiff has stated a cognizable coerced restraint injury sufficient to invoke Article III jurisdiction, courts apply a three-part test, asking whether the plaintiff has established "[1] an intention to engage in a course of conduct [2] arguably affected with a constitutional interest, but proscribed by a statute, and [3] there exists a credible threat of prosecution thereunder."[167] Importantly, the plaintiff need not await the commencement of any concrete enforcement action; it is the threat of enforcement that creates the Article III injury.[168]

The Article III inquiry contains guardrails to ensure an acute controversy. For instance, a plaintiff having "no fears of state prosecution except those that are imaginary or speculative" cannot establish a cognizable injury.[169] Similarly, plaintiffs with a mere "subjective chill" cannot establish standing.[170] Evidence of "past enforcement against the same conduct" places

---

arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" (quoting *Babbitt*, 442 U.S. at 298)).

166. *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 536 (2021) (finding abortion providers had standing to challenge law where they faced a "credible threat" of civil enforcement actions thereunder); Vermont Right to Life Comm., Inc. v. Sorrell, 221 F.3d 376, 382 (2d Cir. 2000) ("The fear of civil penalties can be as inhibiting of speech as can trepidation in the face of threatened criminal prosecution."); Consumer Data Indus. Ass'n v. King, 678 F.3d 898, 905 (10th Cir. 2012) (finding standing to sue for injunctive and declaratory relief where plaintiff faced credible threat of enforcement of civil penalties); Wollschlaeger v. Governor of Fla., 848 F.3d 1293, 1304 (11th Cir. 2017) (finding standing based on self-censorship for fear of professional discipline); Speech First, Inc. v. Fenves, 979 F.3d 319 (5th Cir. 2020) (finding standing to sue over state university policies).

167. *Driehaus*, 573 U.S. at 159 (quoting *Babbitt*, 442 U.S. at 298).

168. The Court's articulation of the injury in *Driehaus* was clear on this point. It described a recurring issue in the case law regarding "when the threatened enforcement of a law creates an Article III injury." 573 U.S. at 159. It then further clarified that "[w]hen an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." *Id*.

169. Younger v. Harris, 401 U.S. 37, 42 (1971); *see also Babbitt*, 442 U.S. at 302; Maryland Shall Issue, Inc. v. Hogan, 971 F.3d 199, 218 (4th Cir. 2020), *as amended* (Aug. 31, 2020) (no standing where plaintiffs were forgoing Second Amendment rights based on an interpretation of law that enforcing authority had publicly disavowed).

170. *E.g.*, Backpage.com, LLC v. Lynch, 216 F. Supp. 3d 96, 102–04 (D.D.C. 2016) (no standing where plaintiff alleged intent to engage in conduct not proscribed by the challenged statute).

a plaintiff squarely in Article III's bounds.[171] But in a pre-enforcement context, such evidence is often unavailable. In those circumstances, the lack of prior enforcement alone does not defeat standing.[172] Especially in the context of criminal prohibitions, some courts of appeals apply a presumption of enforcement to recently-enacted statutes.[173] The converse is also true: When a statute has long been on the books, but seldom enforced, the Court has found the threat of enforcement too speculative to confer standing.[174]

---

171. *See Driehaus*, 573 U.S. at 164 (citing Steffel v. Thompson, 415 U.S. 452, 459 (1974)).

172. *See Babbitt*, 442 U.S. at 292 (holding that plaintiffs had standing to challenge statutory provisions that had not been enforced, but abstaining on the merits of the provisions' lawfulness).

173. Dream Defs. v. Governor of Fla., 57 F.4th 879, 887–88 (11th Cir. 2023) (holding that plaintiffs who challenged criminal prohibition shortly after enactment, where state actors vigorously defended statute, had pre-enforcement standing); Speech First, Inc. v. Fenves, 979 F.3d 319, 335 (5th Cir. 2020) ("[W]hen dealing with pre-enforcement challenges to recently enacted (or, at least, non-moribund) statutes that facially restrict expressive activity . . . courts will assume a credible threat of prosecution in the absence of compelling contrary evidence.") (quoting N.H. Right to Life Pol. Action Comm. v. Gardner, 99 F.3d 8, 15 (1st Cir. 1996)); Universal Life Church Monastery Storehouse v. Nabors, 35 F.4th 1021, 1035 (6th Cir. 2022) ("[T]he fact that no one has been prosecuted under the amendment is unsurprising.").

Some courts will accept the enforcing authority's representations that it does not intend to enforce the statute as defeating standing. *See* Winsness v. Yocom, 433 F.3d 727, 729, 732 (10th Cir. 2006) (holding that plaintiffs had no standing where district attorney disavowed intention to prosecute); D.L.S. v. Utah, 374 F.3d 971, 975 (10th Cir. 2004) (holding that plaintiffs no standing where government disavowed enforcement). This is arguably inconsistent with Supreme Court precedent. *See* Stenberg v. Carhart, 530 U.S. 914, 940 (2000) (declining to adopt Attorney General's nonbinding statutory interpretation); *see also* SisterSong Women of Color Reprod. Just. Collective v. Kemp, 472 F. Supp. 3d 1297, 1309 (N.D. Ga. 2020) (citing *Carhart* in holding that plaintiffs had pre-enforcement standing to challenge abortion prohibition despite district attorney's repeated promises not to enforce challenged law). If the enforcing authority has any history of enforcement, moreover, accepting a disavowal of enforcement in the context of litigation may run afoul of the principles embodied in the Court's unwillingness to dismiss as moot cases in which a defendant as voluntarily ceased their offending conduct. *See* Yeomans, *supra* note 8, at 523–24 (discussing voluntary cessation doctrine). The Fourth Circuit takes a more rights-protective approach in declining to credit "[u]nofficial and non-binding statements" that defendants did not intend to enforce abortion restrictions. Bryant v. Woodall, 1 F.4th 280, 289 (4th Cir. 2021), *as amended* (June 23, 2021).

174. Poe v. Ullman, 367 U.S. 497, 501, 509 (1961) (plurality opinion) (holding that plaintiffs had no standing to challenge statute prohibiting the giving of medical contraceptive advice that was enacted in 1879 and only once invoked). In *Poe*, the Court noted a record of flagrant, unenforced violations, allowing an inference that the government had acquiesced in violations of the statute. *Id*. at 502, 508.

For an interesting confluence between a seldom enforced statute and the presumption of enforcement granted recent legislative enactments, *see Bryant*, 1 F.4th at 286, in which

The doctrine facilitates federal-court access to plaintiffs who have forgone a range of constitutionally protected conduct. Those seeking to challenge abortion restrictions, for instance, have successfully invoked the coerced restraint injury to access federal court. Indeed, there is a direct line between the Court's earlier property-interference equitable jurisprudence discussed in Part II.A and standing in challenges to abortion restrictions. In *Roe v. Wade*,[175] the Court held, somewhat flippantly, that there should be "little dispute" that Roe presented the court with a concrete case or controversy when she filed suit.[176] To support its pronouncement, the Court cited recent challenges to anti-abortion statutes decided by the Second Circuit, Sixth Circuit, and District of Kansas.[177] The only Supreme Court authority it invoked was *Truax v. Raich*, an early twentieth-century case holding that equity could enjoin the enforcement of state criminal laws when property rights were at stake.[178] In *Roe*'s companion case, *Doe v. Bolton*,[179] the Court held that abortion providers had standing to challenge an abortion restriction "despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes" because the law criminalized their provision of abortion and they "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief."[180]

The coerced restraint doctrine, which holds that coerced restraint is a cognizable Article III injury, is an outgrowth of the notion that federal courts will exercise equity jurisdiction to hear a challenge to a state law that arguably infringes federal rights. It encapsulates *Ex parte Young*'s concern with facilitating access to pre-enforcement review when the only other option for vindicating rights would be to risk state penalties. And it carries forth the federal-court tradition of vindicating the supremacy of federal rights over state lawmaking.

---

the Fourth Circuit found a credible threat of prosecution under an anti-abortion statute that had not been enforced in fifty years, but was recently amended. *Id*. at 285–88.

175. 410 U.S. 113 (1973).

176. *See id*. at 124.

177. *Id*. (citing Abele v. Markle, 452 F.2d 1121, 1125 (2d Cir. 1971); Crossen v. Breckenridge, 446 F.2d 833, 838–39 (6th Cir. 1971); Poe v. Menghini, 339 F. Supp. 986, 990–91 (D. Kan. 1972)).

178. *Id*. (citing Truax v. Raich, 239 U.S. 33, 39 (1915)).

179. 410 U.S. 179 (1973).

180. *Id*. at 188.

III. COERCED RESTRAINT IS REMEDIABLE BY PROSPECTIVE RELIEF

A plaintiff who sues to remedy their coerced restraint injury requests from the court prospective relief that will preclude the defendant government official from enforcing the challenged law against the plaintiff in the future.[181] Typically, the plaintiff requests both a declaration that the law is invalid and an injunction prohibiting its enforcement.[182]

The main practical difference between declaratory and injunctive relief is that injunctive relief is immediately coercive, whereas declaratory relief resolves the dispute between the parties on the law, but requires a subsequent action to give rise to contempt for violations.[183] But either type of relief is sufficient to remedy the Article III coerced restraint injury because either form of relief precludes the named defendant from seeking to enforce the challenged law against the plaintiff.[184] The injunction does so in

181. There is a rich scholarly debate regarding the scope of remedies, but it is entirely uncontroversial to say that federal courts are empowered to preclude a specific state official, named as a defendant in a federal lawsuit, from enforcing an unlawful state statute against a specific plaintiff. *See, e.g.*, Howard M. Wasserman, *Concepts, Not Nomenclature: Universal Injunctions, Declaratory Judgments, Opinions, and Precedent*, 91 U. COLO. L. REV. 999, 1017 (2020) ("The binding judgment resolves constitutional litigation involving one plaintiff, one defendant, one law, and one constitutional right.").

182. Susan B. Anthony List v. Driehaus, 573 U.S. 149, 154 (2014) (noting plaintiff's request for declaratory and injunctive relief); Babbitt v. Farm Workers, 442 U.S. 289, 298 (1979) (considering district court's declaration that the challenged law unconstitutional and enjoined its enforcement); Steffel v. Thompson, 415 U.S. 452, 475 (1974) (ruling on declaratory relief request only); Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1123 (2014) ("[I]n many cases in which a plaintiff seeks prospective relief, a declaratory judgment and an injunction are interchangeable.").

Historically, and before the Declaratory Judgment Act, 28 U.S.C. § 2201, parties could request nominal damages in order to obtain declaratory relief. *See* Uzuegbunam v. Preczewski, 141 S. Ct. 792, 798 (2021).

183. Bray, *supra* note 182, at 1123–24 (describing injunctions as well-suited to management of the parties, whereas declaratory relief is sometimes available at an earlier stage of litigation). Injunctive relief is also more specific than declaratory relief, and it is therefore well-suited to specific reform efforts. Wasserman, *supra* note 181, at 1014 ("An injunction is essential in structural-reform litigation, where the purpose of the suit is judicially supervised reform of government institutions, such as schools or prisons."). This type of ongoing supervision should not be necessary in a coerced restraint case. Once the state official is told that they cannot prosecute the protected conduct, that should be the end of the matter. *See* Bray, *supra* note 182, at 1108 ("Once a court tells an executive official that certain conduct is required or forbidden, it is presumed that the official will comply.").

184. The Tenth Circuit has described declaratory relief as redressing the threat of enforcement directly because "once the declaration has issued, the court could issue follow-up relief to enjoin enforcement of the preempted provisions" should the defendant attempt to enforce them, and indirectly "because the declaratory judgment would have binding

immediately coercive terms and the declaration puts the defendant on notice that the court stands ready to effectuate its judgment through coercion.

The Supreme Court recognized the coerced restraint injury in Article III terms and paired its proper exercise with prospective relief in increments. In *Steffel*, without foreclosing the possibility of injunctive relief in the future, the Court limited its remedy to declaratory relief, which it considered to be an important remedial option to a plaintiff otherwise stuck "between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding."[185] In doing so, the Court described the declaratory judgment as a "much milder form of relief than an injunction" and therefore much less offensive to principles of federalism. [186]

But the Court then quickly expanded the federal courts' remedial power vis-à-vis coerced restraint to encompass preliminary and permanent injunctive relief.[187] In *Doran v. Salem Inn, Inc*., for example, the Court held that federal courts can preliminarily enjoin the enforcement of state criminal laws, explaining that absent such relief, plaintiffs suffering from allegedly coerced restraint, including the plaintiffs before the Court, "may suffer unnecessary and substantial irreparable harm."[188] The Court also made clear the importance of a preliminary injunction in coerced restraint cases. It held that if a plaintiff were to violate the challenged law before the case has sufficiently matured (there, before the plaintiff secured a preliminary injunction), the state could bring charges against the plaintiff and invoke *Younger*.[189]

---

collateral effect" in state court. Consumer Data Indus. Ass'n v. King, 678 F.3d 898, 906 (10th Cir. 2012). Were a declaratory judgment not given res judicata effect in a state court, in a dispute between parties identical to the federal action, "[t]he very purpose of the declaratory judgment proceeding would appear to be thwarted." David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. U. L. REV. 759, 764 (1979).

185. 415 U.S. at 462. The remedy was not hollow, however. Any subsequent state court adjudication that ran afoul of the Court's declaration would be all but guaranteed to be overturned. *See id*. at 470. And even a lower federal court's declaration of unconstitutionality, absent Supreme Court review, could "cut down the deterrent effect of an unconstitutional state statute," given its persuasive force to state enforcement officials. *Id*. at 470–71.

186. *Id*. at 471.

187. Doran v. Salem Inn, Inc., 422 U.S. 922, 934 (1975); Wooley v. Maynard, 430 U.S. 705, 717 (1977).

188. 422 U.S. at 931.

189. *Id*. at 927–29; *see also* Hicks v. Miranda, 422 U.S. 332, 349 (1975) (holding that "where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of *Younger v. Harris* should apply in full force").

The ease and quickness with which the Court extended the recognition of remedial power from declaratory to injunctive relief suggests there is little daylight between the two remedies, either in their encroachment on federalism or in terms of their power to free a plaintiff "to engage in constitutionally protected conduct without fear of enforcement."[190] Justice Brennan's description of declaratory relief as "mild" in *Dombrowski* may therefore have been more strategic than accurate.[191] It departed from how the Court described declaratory relief just three years earlier in *Samuels v. Mackell*, a companion case to *Younger*.[192] There, the Court held that federal courts could not grant plaintiffs declaratory relief when doing so would interfere with a pending state prosecution.[193] It explained that a declaratory judgment was no less disruptive of state proceedings than an injunction because (1) declaratory judgments can be summarily enforced by injunctions and (2) "declaratory relief alone has virtually the same practical impact as a formal injunction would."[194] It quoted a Supreme Court opinion from 1952 that explained that, if a federal decision in an action to declare state proceedings unconstitutional were not res judicata on the state court proceedings, then the declaration would have no practical effect, and the federal judgment would "serve[] no useful purpose as a final determination of rights."[195] Justice Rehnquist later described the declaratory relief contemplated by *Steffel* as capable of "completely resolv[ing]" the controversy between the parties—i.e. whether the state could prosecute the plaintiff for his handbilling.[196]

In the normal course, then, federal courts vindicate federal rights and preserve the balance of supremacy by awarding prospective relief that bars government officials from enforcing the challenged law. It is unsettled, however, how much protection prospective relief offers. If a federal court awards a plaintiff injunctive relief, declaratory relief, or both, and that relief is later vacated, can the state seek retroactive civil or criminal liability based

---

190. Wasserman, *supra* note 181, at 1013.

191. *See* Bray, *supra* note 183, at 1102 (describing possibly strategic, but false, description of declaratory judgments as milder than injunctions). As Professor Owen Fiss points out, declaratory relief is a statutory creation "not moored to the history of equity" and therefore, at that time, potentially not beholden to the irreparable injury requirement. Owen Fiss, Dombrowski, 86 YALE L.J. 1103, 1123 (1977).

192. Samuels v. Mackell, 401 U.S. 66, 72–73 (1971).

193. *Id*.

194. *Id.* at 72.

195. *Id*. at 72–73 (quoting Pub. Serv. Comm'n of Utah v. Wycoff Co., 344 U.S. 237, 247 (1952) (Douglas, J., dissenting)).

196. Calderon v. Ashmus, 523 U.S. 740, 749 (1998).

on conduct the plaintiff engaged in while the relief was in place? This question implicates the meaning of federally guaranteed rights and the balance between such rights and state encroachment.

IV. THE SCOPE OF PROSPECTIVE PROTECTION

A court's power to protect litigants' conduct from future punishment should an injunction be vacated or otherwise dissolved is an unsettled question.[197] To be sure, if an injunction is vacated (or a declaratory judgment reversed), the law at issue can be enforced prospectively.[198] But the Supreme Court has not said what protection an injunction, or declaratory relief, can provide to conduct undertaken while the relief was on the books. The question is ripe for authoritative decision, given the reversal of *Roe* and the question of what liability might be on the table in its wake,[199] as well as the question of how litigants should order their conduct in the face of coercive state lawmaking.

A. *Case Law*

Opinions in three cases shed some light on the retroactive enforceability of previously enjoined laws but stop far short of resolving it. In the first, *Oklahoma Operating Co. v. Love*, the Court seemingly instructed a lower federal court to affirmatively insulate behavior undertaken during the pendency of prospective relief but without analyzing its authority to do so.[200] In the second, *Dombrowski v. Pfister*, forty-five years later, the Court appeared to disclaim broad protective authority, but on the basis of precedent that undermined its language.[201] The third case, *Edgar v. MITE Corp.*,

197. This section mainly discusses injunctions, as that has been the focus of the precedent and academic discussion discussed herein. But the same logic throughout this piece applies to declaratory relief.

198. *See* Dombrowski v. Pfister, 380 U.S. 479, 491 (1965) (noting that a state may seek a narrowing construction in state court and then move for modification of federal injunction "to permit future prosecutions"); Shapiro, *supra* note 184, at 769 (explaining that federal-court determination of overbreadth "should not preclude the state from taking appropriate steps to obtain a construction of state law that would permit enforcement of that law against a party to the federal proceeding for conduct occurring after the construction is obtained").

199. *See* Amar, *supra* note 39, at 673 (imploring Congress and the federal judiciary to resolve the question "so that people can know how much—or how little—injunctive relief is really worth").

200. *See generally* Okla. Operating Co. v. Love, 252 U.S. 331, 337–38 (1920).

201. *See generally* Dombrowski v. Pfister, 380 U.S. 479, 483–89 (1965).

generated concurring opinions that sparred over the Court's authority, but the majority opinion ignored the question.[202] Finally, and most recently, Justice Kavanaugh offered a limited analysis in his concurrence in *Dobbs* in an attempt to assure the public that the effect of the *Dobbs* opinion would not have the wide-ranging consequences for criminal and civil liability that some fear.[203]

In 1920, not long after the Court recognized its authority to restrain the enforcement of state punitive statutes, the Supreme Court decided *Oklahoma Operating Co. v. Love*.[204] Oklahoma state law regulated the rates that companies deemed monopolies could charge for laundry services.[205] The Oklahoma Operating Company had violated the maximum statutory rates and was facing enforcement action by the Oklahoma Corporate Commission.[206] The law punished, through the Commission, any violation of its rate requirements with a $500 fine; each day that a company was in violation was a separate offense.[207] And the statute provided that only the state supreme court could "correct or annul" any action of the Commission, and only by way of appeal of an enforcement action, accompanied by posting a significant bond.[208] In other words, the only way to challenge the lawfulness of state-imposed rates was to violate the law and await judicial review during the course of an enforcement action.[209]

The Company sued in federal court to enjoin the Commission from enforcing the rate restrictions.[210] It argued that the ratemaking statute was unlawful under the Fourteenth Amendment's Due Process Clause because the law provided no opportunity to review whether the rates were compensatory except through an enforcement action, at great risk to the company.[211] The Court agreed, invoking *Ex parte Young* and holding that "judicial review beset by such deterrents does not satisfy the constitutional

202. *See generally* Edgar v. MITE Corp., 457 U.S. 624 (1982).

203. *See* Dobbs v. Jackson Women's Health Org. 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring).

204. 252 U.S. 331.

205. *Id*. at 332–33.

206. *Id*. at 335.

207. *Id*. at 334–35.

208. *Id*. at 335.

209. *See id*. at 336 ("So it appears that the only judicial review of an order fixing rates possible under the laws of the state was that arising in proceedings to punish for contempt.").

210. *Id*. at 332–33.

211. *Id*. at 333. Schematically, the law at issue in *Love* is similar to that underlying *Ex parte Young*. In *Ex parte Young*, the dispute originated over a railroad rate regulation that also purported to require its violation in order to secure judicial review. 209 U.S. 123, 130–31 (1908).

requirements."[212] It remanded for review of the legality of the rates themselves, and in doing so it instructed the lower court to enter a temporary injunction precluding the Commission from enforcing the penalties against the Company while the court adjudicated whether the rates themselves were compensatory.[213] Should the rates be found non-compensatory, the court would then enter a permanent injunction restraining enforcement of the law.[214] But even if the rates themselves were held lawful, Justice Brandeis directed the lower court to nonetheless issue a permanent injunction "to restrain enforcement of penalties accrued *pendente lite*, provided that it also be found that the plaintiff had reasonable ground to contest them as being confiscatory."[215]

Justice Brandeis, speaking for the entire Court, thereby insulated the Company from incurring penalties during the course of the lower court's proceedings under the cover of a temporary injunction, regardless of whether the Company was ultimately successful on its challenge to the lawfulness of the rates themselves, and therefore regardless of whether the temporary injunction was made permanent. This decision clearly assumes that the federal courts' equity power extends to immunizing conduct that takes place under the cover of a federal-court injunction, even when the injunction has been lifted.[216]

Forty-five years later, in *Dombrowski v. Pfister*, the Court again shed light on the protection an injunction might give a plaintiff.[217] The facts of *Dombrowski* were discussed in Part II.b.[218] To refresh, civil rights activists sought to enjoin enforcement of the Louisiana Subversive Activities and Communist Control Law and the Communist Propaganda Control Law.[219] They challenged the laws as overbroad on their face and alleged that they had been subject to bad-faith enforcement actions.[220] The Court held that the statutory provisions at issue violated the First Amendment.[221] But the meat

212. *Love*, 252 U.S. at 337.

213. *Id*.

214. *Id*. at 338.

215. *Id*.

216. *See* Fallon, *supra* note 31, at 618 n.31 (describing *Love* as "arguably dispositive[]" of the question whether federal courts can immunize conduct that occurs under injunctive cover); Gillen, *supra* note 39, at 301 (noting that in *Love* "the Supreme Court indicated that the grant of preliminary relief by a federal court did protect the litigant from liability arising from a failure to comply with federal law").

217. *See generally* Dombrowski v. Pfister, 380 U.S. 479 (1965).

218. *See supra* Section II.b.

219. *Dombrowski*, 380 U.S. at 482.

220. *Id*.

221. *Id*. at 494–96.

of the opinion dealt with whether the plaintiffs alleged harm sufficient to justify a federal injunction, and whether, nonetheless, the federal courts should abstain from interpreting the state law.[222] Relying primarily on the irreparable nature of the loss of First Amendment freedoms for any period of time, the Court held that the plaintiffs had alleged the type of harm that warrants a federal injunction, and that, in the face of such harm, it would be inappropriate for the federal courts to abstain.[223]

In discussing its decision not to abstain, the Court explained that it would not subject those affected by the statute to defending against multiple prosecutions "aimed at hammering out the structure of the statute piecemeal."[224] Rather, it essentially flipped the burden on the state to rebut the Court's finding that the statute was overbroad by "obtaining a permissible narrow construction in a noncriminal proceeding" in the state courts.[225] If the state were to obtain such a narrowing construction in the state courts, it could then "seek modification of the injunction to permit future prosecutions."[226]

At the end of this discussion, the Court included a footnote that seemingly went out of its way to undermine the efficacy of federal-court injunctive relief in the coerced restraint context.[227] It said, "[o]ur cases indicate that once an acceptable limiting construction is obtained, it may be applied to conduct occurring prior to the construction, provided such application affords fair warning to the defendants."[228] The footnote is "at odds with the rest of the opinion" and, as Professor David Shapiro argued, "may have been the product of compromise with the majority."[229]

Certainly the precedent Justice Brennan relied on did not support the proposition that the state can retroactively prosecute conduct undertaken while a statute was enjoined. Instead, he cited cases in which a narrowing construction reached on direct appeal of a criminal conviction was used to uphold the conviction.[230] He also cited *Lanzetta v. New Jersey*, which established that a defendant who was convicted under an unconstitutional statute could have his conviction vacated, even though the state courts later

---

222. *Id*. at 483–92.
223. *Id*.
224. *Id*. at 491.
225. *Id*.
226. *Id*.
227. *Id*. at 491 n.7.
228. *Id*. at 491 n.7 (internal citations omitted).
229. Shapiro, *supra* note 184, at 768–69.
230. *Dombrowski*, 380 U.S. at 491 n.7 (citing Poulos v. New Hampshire, 345 U.S. 395 (1953); Cox v. State of New Hampshire, 312 U.S. 569 (1941); Winters v. New York, 333 U.S. 507 (1948)).

narrowed the construction of the statute to save its constitutionality.[231] The Court declined to retroactively apply the narrowed construction to the defendant to uphold his conviction, finding that the defendant did not have fair notice of that narrowed interpretation.[232] Finally, Justice Brennan cited *Harrison v. NAACP*,[233] which suggests that federal courts may exercise authority to protect litigants from retroactive enforcement. In that case, the NAACP challenged several Virginia statutes that imposed strict registration requirements on entities engaging in racial justice and other advocacy in the state.[234] The Court held that the district court should have abstained as to the scope of the statutes at issue to allow the parties to complete the state-court declaratory judgment procedure they had already invoked.[235] At the end of its opinion, the Court admonished the state officials to stay true to their commitment to the Court "never to proceed against appellees under any of these [challenged] enactments with respect to activities engaged in during the full pendency of this litigation."[236] Should the officials not honor their word, or should nonparty enforcing officials try to enforce the challenged laws, the Court said, "the District Court of course possesses ample authority in this action, or in such supplemental proceedings as may be initiated, to protect the appellees while this case goes forward."[237]

While the language in the *Dombrowski* footnote appears to open the door to retroactive punishment, notwithstanding a federal court's declaration of unlawfulness, the precedent it cites does not support the Court's rhetoric, and in fact points to just the opposite.

In 1982, Justice Stevens, concurring, and Justice Marshall, dissenting, sparred over the question of whether a preliminary injunction can protect

---

231. 306 U.S. 451, 456 (1939) (discussing State v. Gaynor, 197 A. 360 (1938)).

232. *Id*.

233. 360 U.S. 167 (1959).

234. *Id*. at 169.

235. *Id*. at 178.

236. *Id*. at 179.

237. *Id*. The Supreme Court cited *Harrison* in *Babbitt*, when it left it up to the district court to decide whether to "protect appellees against enforcement of the state statute" pending the resolution of the statute's meaning by the state courts. Babbitt v. UFW Nat'l Union, 442 U.S. 289, 312 n.18 (1979). *Babbitt* did not address the merits of what protection the district court could provide the plaintiffs. *Id*. But the Court was responding to the suggestion that it should reduce "the impact of abstention on appellees' pursuit of constitutionally protected activities" by restraining enforcement of the law pending a state court decision. *Id*. The only way the Court could lessen the impact of the plaintiffs' coerced restraint would be by immunizing their conduct, not by merely delaying the statute's enforcement. *See infra* Section V.

conduct undertaken under its cover in *Edgar v. MITE Corp*.[238] In that case, MITE Corporation made a tender offer for all outstanding shares of Chicago Rivet & Machine Co.[239] In doing so, it registered its offer with the SEC, but not with the Illinois Secretary of State, as it was required to do under the Illinois Business Take-Over Act.[240] Violation of the Illinois Act was punishable by civil and criminal penalties.[241] MITE filed a federal-court action simultaneous with its filing of a Schedule 14D-1 with the SEC, but before publishing its offer, arguing that the Illinois Act was preempted by federal securities law and violated the Commerce Clause.[242] The company secured a preliminary injunction prohibiting the Illinois Secretary of State from commencing enforcement proceedings, then three days later published its tender offer.[243] During the course of the litigation, the company withdrew its offer.[244] A few days later, the district court entered a permanent injunction restraining enforcement of the Illinois Act.[245]

On appeal, the Seventh Circuit affirmed the injunction, holding that the Illinois Act was preempted by federal securities law and an unconstitutional burden on interstate commerce.[246] The court declined to dismiss the appeal as moot, even though MITE had withdrawn its tender offer, because the Illinois Secretary of State had threatened to proceed with possible criminal and civil penalties against the company for violating the Illinois Act should the injunction be dissolved.[247]

The Supreme Court agreed that the case was not moot on the basis that a reversal of the district court's injunction could expose the company to an enforcement action by the Secretary.[248] It expressly declined to decide, however, whether the district court's preliminary injunction was "a complete

238. 457 U.S. 624 (1982).
239. *Id*. at 627.
240. *Id*. at 626–28.
241. *Id*. at 630.
242. *Id*. at 627–28.
243. *Id*. at 629.
244. *Id*. at 629–30.
245. MITE Corp. v. Dixon, 633 F.2d 486, 490 (7th Cir. 1980).
246. *Id.* at 502.
247. 457 U.S. at 630.
248. *Id*. The Court did not say whether such an action would be frivolous, given the protection of a federal-court injunction when MITE Corp. engaged in the behavior that would be the subject of any state enforcement action. The mere prospect of charges, whether frivolous or not, assured the Court of the case's continuing controversy. Justice Marshall called this reasoning "facile," arguing that "[t]here is a live controversy in this case only if the State could seek penalties from MITE." *Id*. at 662–63 (Marshall, J., dissenting).

defense to civil or criminal penalties."[249] It reasoned that the question mattered only if the Secretary were ultimately to bring an enforcement action against the company, which it could do only if the Court held the Illinois Act to be both constitutional and not preempted by federal securities law.[250] Because the Court found the Illinois Act to be unlawful under federal law,[251] it did not have to decide whether the preliminary injunction immunized conduct undertaken during the course of the injunction.

Justice Stevens and Justice Marshall thought the question of the preliminary injunction's potential immunizing effect was dispositive of the Court's jurisdiction and should have been decided.

Justice Stevens argued that the preliminary injunction had no immunizing power over conduct undertaken while it was in place. He based his argument on the features of a preliminary injunction. A preliminary injunction is "normally limited to the parties named in the instrument," entered upon "a mere probability of success on the merits," and accompanied by a bond; such features are, according to Justice Stevens, "inconsistent with a blanket grant of immunity."[252] He then invoked *Steffel v. Thompson*[253] for the proposition that a litigant who wished to engage in constitutionally protected conduct, but refrained for fear of prosecution under an arguably unconstitutional state statute, could not rely on a federal-court declaratory judgment that the state statute is unconstitutional as permission to "violate the statute with impunity."[254] In his view, the language in *Steffel* that "[i]f a declaration of total unconstitutionality is affirmed by this Court, it follows that this Court stands ready to reverse any conviction under the statute," did not amount to immunity from prosecution.[255] He argued that, although the federal declaratory judgment statute is meant to permit individuals to challenge the constitutionality of punitive laws without incurring liability, it is unclear *when* a successful federal litigant could act without fear of punishment.[256] He continued, "[t]he fact that a federal judge has entered a declaration that the law is invalid does not provide that assurance; every litigant is painfully aware of the possibility that a favorable judgment of a trial court may be reversed on appeal."[257] The most a litigant could hope for

249. *Id*. at 630.
250. *Id*.
251. *Id*.
252. *Id*. at 649 (Stevens, J., concurring).
253. 415 U.S. 452 (1974), discussed *supra* Section II.b.
254. Edgar v. MITE Corp., 457 U.S. 624, 650 (1982) (Stevens, J., concurring).
255. *Id.* (quoting Steffel v. Thompson, 415 U.S. 452, 469–70 (1974)).
256. *Id*. at 651 (Stevens, J., concurring).
257. *Id*.

was a Supreme Court affirmance, which, as *Steffel* said, would mean the Court would presumably reverse any subsequent conviction under the challenged law.

Justice Marshall, joined by Justice Brennan, argued that a preliminary injunction can and, as a general rule, should immunize conduct undertaken during its life.[258] Otherwise, the injunction is largely an empty measure. Practically, a party seeking the cover of an injunction to engage in conduct arguably proscribed by the challenged statute "will take little solace from temporary immunity."[259] As applied to the context before the Court, MITE would have been "reluctant" to move forward with its offer if there were a risk of substantial penalty, notwithstanding the preliminary injunction that it won.[260] In addition to ensuring that injunctions are worth substantially more than the paper they are written on, Justice Marshall viewed his background rule as consistent with the Court's precedent recognizing "that reasonable reliance on judicial pronouncements may constitute a valid defense to criminal prosecution."[261]

Most recently, Justice Kavanaugh, concurring in the opinion in *Dobbs v. Jackson Women's Health Organization*,[262] explained that, in his view, the Due Process Clause or the Ex Post Facto Clause would prohibit a state from "retroactively impos[ing] liability or punishment for an abortion that occurred before" the Court overruled *Roe*.[263] He cited only *Bouie v. City of Columbia*, a case in which the Court held that a defendant could not be prosecuted for violation of a state statute based on a state court's later unforeseeable broadening interpretation of a criminal statute.[264]

Certainly, retroactive liability in the context of the Court overruling a forty-year-old precedent would undermine basic principles of fair notice that animate much of the Court's procedural due process jurisprudence.[265] One

---

258. *Id*. at 657–58.

259. *Id*. at 658.

260. *Id*. at 659.

261. *Id*. at 660 (citing Marks v. United States, 430 U.S. 188 (1977)).

262. 142 S. Ct. 2228, 2309 (2022).

263. *Id*. (Kavanaugh, J., concurring). *But see* Mitchell, *supra* note 18, at 996–97 (arguing that due process may not apply in the type of context Justice Kavanaugh contemplates because the "defendant certainly had fair notice that he was violating the *statute*; his complaint would be that the judiciary's repudiation of an earlier court's non-enforcement policy retroactively changed the expected consequences of his statutory violations").

264. 378 U.S. 347, 352 (1964).

265. *See, e.g.*, *Bouie*, 378 U.S. at 353–54; James v. United States, 366 U.S. 213, 221–22 (1961); Marks v. United States, 430 U.S. 188, 192 (1977); United States v. Lanier, 520 U.S. 259, 266 (1997); Fallon, *supra* note 31, at 618 ("It is virtually unimaginable that the

can also imagine that an express rule of retroactive liability could affect judicial behavior and hinder the development of the law. A court with authority to revisit precedent, and faced with precedent it finds warrants reversal, may nonetheless hesitate before doing so if reversal would result in widespread retroactive criminal or civil punitive liability. The Court's stated commitment to weighing reliance interests as part of its stare decisis calculus suggests this related consideration would be appropriate.[266] And the Court's notable failure to consider this type of interest in overruling precedent, including in *Dobbs*, suggests that the Court does not view retroactive liability as a real possibility under existing law.[267]

As Professor Michael Morley argues, however, the Court's due process and ex post facto precedent do not necessarily account for every circumstance in which a litigant might face retroactive criminal or civil liability for engaging in conduct under the protection of an injunction.[268]

Court could find citizens who relied on judicial injunctions, issued pursuant to the judicially declared supreme law, could subsequently be held to have done so at risk of criminal prosecution if the Supreme Court ever changed its mind.").

266. *See* Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 854 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (weighing as one factor in stare decisis "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation").

267. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2261 (2022) (evaluating reliance interests implicated by revoking the right to pre-viability abortions without considering the potential for widespread criminal or civil penalties arising from retroactive enforcement of enjoined law).

After the Supreme Court overturned forty-year-old precedent that had held that public sector unions could charge non-members fees to cover the cost of work the unions did on the their behalf, *see Janus v. AFSCME Council No. 31*, 138 S. Ct. 2448 (2018), overruling *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), the Courts of Appeals unanimously refused to hold public sector unions retroactively liable for collecting fees. *See* Doughty v. State Emps.' Ass'n of N.H., 981 F.3d 128, 133–37 (1st Cir. 2020), *cert. denied*, 141 S. Ct. 2760 (2021); Wholean v. CSEA SEIU Loc. 2001, 955 F.3d 332 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 1735 (2021); Diamond v. Pa. State Educ. Ass'n, 972 F.3d 262 (3d Cir. 2020), *cert. denied*, 141 S. Ct. 2756 (2021); Akers v. Md. State Educ. Ass'n, 990 F.3d 375, 379–80 (4th Cir. 2021); Ogle v. Ohio Civ. Serv. Emps. Ass'n, 951 F.3d 794 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1265 (2021); Lee v. Ohio Educ. Ass'n, 951 F.3d 386 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1264 (2021); Janus v. AFSCME Council 31, 942 F.3d 352, 361–64 (7th Cir. 2019), *cert. denied*, 141 S. Ct. 1282 (2021); Mooney v. Ill. Educ. Ass'n, 942 F.3d 368 (7th Cir. 2019), *cert. denied*, 141 S. Ct. 1283 (2021); Danielson v. Inslee, 945 F.3d 1096 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 1265 (2021).

268. Morley, *supra* note 38, at 24–30; *see also* Amar, *supra* note 39, at 671–72 (noting (1) the Court permits reliance on its own rulings, but not necessarily those of circuit courts, and (2) the distinction between judicial determinations of statutory coverage versus their constitutionality).

Most notably, the Court in *United States v. Rodgers*[269] suggested that private parties cannot rely on a circuit court's construction of a criminal statute, at least in instances where a circuit split exists, to order their conduct.[270]

The unsettled nature of the question of retroactive enforceability animating the dueling opinions in *MITE* and arising in the aftermath of *Dobbs* has left it ripe for resolution.[271]

B. *The Academy*

Scholars have evaluated the question of retroactive enforceability from several angles. Professor Richard Fallon, Jr., has pondered the question in the context both of First Amendment overbreadth litigation and, presciently, abortion restrictions, declaring the issue "unsettled."[272] In doing so, he has nodded to the thesis presented in this piece, noting that a federal court's power to resolve cases and controversies "may imply" the power to provide immunity,[273] and that the purpose of doctrines like overbreadth that "desire to avert chill" may "require recognizing the protective effect of declaratory judgments, even after they are vacated."[274] Professor Vikram David Amar also considered the question in the abortion context during litigation over the federal Partial Birth Abortion ban, weighing the issue from several angles but offering no conclusion regarding the extent of immunity conferred by an injunction.[275]

Professor Patrick Gillen has argued that preliminary injunctions must serve as a defense to liability for conduct undertaken during the preliminary

---

269. 466 U.S. 475 (1984).

270. Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. CAL. L. REV. 455, 457 (2001) (discussing the anomaly of *Rodgers*, 466 U.S. 475, in which defendant was held retroactively criminally liable despite reliance on binding circuit law).

271. Immediately after *Dobbs* was decided, states requested the lifting of injunctions that had barred the enforcement of restrictive abortion laws. *See, e.g.*, *AG Rokita Asks Court to Lift Multiple Abortion Injunctions Following* Dobbs *Decision*, THE IND. LAW. (June 28, 2022), https://www.theindianalawyer.com/articles/ag-rokita-asks-court-to-lift-multiple-abortion-injunctions-following-dobbs-decision; *Evolving Laws and Litigation Post*-Dobbs: *The State of Reproductive Rights as of August 23*, MORGAN LEWIS (Aug. 23, 2022), https://www.morganlewis.com/pubs/2022/08/evolving-laws-and-litigation-post-dobbs-the-state-of-reproductive-rights-as-of-august-23.

272. Fallon, *supra* note 39, at 883; Fallon, *supra* note 31, at 616–21.

273. Fallon, *supra* note 31, at 618–19. Thanks are due to Professor Fallon's article for sparking the nugget of an idea that gave rise to this piece.

274. Fallon, *supra* note 39, at 882–83.

275. *See generally* Amar, *supra* note 39.

injunction's life, based on the Supreme Court's equity jurisprudence.[276] Drawing on the Court's exercise of its equity powers in the early twentieth century, Professor Gillen concludes that the enduring protection of preliminary injunctions is necessary, under a due process rationale, to effectuate the Court's concern for providing access to federal courts in the context of punitive statutory schemes like that in *Ex parte Young*.[277] Professor Michael Morley has argued that preliminary and permanent injunctions serve to immunize conduct by drawing on courts' continuing authority to punish the violation of injunctions that are no longer in place.[278]

On the other side of the debate, then-Professor Jonathan Mitchell, in a 2018 *Virginia Law Review* piece, advocated forcefully for the idea that federal courts cannot protect conduct that takes place under the cover of pending injunctive or declaratory relief.[279] Mitchell takes on what he calls "the fallacy that equates a court's non-enforcement of a statute with the suspension or revocation of that law."[280] He starts from the relatively uncontroversial premise that a court cannot literally excise a statute from the relevant code when adjudging the statute unconstitutional.[281] From there, he posits that when courts declare that a certain law is unconstitutional, they often overstate what they are actually doing. Courts do not "strike down" or "invalidate" laws, but merely "*decline to enforce* statutes that contradict their interpretation of the Constitution."[282] To effectuate their judgments, courts

276. Gillen, *supra* note 38, at 274.

277. *Id*. at 302, 304.

278. Morley, *supra* note 38, at 1183.

279. Mitchell, *supra* note 18. Mitchell's piece does not engage meaningfully with the precedent discussed in the section above. It is nonetheless the piece I focus on most closely because it sets forth the position with which I disagree and because its theory was trotted out in recent legislation and litigation, thus warranting engagement.

280. *Id*. at 943.

281. *Id*. at 936. I generally agree with Mitchell that a judicial opinion declaring a law unconstitutional does not literally excise that book from the code into which it was enacted. If a court, with the authority to take a contrary view, were to later disagree, the statute would become prospectively enforceable again. *See* Fallon, *supra* note 31, at 614–15 ("Contrary to the expectations of most non-lawyers, the old statutes would spring back to life in any state in which subsequent legislation has not expressly or impliedly repealed them."). Where Mitchell and I disagree is on the implications of his argument for the enforceability of that statute for conduct undertaken while it was held to be invalid and before a subsequent court decided otherwise.

282. Mitchell, *supra* note 18, at 953, 1000.

can "enjoin executive officials from taking steps to enforce a statute—though only while the court's injunction remains in effect."[283]

After an injunction is vacated, in Mitchell's view, "the executive would be free to enforce the statute again—both against those who will violate it in the future and against those who have violated it in the past."[284] Mitchell thus encourages the executive to "threaten future enforcement of a judicially disapproved statute against present-day violators, in the event that a future court repudiates the rulings that are blocking the statute's enforcement," in order to "induce immediate compliance with the [enjoined] statute."[285]

The implications of this argument, when viewed in the context of lawmaking that coerces restraint from constitutionally protected conduct, would be to grant state lawmakers unlimited authority to constrain the conduct of people within their borders. A state could enact a blatantly unconstitutional law that criminalized constitutionally-protected conduct and attach a lengthy or nonexistent statute of limitations to violations.[286] Presumably the law would be challenged in short order and a court would declare it unlawful and enjoin its enforcement. But, if Mitchell is correct that an injunction cannot immunize conduct, the enforcing authority could threaten to pursue all violations of the law while it is enjoined should the injunction ever be dissolved, compelling people to obey the enjoined law for fear of future consequences. As noted above, Mitchell views this

283. *Id*. at 936. Remarkably, for this last proposition, Mitchell cites only *Ex parte Young*, 209 U.S. 123, 155–56 (1908), which supports the first half of his proposition, but not the second.

284. *Id*. at 987.

285. *Id*. at 987–88.

286. Mitchell recommends that lawmakers provide "no statute of limitations for the civil and criminal penalties provided in the law," or that "(at the very least) the statute of limitations will be tolled if a court declares the statute unconstitutional or enjoins its enforcement." *Id*. at 1000. He also recommends providing in the law that "[t]hose who violate the statute remain subject to penalties even if they act at a time when the courts have blocked the statute's enforcement" in order to "nullif[y] defenses based on a mistake of law." *Id*. at 1001. These legislative options would "mak[e] the threat of future prosecution more salient and more likely to induce compliance." *Id*. The Texas Heartbeat Act included a bar on a mistake of law defense and a bar on relying on a court decision that is later overruled on appeal or by a subsequent court, "even if that court decision had not been overruled when the defendant engaged in conduct that violated" the law. TEX. HEALTH & SAFETY CODE ANN. § 171.208(e)(1), (3) (West 2021).

consequence not as a threat to the rule of law, but as a feature that government actors should recognize and use.[287]

Mitchell's main evidence for his view that injunctions, whether preliminary or permanent, cannot immunize conduct is the same as the evidence generally for his proposition that judicial review amounts to nothing more than the judiciary declining to enforce a law in a given case: a thwarted constitutional proposal to endow federal courts with the authority to exercise an executive-like veto over legislation.[288]

Mitchell argues that the popular misconception that federal courts "strike down" or "invalidate," rather than decline to enforce, unconstitutional laws can be traced back to the Constitutional Convention, where "[s]ome of the most influential framers" advocated for a Council of Revision that would have allowed the federal courts to exercise a veto power over federal legislation, similar to the executive veto power.[289] James Madison, James Wilson, and George Mason all supported giving the judiciary an executive-like veto power over federal laws.[290] The proposal ultimately failed. In Mitchell's view, because the Framers rejected a proposal in which the judiciary, through the Council of Revision, could *"permanently* block legislation from taking effect," judicial review is therefore limited to "allow[ing] a court to decline to enforce a statute and enjoin the executive from enforcing it," but "cannot prevent future courts from enforcing the statute if they have a different view of what the Constitution requires."[291]

By focusing on the remedial power that the Council would have accorded federal courts, Mitchell fails to grapple with the possibility that the rejection of the Council of Revision may have had more to do with the Framers' view of the Supreme Court's permissible jurisdiction. As Mitchell acknowledges, detractors of the Council argued in part that the judiciary already had the power under their judicial review authority to "thwart

287. *Id*. at 987 ("One powerful (and underused) tactic is for the executive to threaten future enforcement of a judicially disapproved statute against present day violators, in the event that a future court repudiates the rulings that are blocking the statute's enforcement.").

288. *Id*. at 956–60.

289. *Id*.

290. *Id*.

291. *Id*. at 956. Mitchell does later acknowledge the role of stare decisis in constraining later, or lower, courts, but he labels it a culprit that has reinforced the writ-of-erasure fallacy. *Id*. at 968. In a legal realist turn, Mitchell notes that "the Supreme Court is continually overruling its constitutional precedents" and forecasts what precedent might be on the chopping block, depending on future justices' political preferences. *Id*. at 969–70.

unconstitutional legislation."[292] The question up for debate, then, was in what context the judiciary could exercise that authority. The Constitution ultimately constrained the federal courts to exercising their authority only when the dispute before them satisfied Article III's requirements, including the requirement that the party invoking the court's authority be injured in a manner redressable by a court win.[293] Endowing courts with an executive-like veto would have expanded their jurisdiction to issue advisory opinions.

The rejection of a Council of Revision is perhaps not the compelling evidence Mitchell thinks it is. And once viewed through the lens of the Court's coerced restraint jurisprudence, Mitchell's thesis regarding the scope of federal injunctions' protective power begins to crumble.

V. THE CONSTITUTION SUPPORTS BROADLY PROTECTIVE PROSPECTIVE RELIEF

This section contributes to the decades-long conversation about the power of prospective relief to protect conduct by demonstrating that the Supreme Court's coerced restraint jurisprudence depends on the federal courts' authority to offer broad protection to parties who rely on their prospective relief. This section explains that subjecting litigants to the prospect of retroactive criminal or civil liability if the federal-court prospective relief on which they have relied is later vacated would be significantly at odds with the years of precedent finding that coerced restraint is remediable by prospective relief. This outcome would also fatally undermine federal supremacy, allowing states the ability to nullify federal rights through arguably or even blatantly unconstitutional lawmaking.

A. *Article III*

Article III limits the federal courts' jurisdiction to adjudicate the lawfulness of a given statute only in contexts amounting to "cases" and "controversies," as those terms have been defined by the Supreme Court. But Article III should also be viewed as a source of affirmative power: It authorizes the federal courts to exercise their "power" over a broad range of

---

292. *Id*. at 961. In Mitchell's account, "none of these delegates appeared to notice" that "[j]udicial review is merely a non-enforcement prerogative that leaves the enacted statute on the books." *Id.*; *see also* Liebman & Ryan, *supra* note 88, at 715. Detractors also argued that it would be inappropriate for judges to arbitrate "the policy of public measures." *Id*. at 715, 719.

293. See *supra* Section II.

"cases" and "controversies."[294] Implicit in that authorization is the ability to *resolve* cases and controversies[295]—to say what the law is[296] and, if appropriate, to remedy the plaintiff's harm.

The limited view of federal courts' ability to protect litigants who rely on their injunctions shared by Mitchell and Justice Stevens, and embodied in Texas's Heartbeat Act, is inconsistent with the Court's Article III jurisprudence.[297] If federal courts were unable to immunize conduct undertaken in reliance on their injunctive or declaratory relief, then they would be unable to redress the Article III coerced restraint injury. That conclusion would be at odds with an unbroken and unquestioned line of more than fifty years of precedent, which developed coextensively with the Court's standing jurisprudence holding the opposite.[298]

When a plaintiff comes to court complaining that the prospective enforcement of a punitive statute has caused the plaintiff to refrain from engaging in arguably protected behavior, eliminating the threat of enforcement remedies that injury.[299] A litigant who successfully obtains prospective relief, but who could still face retroactive punishment if a later court disagrees with the basis for that relief would still live in fear of exercising their constitutional rights. Mitchell admits as much when he urges officials to "induce immediate compliance" with the unlawful statute by "threaten[ing] future prosecution."[300]

---

294. U.S. CONST. art. III.

295. *See* Fallon, *supra* note 31, at 618–19 (2007) ("The conferral of judicial power to resolve cases and controversies may imply a judicial capacity to grant relief" immunizing from prosecution conduct that occurs under an injunction's protection).

296. Marbury v. Madison, 5 U.S. 137, 177 (1803).

297. Mitchell acknowledges that his theory is inconsistent with the Court's Establishment Clause jurisprudence. Mitchell treats that inconsistency not as evidence against his argument, but as invalidating the Court's entire Establishment Clause standing jurisprudence. Mitchell, *supra* note 18, at 1005 ("A court is simply powerless to redress an endorsement of religion that appears solely in the text of enacted legislation; the court can act only against executive action that is implementing a regime of religious endorsement.").

298. *See supra* Section II.c.

299. *E.g.*, Susan B. Anthony List v. Driehaus, 573 U.S. 149, 167–68 (2014) ("[D]enying prompt judicial review would impose a substantial hardship on petitioners, forcing them to choose between refraining from core political speech on the one hand, or engaging in that speech and risking costly Commission proceedings and criminal prosecution on the other.").

300. Mitchell, *supra* note 18, at 988, 1001.

1. Case Law

Under modern standing doctrine, in order to invoke the federal courts' jurisdiction, a plaintiff must demonstrate that they have suffered a cognizable injury in fact, caused by the defendant, and redressable by the court.[301] In other words, the court's ability to redress the plaintiff's harm is a necessary predicate to jurisdiction.

Redressability exists when a favorable court judgment will satisfy *an* injury to the plaintiff; redress need not be complete in the sense that it need not solve the plaintiff's every injury.[302] But in a coerced restraint case, a decision that leaves the plaintiff with continued doubt as to whether they may later be punished for engaging in constitutionally protected conduct fails to meaningfully redress the plaintiff's injury. Without the assurance that the litigant will not be punished for engaging in constitutionally protected conduct in the future, a reasonable plaintiff would continue to feel coerced into forgoing constitutionally protected activity.

In recent litigation in a federal district court in Texas, the Texas Attorney General essentially made this very argument—that an injunction without broad protective power cannot redress the coerced restraint injury—albeit for the purpose of opposing the plaintiff's request for injunctive relief. In *Longoria v. Paxton*,[303] Isabel Longoria, the Elections Administrator in Harris County, Texas, and Cathy Morgan, a volunteer certified to register voters in Texas's Williamson and Travis Counties, brought a § 1983 action challenging a change to the Texas Election Code that prohibited elections officials from soliciting anyone to apply to vote by mail.[304] Violation was punishable by fines and imprisonment.[305] The plaintiffs alleged a coerced

301. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

302. Larson v. Valente, 456 U.S. 228, 243–44 n.15 (1982). The Court's holding in *Massachusetts v. EPA*, 549 U.S. 497 (2007), that a judgment reducing "to some extent" the risk of catastrophic harm from "global warming" was enough to satisfy the redressability requirement does not undermine this Article's thesis. *Id*. at 526. The *Massachusetts* standing analysis was within a special statutory context and was colored by Massachusetts's apparent entitlement to "special solicitude" as a state with "quasi-sovereign interests" in the standing analysis. *Id*. at 517–18, 520.

303. Longoria v. Paxton, 585 F. Supp. 3d 907, 934 (W.D. Tex. Feb. 11, 2022), vacated and remanded by 2022 WL 2205419 (5th Cir. 2022).

304. *Id*. at 914–15. The law provided: "A public official or election official commits an offense if the official, while acting in an official capacity, knowingly: (1) solicits the submission of an application to vote by mail from a person who did not request an application." *Id*. at 914. *See supra* Section I.b for further discussion of the context of this change in the law.

305. *Paxton*, 585 F. Supp. at 915.

restraint injury, arguing that the provision chilled their First Amendment speech rights because they wished to encourage eligible voters to vote by mail, but felt they could not do so without risking fines and prosecution.[306]

At the outset of the litigation, the plaintiffs moved for a preliminary injunction to prevent the Texas Attorney General and the district attorneys of Harris, Williamson, and Travis Counties from enforcing the challenged provision.[307] The Harris and Travis County district attorneys stipulated that they would not enforce the challenged section until the litigation was resolved; the Williamson County district attorney and the Texas Attorney General defended the law on the merits and opposed the request for a preliminary injunction.[308]

In opposing the plaintiffs' preliminary injunction motion, the Texas Attorney General argued that injunctive relief was inappropriate because it "would not prevent the [plaintiffs'] alleged irreparable harm" of coerced restraint from exercising their First Amendment rights because the "[p]laintiffs would still face the possibility of criminal prosecution (or civil enforcement) for solicitation committed during the pendency of the injunction if the injunction were set aside."[309]

The Attorney General's only authority for that proposition was Justice Stevens's concurrence in *Edgar v. MITE Corp*.[310] Perhaps recognizing the paucity of authority, the brief argued that even if a court were to later hold that the plaintiffs' conduct during the pendency of a preliminary injunction were immunized, the fact that "[p]laintiffs *cannot know now that courts will later so hold*" precluded any meaningful relief.[311] The district court disagreed with the Attorney General, rejecting the argument as unsupported by any controlling case law and contrary to Supreme Court precedent.[312]

---

306. *Id*. at 915, 917.

307. *Id*. at 918.

308. *Id*.

309. Att'y Gen. Paxton's Response to Plaintiff's Motion for Preliminary Injunction, Longoria v. Paxton, No. 5:21-cv-1223, (W.D. Tex. Feb. 11, 2022).

310. *Id*. (citing Edgar v. MITE Corp., 457 U.S. 624, 649 (1982) (Stevens, J. concurring)).

311. *Id*. (emphasis in original).

312. As noted, the attorney general relied on Justice Stevens's concurrence in *Edgar v. MITE Corp. See* Att'y Gen. Paxton's Response to Plaintiff's Motion for Preliminary Injunction, *supra* note 309. In rejecting the Attorney General's argument, the court cited "substantial authority supporting the opposite—that enforcement of activity undertaken during the pendency of a preliminary injunction will not result." Longoria v. Paxton, 585 F. Supp. 3d 907, 933 (W.D. Tex. Feb. 11, 2022) (citing Okla. Operating Co. v. Love, 252 U.S. 331 (1920); Board of Trade City of Chicago v. Clyne, 260 U.S. 704 (1922)). *Love* is discussed *supra* at notes 205–218 and accompanying text. *Clyne* was a Supreme Court order

The Texas Attorney General's unsuccessful argument illustrates how a federal court's inability to immunize conduct under an injunction or declaratory relief would preclude the court from remedying the coerced restraint injury. There is an ever-present possibility that an injunction or declaratory relief will be vacated. A preliminary injunction may not be made permanent at the end of the case. A permanent injunction or declaratory relief may be reversed on appeal.[313] Even relief affirmed by the Supreme Court or grounded in well-established Supreme Court precedent carries no guarantee of permanency. In recent years, the Supreme Court has reversed multiple longstanding precedents, leaving heightened uncertainty as to the state of the law.[314] A plaintiff who truly fears the consequences of enforcement of a punitive statute would be well-advised to avoid violating that statute in perpetuity unless the federal-court relief she obtained could immunize their conduct prior to its dissolution. That is especially so in the universe Mitchell advocates, in which officials would proactively induce compliance with an enjoined law by threatening retroactive punishment.[315] In that universe, their injury would be incapable of remedy. The decades of precedent discussed above, which make clear that coerced restraint is remediable by prospective relief, therefore seriously undermines the argument that federal-court injunctions are powerless to protect individuals from relying on their protection while they are in effect.

2. Counterargument

One obvious counterargument to this Article III theory is that even if a court order precluding enforcement of a criminal statute were later overturned, the plaintiff still could have benefitted, and therefore enjoyed some redress, from the period of respite between when the favorable ruling was issued and when it was invalidated. Another counterargument is that the prospect that an injunction affirmed by the Supreme Court, or grounded in

---

that purported to restrain the enforcement of the Grain Futures Act against the plaintiff for any "act committed during the pendency of this cause or 20 days thereafter." 260 U.S. at 704.

313. *See Edgar*, 457 U.S. at 651 (Stevens, J., concurring) ("The fact that a federal judge has entered a declaration that the law is invalid does not provide that assurance; every litigant is painfully aware of the possibility that a favorable judgment of a trial court may be reversed on appeal.").

314. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (overruling 40-year-old bodily autonomy precedent); Janus v. AFSCME Council No. 31, 138 S. Ct. 2448 (2018) (overruling 40-year-old First Amendment precedent).

315. Mitchell, *supra* note 18, at 1001.

Supreme Court precedent, would later be vacated is too speculative to form the basis of a continuing coerced restraint injury.

As to the first argument, courts have declined to dismiss on jurisdictional grounds coerced restraint cases in which the enforcing authority has promised to refrain from enforcement until the litigation is concluded[316] A mere delay in punishment therefore does not undermine the salience of the coerced restraint injury.

As to the second argument, courts simply do not require plaintiffs to refrain from protected conduct for a case's entire appeals period. In the context of this article's focus—the First Amendment—quick relief is necessary to avoid irreparable harm. The Supreme Court has repeatedly said that chilling of First Amendment rights for even a short period of time is intolerable.[317] On that basis, a showing of a likelihood of success on a First Amendment claim almost guarantees the plaintiff will convince the court that it faces irreparable injury entitling the litigant to a preliminary injunction.[318] On this same reasoning, the Court has declined to abstain on *Pullman* grounds when doing so would subject the plaintiff to further chilling of their First Amendment rights.[319]

Furthermore, the Court has taken a broad view of the scope of harm that gives it jurisdiction to decide the lawfulness of state statutes.[320] It has, for instance, exercised jurisdiction in cases in which the government coerced restraint through mere advisory, informal sanctions.[321] As the Eleventh Circuit recently explained, while applying the coerced restraint analysis in the First Amendment context, "[n]either formal punishment nor the formal

316. *See*, *e.g.*, Longoria v. Paxton, 585 F. Supp. 3d 907, 919–20 (W.D. Tex. Feb. 11, 2022). Moreover, "[s]tanding depends on the probability of harm, not its temporal proximity." 520 Michigan Ave. Assocs., Ltd. v. Devine, 433 F.3d 961, 962 (7th Cir. 2006).

317. *E.g.*, *Dombrowski*, 380 U.S. at 487 (the Court has "avoided making vindication of freedom of expression await the outcome of protracted litigation").

318. *See supra* note 135.

319. City of Houston v. Hill, 482 U.S. 451, 467–68 (1987) ("In such case[s] to force the plaintiff who has commenced a federal action to suffer the delay of state-court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect." (quoting Zwickler v. Koota, 389 U.S. 241, 252 (1967)). *But see supra* Section II.c.

320. *See* Henry Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518, 548 ("The first amendment would seem a proper source for the implication of affirmative remedies; since the risks of the criminal process and a possibly hostile jury may deter the exercise of first amendment freedoms as much as may an overbroad statute, the state should be required to provide remedies which are adequate to rectify the situation.").

321. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 67 (1963).

power to impose it is strictly necessary to exert an impermissible chill on First Amendment rights—indirect pressure may suffice."[322]

To be sure, when there is *no* prospect of enforcement, plaintiffs have no standing.[323] But so long as a credible threat of sanctions remains, either because the injunction may dissolve during the course of the case's usual adjudication, or because it might be vacated after the case law changes in the future, the harm remains.[324]

3. Hypothetical Case

Applying the coerced restraint standing test to a hypothetical scenario helps illustrate how remedially ineffectual prospective relief without any assurance of immunity would be.

Plaintiff has refrained from speaking because she fears prosecution under Statute A, which arguably restricts her otherwise constitutionally protected activity. Statute A is enforceable by the local district attorney, who voiced support for the law while it was in the legislative process. The district

---

322. Speech First v. Cartwright, 32 F.4th 1110, 1123 (11th Cir. 2022). In *Speech First v. Cartwright*, Speech First, an organization that advocates for free speech rights of its college-student members, challenged a campus policy that sought to discourage harassing or offensive conduct that arose from bias toward several protected characteristics. *Id*. at 1114. The district court held that the plaintiffs did not have standing to challenge the policy because it was "enforced" by a response team whose authority was limited to requesting a voluntary meeting with any student accused of violating the school policy and to referring incidents to other university actors for possible discipline. *Id*. at 1118. The Eleventh Circuit disagreed, holding the plaintiffs had articulated a cognizable coerced restraint injury because, notwithstanding the lack of formal enforcement authority, in the court's view, "the average college student would be intimidated, and quite possibly silenced, by the policy." *Id*. at 1124.

323. *California v. Texas*, 141 S. Ct. 2104 (2021), addressed a challenge by private individuals and states to the Affordable Care Act's insurance mandate. *Id*. at 2112. Congress had repealed the mandate's penalty, leaving only an entirely unenforceable statutory command that individuals obtain insurance coverage. *Id*. at 2112–13. The Court held the private plaintiffs had no standing because, absent the enforcement mechanism, they could not trace their injury—buying insurance—to government action, nor could they show that a court declaration that the unenforceable mandate to buy insurance was unconstitutional would remedy their harm. *Id.* at 2114–15. The fact that Congress had repealed the mandate was enough to nullify the specter of enforcement. *Id*. To be sure, Congress could decide to enact a retroactive penalty, subject to applicable due process challenges, but the fact that Congress might enact future legislation is much more remote than the possibility that a higher court, or a later Supreme Court, might reverse a decision on appeal, or overturn precedent. *Id.* at 2114.

324. Keyishian v. Bd. of Regents, 385 U.S. 589, 604 (1967) ("'[T]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions.' The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against . . . ." (quoting NAACP v. Button, 371 U.S. 415, 433 (1963))).

court finds the statute offends the First Amendment and enjoins the district attorney from enforcing it. The district attorney appeals the injunction to the court of appeals. On average, the court of appeals takes 15 months from the notice of appeal until it issues a decision in any given case. Plaintiff has researched the district court and found that it is often affirmed on appeal, but sees its highest reversal rates in the area of constitutional law. Plaintiff's attorney predicts a 45% chance of reversal on appeal. Given these odds, and the high penalties for violation of Statute A, Plaintiff determines she must continue to self-censor until her appeal is decided.

Applying the coerced restraint test to these facts, Plaintiff can show that she wishes to engage in constitutionally protected behavior, that Statute A arguably prohibits that behavior, and that, should the injunction be overturned on appeal, there is a credible threat that the district attorney will prosecute. Given the possibility of reversal on appeal, it is not imaginary or speculative that she might be subjected to punishment for engaging in constitutionally protected conduct. In fact, because she has sued the district attorney over the enforcement of this law, if the gates are re-opened to prosecution, the district attorney is more likely to be aware of Plaintiff's conduct during the pendency of the appeal.

Fifteen months pass and the appeals court affirms the injunction, finding that it is compelled by Supreme Court precedent. In its decision, the court of appeals notes that the precedent has been called into question by legal commentators, but that it has not yet been reversed. The district attorney petitions the Supreme Court for certiorari, but the petition is denied. Nonetheless, the district attorney vows to retroactively enforce the statute against anyone who violates it while the court's injunction is in place, if the injunction were ever to be vacated. Plaintiff, knowing that the operative statute of limitations is ten years, and knowing that commentators predict the Supreme Court will reverse the precedent on which the court of appeals relied, continues to refrain from her otherwise constitutionally protected conduct, fearing later prosecution. The federal-court injunction has thus failed to remedy her injury.

The abortion context provides a concrete example of this hypothetical scenario. Had a plaintiff successfully enjoined enforcement of Texas's Heartbeat Act for any meaningful period of time,[325] and if that injunction could not protect their behavior during its pendency, a plaintiff who wished

325. *See supra* note 26.

to avoid disastrous punishment would be wise not to violate the statute.[326] The Fifth Circuit, while it would have had no authority to find the law constitutional before *Roe* was overturned, could have reversed the injunction on any of the "complex and novel antecedent procedural questions" that ultimately doomed the federal challenge brought by private plaintiffs.[327] And the plaintiff would know that even if the Fifth Circuit affirmed the injunction, the chances that the Supreme Court would vacate the injunction, given speculation that it would reverse *Roe v. Wade* in that very same term, were far from imaginary.[328] The uncertainty accompanying any federal-court relief would leave a plaintiff to choose between violating the statute and risking harsh punishment in the future or refraining from engaging in protected conduct.

B. *Supremacy*

Finally, the consequences of ascribing such feeble power to federal-court prospective relief would be no less than to undermine the principles of supremacy that underlie coerced restraint and its predecessor doctrines.[329] As scholars have noted, the state legislative trend of enacting privately enforced suppressive laws that evade judicial review is deeply problematic, not least because it tips the balance of supremacy in favor of state lawmaking over federal rights.[330] A holding that prospective relief regarding *state*-enforced laws is merely a stay on enforcement, and not immunity for conduct undertaken while the relief was in place, would exacerbate this inversion of supremacy. While judicial review of state-enforced laws has not suffered from the same complex procedural questions hindering judicial review of privately enforced laws, the judicial review that is available to evaluate state-enforced suppressive laws would be largely meaningless as a practical matter if litigants could not rely on the results of that litigation.

---

326. The stakes of coerced restraint in the reproductive rights space are stark for obvious reasons: A pregnant person who refrains from seeking an abortion, or who is unable to obtain one because providers refrain from offering them, will lose that option in a very short amount of time.

327. *See* Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021).

328. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

329. *See supra* Section II.a.

330. *See, e.g.*, Borgmann, *supra* note 48 (identifying the private enforcement trend in 2006 and arguing that the evasion of judicial review arrogates state legislatures above federal courts); *see also* Michaels & Noll, *supra* note 2 (defining rights-suppressing laws as a means to advance an "illiberal, partisan political agenda").

The Court's commitment to vindicating the supremacy of federal law was a driving force behind the *Ex parte Young* decision and other Supreme Court decisions in the early twentieth century that held that federal courts can and should restrain the enforcement of unconstitutional state laws in circumstances in which the plaintiff would otherwise face irreparable harm.[331] The Framers of the Constitution delegated to the judiciary the task of upholding supremacy through judicial review.[332] Ensuring a path for parties to test the validity of allegedly unlawful state enactments in federal court without risking extreme penalties encouraged parties to come to the federal courts to vindicate rights.[333]

But if federal litigants could not be assured of the protection of their successes, and therefore could not escape the coercive threat of state sanctions, there would be little incentive to sue. If the federal courts were incapable of remedying a plaintiff's otherwise irreparable harm, putting Article III considerations aside, there would be no point in incurring the costs, inconveniences, and potential targeting that litigation would bring. The federal courts' role as vindicators of supremacy would wither from disuse.

And even if litigants persisted in coming to court, the Texas Attorney General's argument in the *Longoria* case discussed above exemplifies federal courts' practical impotence as a viable rights-vindication forum, absent the power to immunize conduct. The Texas Attorney General argued that, even assuming the plaintiff had established irreparable harm, the federal court's injunction would be entirely incapable of remedying that harm because of the prospect of retroactive enforcement of any violation of the statute during the course of the preliminary injunction should the injunction not be made permanent.[334] In Mitchell's view, the same would be true of permanent injunctions.[335] In the context of coerced restraint, if prospective relief cannot eliminate the threat of enforcement, it is not a viable form of relief.

Such federal court impotence would leave the states with de facto supremacy over federal rights. As Mitchell suggests, state legislatures could discourage the exercise of constitutional rights through lawmaking. Even if the law is enjoined or declared unlawful, if federal court-prospective relief

---

331. *See supra* note 109.

332. Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1353–54 (2001); Liebman & Ryan, *supra* note 88 at 708; *see also* Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1036 (1995).

333. *See Ex parte* Young, 209 U.S. at 148.

334. *See supra* Section V.a.

335. *See supra* Section IV.b.

cannot protect plaintiffs from retroactive discipline, state officials could continue to coerce restraint under the invalidated law by threatening retroactive enforcement. Such a regime would leave state lawmakers and state officials as the final arbiters of constitutional rights—a regime entirely at odds with the Constitution.[336]

The litigation around the Texas Heartbeat Act previewed what this inverted supremacy might look like. The federal courts declined to review the legality of that Act because of the Act's enforcement mechanism, which left no clear federal defendant.[337] The law remained in effect, forcing those in the state to forgo rights to which they were entitled for nine months.[338] Limiting the protective power of federal-court prospective relief would threaten to enlarge the categories of state laws that could be arguably, or even obviously, incompatible with federal law, and yet continue to order public conduct.

CONCLUSION

Decades of precedent recognizing coerced restraint as a cognizable harm that is remediable by federal prospective relief is at odds with the argument that federal courts cannot immunize conduct undertaken under the cover of such relief. The consequences of ascribing feeble protection to federal-court prospective relief are no less than the inversion of federal supremacy, placing state legislatures in charge of which constitutional rights endure. Instead, constitutional precedent and structure suggest that federal courts have the authority to immunize conduct undertaken in reliance on prospective relief.

336. U.S. CONST. art. VI, cl. 2.

337. *See supra* note 26 and accompanying text. The Court's decisions surrounding the Act did not offer a robust defense of the federal courts' role in vindicating supremacy. Dissenting from the Supreme Court's decision holding that the private plaintiffs could sue only a limited group of state defendants, Justice Sotomayor charged the Court with "shrink[ing] from Texas's challenge to federal supremacy." Whole Woman's Health v. Jackson, 142 S. Ct. 522, 550 (Sotomayor, J., dissenting in part). The majority responded in part by pointing out that the "Court has never recognized an unqualified right to pre-enforcement review of constitutional claims in federal court." *Id*. at 537–38.

338. *See supra* note 8 and accompanying text.