
UNCERTAIN ENFORCEMENT AND STANDING TO SUE

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ABSTRACT

Plaintiffs with strong claims that a law is unconstitutional may yet fail to establish standing when the law is rarely enforced. Other statutes, like Texas's unusual abortion law, may render challenges difficult by delegating enforcement to private parties who are difficult to identify in advance. Both problems arise from the assumption that the law shapes behavior only through sanctions imposed in enforcement proceedings. This view is mistaken, both jurisprudentially and empirically. Worse, it requires courts to ask two unanswerable questions: How likely is enforcement? And how likely does Article III require it to be? It also asks standing doctrine to do too much by roping in legitimate concerns about courts' ability to decide cases competently prior to enforcement and the urgency of pre-enforcement relief that are better handled by the law of ripeness and remedies.

This Article demonstrates that standing doctrine already recognizes many injuries apart from enforcement sanctions. If the plaintiff complies with a law that prohibits or requires activity against the plaintiff's wishes, that constitutes injury in fact. And to the extent that a legal mandate causes injury without need for further enforcement action, a proper defendant for a challenge to the law need only have authority to defend the statute—not enforce it. This insight avoids causation and redressability problems in uncertain enforcement scenarios, and it obviates the procedural hurdles raised by statutes delegating enforcement to unidentified private actors. The Article illustrates these principles by using Texas's anti-abortion law as a case study.

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INTRODUCTION

Four years before *Griswold v. Connecticut*,¹ the Supreme Court turned away a challenge to a state law barring the use of contraceptives. Although the plaintiffs had health conditions that made pregnancy highly dangerous for them, the Court held in *Poe v. Ullman*² that they lacked standing to challenge the law because the state had not enforced it in years. More than a half-century later, plaintiffs wishing to challenge the mandate to buy health insurance in the Affordable Care Act (“ACA”) hit a similar snag.³ Although the Act remains in force and requires nearly all Americans to purchase health insurance, the Court ruled in *California v. Texas*⁴ that Congress’s elimination of the Act’s enforcement mechanism likewise eliminated the plaintiffs’ standing. *Poe* held that lack of enforcement deprived the plaintiffs of any injury; *California v. Texas*, on the other hand, suggested that the problem sounded in Article III’s traceability and redressability requirements. But either way, the Court’s uncertain enforcement doctrine complicates or forecloses challenges to a wide range of laws based on the government’s election not to enforce them.

A related problem arises when plaintiffs wishing to challenge a law cannot be sure *who* will enforce the law against them. For example, Texas’s notorious anti-abortion statute, S.B. 8,⁵ disables state officials from enforcing the measure in favor of any private party who knows of a violation. This arrangement not only makes it less likely that any particular abortion provider will face an enforcement action, but also deprives persons subject to the law of the usual defendant in a suit to establish the law’s invalidity. And because the statute deputizes a potentially infinite range of private enforcers, even providers who successfully challenge the law cannot secure relief that will bind all comers. Statutes with uncertain enforcers thus raise Article III standing problems of injury and causation similar to the uncertain enforcement cases. Nor is S.B. 8 the only example. Similar statutes have been either enacted or proposed to restrict and penalize activities ranging from teaching critical race theory to gun ownership.⁶

The uncertain enforcement problem is one version of a broader “probabilistic standing” problem. The literature on that issue, however, has focused on when *harm* is sufficiently likely to give the plaintiff an Article III “injury in fact.”⁷ My

¹ 381 U.S. 479 (1965).

² 367 U.S. 497, 507-09 (1961) (plurality opinion).

³ See Patient Protection and Affordable Care Act, 26 U.S.C. § 5000A(a).

⁴ 141 S. Ct. 2104, 2114 (2021).

⁵ See S.B. 8, 87th Leg., Reg. Sess., ch. 62, 2021 Tex. Gen. Laws 125 (authorizing enforcement exclusively through private civil actions brought by any person other than state or local officials against those who perform, aid, or intend to aid an abortion). The enforcement provisions are at TEX. HEALTH & SAFETY CODE ANN. § 171.208 (West 2025).

⁶ See sources cited *infra* note 259 (discussing S.B. 8-style enforcement schemes adopted or proposed in other states).

⁷ See generally Curtis A. Bradley & Ernest A. Young, *Standing and Probabilistic Injury*, 122 MICH. L. REV. 1557 (2024) (focusing on probabilistic injury, not enforcement); F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55 (2012) (same).

central argument is that a law's uncertain *enforcement* should not ordinarily foreclose standing to challenge that law in federal court. Courts should presume that people will comply with laws regulating their conduct—whether or not the government is likely to come after violators—and compliant people experience injury when the law binds them to do or not do something against their wishes.

This is equally true when the *identity* of the enforcer is uncertain; in such cases, persons subject to the law face an obligation to comply regardless of who, if anyone, is likely to hold them to it. The question in uncertain enforcer cases, rather, concerns finding appropriate defendants against whom plaintiffs can secure effectual relief. Here I contend that some lawyers and commentators have been insufficiently creative in utilizing the tools that existing doctrine confers on plaintiffs. If the relevant injury stems from an obligation to comply with the law's commands, then a declaratory judgment that the law is invalid should suffice to redress it. Such relief should generally be available in uncertain enforcer situations, even if it is hard to find a target for an injunction.⁸

Requiring plaintiffs to show that enforcement is probable introduces several anomalies into the law of standing.⁹ It abandons standing doctrine's traditional focus on finding the right plaintiff and looks instead to *defendants* and their intentions concerning enforcement of the law.¹⁰ When "the plaintiff is himself an object of the [government] action (or forgone action) at issue. . . . there is ordinarily little question that the action or inaction has caused him injury."¹¹ It is hardly obvious, then, why an inquiry designed to establish the right plaintiff should turn on the intentions of the defendant¹²—or why government officials

⁸ This Article focuses on public law litigation, but similar problems may arise in private litigation. A plaintiff may allege the defendant is about to undertake an action injuring the plaintiff, thereby raising the question how imminent or likely the threatened action must be to permit a suit. See *infra* text accompanying notes 99-106 (discussing *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007), as an example of standing problems arising in private litigation).

⁹ I use "probabilistic standing" capaciously to connote any circumstance in which the plaintiff's standing turns on the likelihood that certain contested facts are true or that future events will occur. See Bradley & Young, *supra* note 7, at 1567-70 (discussing terminology).

¹⁰ See, e.g., *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (holding that, to challenge a criminal statute, plaintiffs must establish "credible threat of prosecution thereunder").

¹¹ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561-62 (1992).

¹² See, e.g., *Raines v. Byrd*, 521 U.S. 811, 818 (1997) ("The standing inquiry focuses on whether the plaintiff is the proper party to bring this suit, although that inquiry often turns on the nature and source of the claim asserted. . . ." (citation omitted)); *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 38 (1976) (observing that "standing 'focuses on the party seeking to get his complaint before a federal court'" (quoting *Flast v. Cohen*, 392 U.S. 83, 99 (1968))); RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 49 (7th ed. 2015) [hereinafter HART & WECHSLER] (stating that standing concerns "who constitutes a proper plaintiff to invoke federal judicial power").

should be able to immunize laws and policies from challenge simply by disavowing any plans to carry them out.

The second anomaly goes deeper. The foundational requirement of contemporary standing doctrine is that the plaintiff must have suffered an “injury in fact.”¹³ Plaintiffs in a case like *Poe* experience injury by having to forgo conduct that they believe the Constitution protects. But the Court’s uncertain enforcement cases seem to assume no injury occurs unless the prohibition is enforced by some sanction or is likely to be enforced in the near future. No enforcement, no injury. That conclusion ignores the practical impact of laws on the books, which may stigmatize persons subject to them, trigger collateral consequences, or cause people to obey out of a general sense of the law’s legitimacy—regardless of the likelihood of enforcement. And it rests on some controversial jurisprudential assumptions about why people obey the law. Grounding standing doctrine in a narrow, paleo-positivist view of legal compliance contradicts the Court’s generally broad-minded approach to cognizable injury.¹⁴

Finally, the Court’s approach to uncertain enforcement extends standing doctrine to questions that it was never designed for and lacks good tools to address. Existing doctrine asks courts to identify a probability threshold for enforcement, then assess whether that standard is met in individual cases. But Article III contains no probability threshold, and the likelihood of enforcement in many cases is extremely difficult to gauge accurately. Such questions are often unanswerable, both factually (how likely *is* enforcement?) and legally (how likely must enforcement be to satisfy Article III?). Standing doctrine should not ask them.¹⁵

To be sure, some rules’ validity depends upon *how* they are enforced, and even when that is not so courts may struggle to assess the rule’s validity without the real-life circumstances generally attendant upon an enforcement action. Similarly, there may be reasons to withhold the heavy artillery of injunctive relief until actual enforcement is imminent. But all these considerations are the bread and butter of justiciability’s timing doctrines—ripeness and mootness—

¹³ See, e.g., *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

¹⁴ See, e.g., *FDA v. All. for Hippocratic Med.*, 144 S. Ct. 1540, 1559 (2024) (accepting “conscience injury” asserted by doctors who alleged they might be required to perform abortions over their moral objection); *Massachusetts v. EPA*, 549 U.S. 497, 521-23 (2007) (accepting long-term threat of injury from climate change as establishing injury); *FEC v. Akins*, 524 U.S. 11, 21 (1998) (accepting informational injury as sufficient). Even cases often criticized for their narrow view of injury are more permissive than they are often made out to be. See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2209 (2021) (accepting reputational injury without collateral consequences); *Lujan*, 504 U.S. at 564 (accepting interference with the desire to experience endangered species as sufficient injury); *Allen v. Wright*, 468 U.S. 737, 755 (1984) (accepting racial stigma as sufficient injury); see also *Bradley & Young*, *supra* note 7, at 1589-91 (considering the scope of injury under *TransUnion*).

¹⁵ Cf. *Bradley & Young*, *supra* note 7, at 1573-75 (arguing courts should not attempt to derive a probability of injury threshold from Article III).

as well as the law of remedies.¹⁶ Even the Supreme Court frequently acknowledges uncertainty about the difference between standing and ripeness;¹⁷ clearer thinking about uncertain enforcement can shed light on that broader quandary.

Uncertain enforcement raises foundational questions but is of considerable practical importance. The Supreme Court has denied standing on uncertain enforcement grounds only in extreme cases, but the lower courts have had to deal with more difficult situations in the gray area. Their decisions are all over the map.¹⁸ For example, a current circuit split concerns whether students may challenge campus “bias response” policies that have not yet been enforced against them.¹⁹ Likewise, Texas’s S.B. 8 demonstrates the extent to which uncertainty about *who* will enforce a law can disrupt traditional assumptions about how to enforce constitutional rights.²⁰ S.B. 8 is an unusual statute—a creature straight out of a federal courts exam, contrived to make judicial review difficult—but private enforcement of public laws is ubiquitous. If taking the government out of the enforcement equation can render the law unchallengeable, we will see many more such laws.

This Article addresses two key scenarios: cases in which the law is unlikely to be enforced *at all*, and cases in which the *identity* of the enforcer is uncertain. Part I, addressing the first scenario, argues that as long as plaintiffs are *subject* to the law, their injury in fact does not depend upon enforcement. Uncertain enforcement is not, in this scenario, a standing problem at all. The injury comes from the compulsion of the law itself, which requires the plaintiff to perform or refrain from engaging in some sort of activity. That should suffice for standing whether or not the government takes further steps to enforce the obligation. Enforcement may be relevant to ripeness (if the manner of enforcement is relevant to the validity of the plaintiff’s claims on the merits) or to the appropriateness of certain forms of relief (if the plaintiff cannot demonstrate the

¹⁶ See, e.g., *Toilet Goods Ass’n v. Gardner*, 387 U.S. 158, 163-64 (1967) (holding challenge to FDA regulations authorizing inspections of facilities was not ripe because its legality was likely to turn on manner in which inspections were carried out).

¹⁷ See, e.g., *Trump v. New York*, 141 S. Ct. 530, 535-36 (2020) (per curiam) (suggesting standing and ripeness doctrines converged); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 n.5 (2014) (“As the parties acknowledge, the Article III standing and ripeness issues in this case ‘boil down to the same question.’” (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8 (2007))).

¹⁸ See *infra* notes 61-73 and accompanying text.

¹⁹ Compare *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330-31 (5th Cir. 2020) (finding standing to challenge such university policy in chilling effect on speech), *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 765 (6th Cir. 2019) (same), and *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1113 (11th Cir. 2022) (same), with *Speech First, Inc. v. Sands*, 69 F.4th 184, 196 (4th Cir. 2023) (finding no standing due to no enforcement), *vacated as moot*, 144 S. Ct. 675 (2024), and *Speech First, Inc. v. Killeen*, 968 F.3d 628, 639-43 (7th Cir. 2020) (same).

²⁰ See *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 532-38 (2021) (considering whether S.B. 8’s delegation of enforcement to private parties left plaintiffs with proper defendant for pre-enforcement constitutional review).

harm required for an injunction). But these questions can be dealt with more readily if separated from the law of standing.

Part II considers uncertainty as to *who* will enforce the law, using Texas's S.B. 8 as a case study. This scenario likewise should not ordinarily pose a standing problem. Standing is about the adequacy of the plaintiff, not the identity of the proper defendant. A proper defendant is a necessary element of a lawsuit, of course, and suing a defendant who cannot provide the relief requested may produce problems under standing doctrine's redressability requirement.²¹ But if the compulsion of law may impose an injury wholly apart from other enforcement steps the government (or its proxies) might take, then a declaratory judgment that no such compulsion exists redresses that injury. And I argue that it will nearly always be possible to identify a defendant against whom that sort of judgment can be sought, even if it is impossible to be sure who might take coercive enforcement actions against the plaintiff in the future.

In discussing each scenario, I will frequently criticize certain aspects of existing doctrine. But my criticism will generally be that those aspects are inconsistent with other, even more fundamental postulates of our jurisprudence. No grand overhaul is necessary to clean up the areas of confusion, but the current contradictions are important and will only get worse if left unattended.

I. UNCERTAINTY AS TO WHETHER THE LAW WILL BE ENFORCED

The "irreducible constitutional minimum" for standing in federal court is that "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."²² Uncertain enforcement relates to this framework in either of two ways. The famous case of *Poe v. Ullman*²³ illustrates the first, denying plaintiffs standing to challenge Connecticut's law banning contraceptives because it had been enforced only once. "The party who invokes the power (to annul legislation on grounds of its unconstitutionality)," Justice Frankfurter wrote, "must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement."²⁴

Second, uncertain enforcement may negate standing's causation elements—traceability and redressability. Consider *California v. Texas*,²⁵ which involved a challenge to the ACA's "individual mandate" to buy health insurance after Congress eliminated the statute's tax penalty for noncompliance.²⁶ The Court

²¹ See, e.g., *California v. Texas*, 141 S. Ct. 2104, 2115-16 (2021).

²² *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

²³ 367 U.S. 497, 501-02 (1961) (plurality opinion).

²⁴ *Id.* at 504-05 (plurality opinion) (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)).

²⁵ 141 S. Ct. at 2115-16.

²⁶ *Id.*; see Patient Protection and Affordable Care Act, 26 U.S.C. § 5000A(a) (requiring applicable individuals to maintain minimum essential coverage); Tax Cuts and Jobs Act of

held that the plaintiffs could not trace their injury of having to buy health insurance to any government action because “there is no action—actual or threatened—whatsoever. There is only the statute’s textually unenforceable language.”²⁷ Likewise, plaintiffs’ harm was not redressable because the law’s unenforceability meant that “[t]here is no one, and nothing, to enjoin.”²⁸

Cases like *Poe* and *California v. Texas* misunderstand the nature of the plaintiff’s injury by assuming that laws injure people only when they are enforced. The Supreme Court has recognized cognizable injuries in fact in any number of circumstances not involving public enforcement actions.²⁹ Moreover, the “no enforcement, no injury” view overlooks the possibility that some people will comply with the law—engaging in or forgoing activity against their wishes—without regard to the likelihood of sanctions. And it neglects a wide range of social sanctions or collateral consequences arising from noncompliance that do not depend on formal enforcement.

The causation problem is somewhat trickier, because standing does require that the plaintiff’s lawsuit target an action that caused the injury and seek relief that can plausibly redress it. Cases like *California v. Texas* thus raise thorny questions about whether the plaintiff can select an appropriate defendant and frame an appropriate remedy. But a proper understanding of the plaintiff’s injury can ease confusion about what remedies may redress it and what defendants are appropriate targets.

Two caveats are in order at the outset. First, my argument would affect standing only in cases in which plaintiffs challenge an infrequently enforced law that restricts their conduct or imposes an obligation upon them. In such cases, if “the plaintiff is himself an object of the action (or forgone action) at issue. . . . there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.”³⁰ Many cases do not fit this pattern. Sometimes it will be uncertain whether plaintiffs are even subject to the law they challenge, raising a significant hurdle to standing.³¹ Relatedly, some plaintiffs challenge government actions other than laws regulating conduct—for instance, executive officers’ conduct while enforcing the law.³² In such cases, the probability of enforcement action against

2017, Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (codified at 26 U.S.C. § 5000A(c)) (reducing penalty to \$0).

²⁷ *California v. Texas*, 141 S. Ct. at 2115.

²⁸ *Id.* at 2116.

²⁹ See *infra* notes 86-114 and accompanying text.

³⁰ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561-62 (1992).

³¹ See, e.g., *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 401-02 (2013) (denying standing to challenge secret government surveillance under the Foreign Intelligence Surveillance Act where plaintiffs could not establish they had been subject to any surveillance); *Bradley & Young*, *supra* note 7, at 1578-81 (discussing *Clapper*).

³² See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983) (denying standing to seek injunction against use of chokeholds by police because plaintiff could not establish likelihood he would be subject to such treatment in the future).

the plaintiff may determine whether or not the plaintiff will be subject to the conduct that they challenge. That *does* raise a standing problem, although not always an insuperable one.³³

The second caveat is that enforcement may be relevant to whether the dispute is ripe for adjudication. Sometimes the plaintiff's claim on the merits may turn on how the law is enforced, or the court may benefit from the concrete facts that enforcement tends to generate. Or the plaintiff's eligibility for certain forms of relief—an injunction, for instance—may turn on harms engendered by enforcement or the threat of enforcement. Both the ripeness doctrine and the law of remedies are designed to take these sorts of factors into account, and neither requires courts to determine how likely is likely enough.

A. *Enforcement and the Plaintiff's Injury*

Poe v. Ullman is the paradigm case in which uncertain enforcement barred an effort by persons subject to a law to challenge its constitutionality. Three pseudonymous plaintiffs, a married couple and a married woman, challenged a Connecticut statute prohibiting use of contraceptive devices and giving medical advice concerning them.³⁴ They alleged that they had experienced past pregnancies that endangered their physical and emotional health and needed information concerning and access to contraceptives.³⁵ In a third case, consolidated with the others on appeal, a physician separately challenged the statute for preventing him from giving necessary medical advice to his patients.³⁶

The Court rejected all three challenges as nonjusticiable. As the plurality read the complaints, plaintiffs claimed “merely that, in the course of his public duty, [Ullman, the state's attorney] intends to prosecute any offenses against Connecticut law, and that he claims that use of and advice concerning contraceptives would constitute offenses.”³⁷ Plaintiffs had not “clearly . . . allege[d] that appellee Ullman threaten[ed] to prosecute *them* for use of, or for giving advice concerning, contraceptive devices.”³⁸ “The lack of immediacy of the threat described by these allegations,” Justice Frankfurter said,

³³ See Bradley & Young, *supra* note 7, at 1581-88 (discussing *Lyons*).

³⁴ 367 U.S. 497, 498-500 (1961) (plurality opinion); see CONN. GEN. STAT. §§ 53-32, 54-196 (1958) (repealed 1971). Section 53-32 provided that “[a]ny person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year.” Section 54-196 added that “[a]ny person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.” Both laws were substantially unchanged from their enactment in 1879. See Buxton v. Ullman, 156 A.2d 508, 510-11 (Conn. 1959), *appeal dismissed sub nom.*, *Poe*, 367 U.S. 497; Tileston v. Ullman, 26 A.2d 582, 584-85 (Conn. 1942), *appeal dismissed per curiam*, 318 U.S. 44 (1943).

³⁵ *Poe*, 367 U.S. at 499.

³⁶ *Id.* at 500.

³⁷ *Id.* at 501.

³⁸ *Id.* (emphasis added).

“might alone raise serious questions of non-justiciability for appellants’ claims.”³⁹

Even if plaintiffs had alleged “a clear threat of imminent prosecutions,” the plurality was prepared to look behind those allegations and assess the actual risk of enforcement against the plaintiffs. Connecticut had only prosecuted *one case* under the statute (a test case that affirmed the statute’s constitutionality),⁴⁰ and contraceptives were openly sold in Connecticut stores without any enforcement action by the government.⁴¹ Given this “undeviating policy of nullification by Connecticut of its anti-contraceptive laws throughout all the long years that they have been on the statute books,” the plaintiffs’ challenge was too “unreal[]” and “abstract” for adjudication.⁴²

Justice Frankfurter’s argument combined two strands that later doctrine has distinguished. A case may be “unreal” or “abstract” either because it is filed before the circumstances have developed sufficiently to permit a court to evaluate the merits issues, or because the court cannot be sure the plaintiff will suffer an injury. The first concern is illustrated by Frankfurter’s citation to *United Public Workers v. Mitchell*,⁴³ which rejected as premature a group of federal employees’ challenge to the Hatch Act.⁴⁴ That statute generally barred federal employees from “taking ‘any active part in political management or in political campaigns,’”⁴⁵ but the plaintiffs had neither violated the act nor

³⁹ *Id.* (citing *United Pub. Workers v. Mitchell*, 330 U.S. 75, 88 (1947)). Justice Brennan’s opinion concurring in the judgment provided the fifth vote for dismissal. He observed that “[t]he true controversy in this case is over the opening of birth-control clinics on a large scale . . . not the use of contraceptives by isolated and individual married couples.” *Id.* at 509 (Brennan, J., concurring). Justice Brennan offered no reason for dismissing the individual plaintiffs’ concerns other than the plurality’s rationale. *See id.* Justices Black, Douglas, Harlan, and Stewart dissented. *Id.* at 509-55.

⁴⁰ *See State v. Nelson*, 11 A.2d 856, 862-63 (Conn. 1940) (upholding statute’s constitutionality under state’s police power to preserve and protect public morals). In another case, a doctor sought a declaratory judgment that the statute was unconstitutional. *See Tileston v. Ullman*, 26 A.2d 582, 584-86 (Conn. 1942) (upholding statute’s constitutionality under police power). The Supreme Court denied review because *Tileston* lacked standing under the Fourteenth Amendment; Connecticut permitted doctors to assert their patients’ rights more broadly than did federal law, so despite suing in state court *Tileston* lacked standing to appeal to an Article III court. *See Tileston v. Ullman*, 318 U.S. 44, 45 (1943) (per curiam). Mr. Ullman—whose long career as New Haven County Attorney was bookended by the *Tileston* and *Poe* cases, *see* Obituary, *Abraham Ullman*, N.Y. TIMES, Aug. 22, 1974, at 36—seems to have known his way around Article III pretty well.

⁴¹ *See Poe*, 367 U.S. at 502.

⁴² *Id.* at 502, 504 (“This court can have no right to pronounce an abstract opinion upon the constitutionality of a State law.” (quoting *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 75 (1867))).

⁴³ *Mitchell*, 330 U.S. 75, cited in *Poe*, 367 U.S. at 504.

⁴⁴ 18 U.S.C. § 61h (1946).

⁴⁵ *Mitchell*, 330 U.S. at 78 (quoting § 61h). Later amendments substantially narrowed this prohibition, now codified at 5 U.S.C. §§ 7323-7324.

specified the political activity in which they wished to engage.⁴⁶ The Court could “only speculate as to the kinds of political activity the appellants desire to engage in.”⁴⁷

As Justice Douglas’s dissent explained, the Government’s interests in Hatch Act cases stemmed from preventing corruption and a re-emergence of the “spoils system” in civil service appointments.⁴⁸ Different activities implicate those interests to different extents; going door-to-door for a particular party’s candidates would be more concerning than non-partisan voter registration drives, for instance. It made sense in *Mitchell* to postpone adjudication until the Court could know precisely what the plaintiffs intended to do.⁴⁹ This concern is now central under the ripeness doctrine, which asks whether the issues in a case brought prior to enforcement of the law against the plaintiffs are “fit for judicial resolution.”⁵⁰

To be sure, the Court’s standing cases have required that plaintiffs have “concrete plans” to engage in conduct that will bring them into contact with the Government’s allegedly unlawful action.⁵¹ But those cases do not require that the Government likewise have “concrete plans” to enforce the law against the plaintiffs. Cases like *Lujan v. Defenders of Wildlife*,⁵² for example, do not involve any action taken by the Government against the plaintiffs at all. The fitness for adjudication concerns of ripeness doctrine may well be relevant in some uncertain enforcement cases, as I discuss in Section I.C, *infra*. But they are distinct from the injury required for standing.

Poe featured no uncertainty concerning the plaintiffs’ intentions: They alleged that pregnancy threatened their health and that Connecticut’s contraceptive ban forced them to choose between forgoing sexual intercourse or

⁴⁶ See *id.* at 83-84. One plaintiff, Mr. Poole, *had* already violated the Act, and the Court decided his claim on the merits. See *id.* at 102-03 (upholding the Act as applied to Poole).

⁴⁷ *Id.* at 90.

⁴⁸ See *id.* at 121-23 (Douglas, J., dissenting in part); see also U.S. Civ. Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, 413 U.S. 548, 564-67 (1973) (upholding Hatch Act against First Amendment challenge).

⁴⁹ See *Mitchell*, 330 U.S. at 90.

⁵⁰ *Abbott Lab’ys v. Gardner*, 387 U.S. 136, 148-54 (1967).

⁵¹ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992). In *Lujan*, the plaintiffs challenged decisions to contribute federal funding to construction projects in foreign countries, alleging that they would be injured by denial of the opportunity to visit endangered species whose habitats those projects threatened. *Id.* at 562-64. The Court said that “‘some day’ intentions” to visit the animals, “without any description of concrete plans” to do so, “do not support a finding of the ‘actual or imminent’ injury that our cases require.” *Id.* at 564.

⁵² *Lujan* concerned whether the Endangered Species Act required interagency consultations about the impact of government actions on endangered species elsewhere in the world. *Id.* at 558-59. Plaintiffs were not subject to that requirement; they thus had to show that the Agency for International Development’s failure to consult would ultimately result in some harm to them. That required them to show “concrete plans” creating a connection between the plaintiffs and the threatened species. See *id.* at 561-62, 564.

risking further miscarriages and potentially fatal complications.⁵³ *Poe*'s result stemmed from a second strand of Justice Frankfurter's reasoning—that is, that plaintiffs lacked *injury* in the absence of enforcement action by the government. He cited *Massachusetts v. Mellon*,⁵⁴ which held that plaintiffs challenging a law must have “sustained or [be] immediately in danger of sustaining some direct injury as the result of its enforcement.”⁵⁵ Frankfurter explained that “[t]he *Mellon* cases involved what is technically designated as the problem of ‘standing,’ but the concern which they exemplify that constitutional issues be determined only at the suit of a person immediately injured has equal application here.”⁵⁶

Poe's result may be correct. Constitutional challenges to contraception laws have relied in part on concerns about how they might be enforced, and in those circumstances a court may appropriately stay its hand until a case of actual enforcement arises. But that is a question of ripeness, which I argue is more distinct from standing than is sometimes appreciated. Ripeness entails primarily prudential considerations about the timing of litigation, and it focuses on whether a court should wait for further events that may better tee up the legal issues in the case.⁵⁷ Uncertainty regarding whether a law will be enforced may also undermine a plaintiff's claim to remedies such as injunctions, which typically depend on a showing of imminent and irreparable harm.

To make the enforcement issue one of *standing*, however, depends on a conclusion that absent enforcement sanctions the plaintiff simply has suffered no harm. The Supreme Court rarely throws plaintiffs out of court on this ground, but both it and the lower courts continue to invoke *Poe*'s notion that plaintiffs may lack standing to challenge a law to which they are subject but which is infrequently enforced.⁵⁸ The most-cited case is *Babbitt v. United Farm Workers National Union*,⁵⁹ which stated that:

When 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, he “should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.”⁶⁰

⁵³ *Poe v. Ullman*, 367 U.S. 497, 498-500 (1961) (plurality opinion); *see also id.* at 528 (Harlan, J., dissenting) (emphasizing this point).

⁵⁴ 262 U.S. 447 (1923).

⁵⁵ *Id.* at 488, *quoted in Poe*, 367 U.S. at 505.

⁵⁶ *Poe*, 367 U.S. at 505 n.9.

⁵⁷ *See infra* Section I.C.

⁵⁸ *See* HART & WECHSLER, *supra* note 12, at 226-27 (discussing *Poe* and treating ripeness of attacks on criminal statutes which may or may not be enforced as special topic).

⁵⁹ 442 U.S. 289 (1979).

⁶⁰ *Id.* at 298 (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)). The United Farm Workers challenged a prohibition on using “dishonest, untruthful, and deceptive publicity” to discourage purchases of an agricultural project, arguing that the union frequently appealed to

Lower courts in particular have interpreted this “credible threat of prosecution” standard inconsistently but more expansively than unusual cases like *Poe* would suggest.

Judge Williams of the D.C. Circuit captured the problem with the *United Farm Workers* test, observing that “the adjective ‘credible’ says little or nothing about the requisite level of probability of enforcement and clarity prevails only at the poles. If the threat is imagined or wholly speculative, the dispute does not present a justiciable case or controversy,” and “[e]vidence that the challenged law is rarely if ever enforced, for example, may be enough to defeat an assertion that a credible threat exists.”⁶¹ At the other pole, “actual threats of arrest made against a specific plaintiff are generally enough to support standing as long as circumstances haven’t dramatically changed.”⁶² The lower courts have tried to fill in the middle, both by engaging in “a factual and case-specific” inquiry⁶³ and by formulating more specific (and sometimes more demanding) rules.

A few examples will give a sense of the general doctrinal disarray. The D.C. Circuit holds that it is insufficient that a plaintiff wishes to engage in conduct that violates a law and the law is generally enforced; rather, plaintiffs must establish that the government is likely to come after *them in particular*. The leading case of *Navegar, Inc. v. United States*,⁶⁴ for example, found standing for pre-enforcement review only to the extent that the statute in question singled out the plaintiff’s products *by name* as prohibited. Later decisions have recognized that “[t]o the extent that [*Navegar*’s rule] implied that plaintiffs must be individually or specifically burdened in a way distinct from some broader class of potential prosecutees, it is at variance with Supreme Court precedent.”⁶⁵ It is also “in sharp tension with standard rules governing preenforcement challenges to agency regulations,” as well as with “cases upholding preenforcement review of First Amendment challenges to criminal statutes.”⁶⁶ And the standard is so

consumers to boycott employers’ products and that such appeals might inadvertently contain errors. *Id.* at 301-02. The State responded that “the criminal penalty provision has not yet been applied and may never be applied to commissions of unfair labor practices, including forbidden consumer publicity.” *Id.* at 302. The Court nonetheless upheld standing, noting that the statute by its terms subjected the union’s activities to criminal penalties, and “the State has not disavowed any intention” of enforcing the law. *Id.* Hence, the union was “not without some reason” to fear prosecution under the ban. *Id.*

⁶¹ *Seegars v. Gonzales*, 396 F.3d 1248, 1252 (D.C. Cir. 2005).

⁶² *Id.*

⁶³ *Navegar, Inc. v. United States*, 103 F.3d 994, 999 (D.C. Cir. 1997).

⁶⁴ *Id.* at 994 (finding standing to challenge portions of statute singling out plaintiff).

⁶⁵ *Seegars*, 396 F.3d at 1253.

⁶⁶ *Id.* at 1253-54; *see also* *Green v. DOJ*, 392 F. Supp. 3d 68, 83-84 (D.D.C. 2019) (drawing sharp line between First Amendment and other cases). The rule treating First Amendment cases differently in uncertain enforcement cases has been applied in several circuits. *See, e.g.,* *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1120 (11th Cir. 2022) (recognizing injury independent of enforcement, but only in free speech cases); *Blum v. Holder*, 744 F.3d 790, 796 (1st Cir. 2014) (stating more lenient First Amendment standard as alternative to *United Farm Workers* standard). That said, there is “no hierarchy of Bill of

fact-intensive that it tends to produce extensive disagreement in application.⁶⁷ Yet the *Navegar* standard remains good law in the D.C. Circuit.⁶⁸

At least one court of appeals has suggested that the Supreme Court's decision in *Clapper v. Amnesty International USA*⁶⁹ "may have adopted a more stringent injury standard for standing" than prior tests like *United Farm Workers*.⁷⁰ The better view, as the Second Circuit explained, is that the *United Farm Workers* standard applies when plaintiffs challenge a law to which they are plausibly subject; it does not apply "when it is not apparent whether a plaintiff is subject to the statute and when the government actively disputes that it is."⁷¹ A different problem has arisen in a series of free speech challenges to university "bias response" programs by students who fear investigation and discipline but have not yet been subject to any enforcement action. Two circuits have held that the uncertainty that particular students will be investigated or punished bars standing to challenge the policy, even though no one claims the policy is generally not enforced.⁷² Three circuits, however, have found standing in very similar cases involving the same plaintiffs.⁷³ One could go on, but these varying interpretations of the necessary likelihood of enforcement highlight the need to clarify what standing requires in such situations.

The problem is *not* one of degree. The Court is unlikely to settle on a stable probability-of-enforcement threshold, both because Article III contains no basis for such a threshold and because the actual probability of enforcement is difficult to measure. The root confusion, however, stems from the assumption that harms arising from enforcement of the law are the only injuries that count for standing. That view is inconsistent with the capacious view of cognizable harms in

Rights protections that dictates different standing analysis." *Seegars*, 396 F.3d at 1257 (Sentelle, J., dissenting).

⁶⁷ See, e.g., *Ord v. District of Columbia*, 587 F.3d 1136, 1139, 1143 (D.C. Cir. 2009) (featuring disagreement between trial court and different judges on the court of appeals concerning whether prior issuance of arrest warrant against plaintiff signified sufficient threat of enforcement under *Navegar*).

⁶⁸ See, e.g., *Angelo v. District of Columbia*, 648 F. Supp. 3d 116, 126-28 (D.D.C. 2022) (rejecting arguments that *Navegar* is not good law in light of Supreme Court precedent).

⁶⁹ 568 U.S. 398 (2013).

⁷⁰ *Blum*, 744 F.3d at 797-99.

⁷¹ *Hedges v. Obama*, 724 F.3d 170, 197 (2d Cir. 2013); see also *Bradley & Young*, *supra* note 7, at 1578-81 (arguing *Clapper* is strict but applies only to a narrow class of cases).

⁷² See *Speech First, Inc. v. Sands*, 69 F.4th 184, 198 (4th Cir. 2023) (finding "no evidence that the Bias Policy has imposed or threatened to impose any discipline on anyone"), *vacated as moot*, 144 S. Ct. 675 (2024); *Speech First, Inc. v. Killeen*, 968 F.3d 628, 641 (7th Cir. 2020) (finding Bias Assessment and Response Team lacked any independent disciplinary authority).

⁷³ See *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1124 (11th Cir. 2022) (finding standing in potential chilling effect); *Speech First, Inc. v. Fenves*, 979 F.3d 319, 335 (5th Cir. 2020) (finding standing in "credible threat of enforcement"); *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 765 (6th Cir. 2019) (finding standing in reputational and indirect disciplinary consequences from investigations and referrals).

contemporary standing jurisprudence, with important jurisprudential and empirical arguments that law affects behavior even in the absence of sanctions, and with the realities of collateral harms imposed by unenforced laws.

1. Injury in Uncertain Enforcement Cases

The Court has seemed to assume—without analyzing or defending the assumption—that the only injury that counts occurs as a result of enforcement action by the defendant. This makes a lack of enforcement a lack of injury—a question of standing, rather than one of timing (ripeness) or remedy (irreparable harm).⁷⁴ I argue that this assumption is generally false: When action by the defendant compels a person to act differently than they otherwise would—that is, to engage in conduct that the defendant has no right to demand, or to forgo conduct in which a person has a right to engage—then that unlawful alteration of the plaintiff’s conduct is sufficient injury in fact. Critically, the promulgation of a legal requirement—whether or not the government takes further action to enforce it—may well cause people to take or forgo action against their wishes.⁷⁵

The best support for sanction-dependent standing comes from *Mellon*’s statement that standing depends on a showing that the plaintiff “has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement.”⁷⁶ That language was dictum in *Mellon*, which concerned whether taxpayers could challenge a federal spending statute based on their infinitesimal share of the public expenditure, not whether a person whose behavior was subject to regulation could challenge that regulation prior to the government enforcing it against them.⁷⁷ And if one reads *Mellon* (or *Poe*) as saying that only enforcement actions against the plaintiff can create a cognizable injury, then those cases have been overruled by *Lujan* and other cases recognizing that even the *beneficiaries* of regulation (who are not subject to enforcement at all) can challenge government policy if they can show some other injury in fact.⁷⁸

⁷⁴ See, e.g., *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2214 (2021) (“No concrete harm, no standing.”). *Poe* itself is often understood as a ripeness case, see, e.g., HART & WECHSLER, *supra* note 12, at 226 (noting *Poe*’s plurality emphasized absence of specific threat of enforcement while dismissing for nonjusticiability), but the Court did not use the word ripeness, and it emphasized the plaintiff’s lack of injury. See *Poe v. Ullman*, 367 U.S. 497, 503-05 (plurality opinion). I argue in Section I.C, *infra*, that ripeness is a better approach.

⁷⁵ Similarly, when government *fails* to enforce the law in a way that deprives plaintiffs of a benefit to which they are legally entitled, that deprivation suffices for standing so long as the plaintiff can trace their injury to the government’s inaction. See *Allen v. Wright*, 468 U.S. 737, 756-57 (1984). These cases generally turn on causation. See, e.g., *id.* at 758-59.

⁷⁶ *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923), quoted in *Poe*, 367 U.S. at 505.

⁷⁷ *Id.* at 486 (“The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate.”).

⁷⁸ See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561-62 (1992) (explaining that while it is generally easier for persons who are “object of the [government’s] action” to establish standing, plaintiffs may also challenge the “government’s allegedly unlawful . . . lack of regulation . . . of someone else” if they can establish injury arising from that inaction).

Requiring government enforcement of the law against the plaintiff would be nonsensical in the significant class of cases in which plaintiffs sue to enforce the law *themselves* against private entities that are violating it.⁷⁹

The Supreme Court made that clear in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC) Inc.*,⁸⁰ which involved a citizen suit by private individuals against a company discharging pollutants into South Carolina's North Tyger River in violation of the Clean Water Act.⁸¹ The plaintiffs, organizations whose members lived near the river, alleged that their members had reasonably refrained from using the waterway on account of the defendant's discharge of chemicals.⁸² The defendant challenged their standing because they had put forward "no demonstrated proof of harm to the environment," but the Court insisted that "[t]he relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff."⁸³ Crucially, plaintiffs could show the latter by demonstrating the pollution had reasonably induced them not to fish, swim, picnic, or engage in other activities near the river. They did *not* have to establish further harm to themselves or to the environment itself.⁸⁴ Certainly the private company defendant in *Friends of the Earth* had no right to "enforce" anything against the plaintiffs; the only questions were whether the defendant had done something unlawful, plaintiffs were subjected to that action, and defendant's action reasonably induced the plaintiffs to forgo plans to engage in lawful activity.⁸⁵

Cases after *Poe* have recognized a wide variety of non-enforcement-based injuries. The most important class involves suits by *beneficiaries* of regulation, typically brought against government agencies to encourage them to regulate third parties more aggressively. In *FEC v. Akins*,⁸⁶ the Court upheld voters' standing to sue to require more aggressive enforcement of campaign finance disclosure rules against entities alleged to have backed candidates for office. The

(emphasis omitted)); see also *FEC v. Akins*, 524 U.S. 11, 13-14 (1998) (holding that voters had standing to challenge the FEC's failure to enforce registration and reporting requirements against organization supporting candidates for election); *Allen*, 468 U.S. at 756-57 (acknowledging public schoolchildren could have injury from the Internal Revenue Service's ("IRS") failure to enforce rules disfavoring contributions to segregated private schools, but finding that plaintiffs had not shown traceability).

⁷⁹ See, e.g., *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208-09 (2021) (upholding standing of persons who could show actual injury to enforce Fair Credit Reporting Act ("FCRA") against private company violating its provisions); *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180-85 (2000) (holding plaintiffs who used waterway had standing to sue company polluting river under Clean Water Act).

⁸⁰ *Friends of the Earth*, 528 U.S. 167.

⁸¹ *Id.* at 176.

⁸² *Id.* at 182-83.

⁸³ *Id.* at 181 (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 956 F. Supp. 588, 602 (1997), *vacated*, 149 F.3d 303 (1998), *rev'd*, 528 U.S. 167 (2000)).

⁸⁴ See *id.* at 181-85.

⁸⁵ See *id.* at 180-81.

⁸⁶ 524 U.S. 11, 13-14 (1998).

injury in *Akins* was certainly not that the law had been enforced against the plaintiffs in some way; rather, it was that the agency's *nonenforcement* resulted in deprivation of information that the plaintiffs sought.⁸⁷ The Court has made clear that standing is more difficult for plaintiffs who seek to require government agencies to regulate someone else,⁸⁸ but that is not because only enforcement sanctions count as injury in fact. The problem is that such suits necessarily involve speculation about whether the plaintiffs' injuries are really traceable to the government's lax treatment of regulated entities—who are not typically parties to the litigation—and whether those entities will respond to greater regulatory efforts in ways that redress the plaintiffs' injuries.⁸⁹ Beneficiary suits thus foundered on traceability and redressability grounds in *Lujan* and *Allen*, but neither decision questioned that non-sanctions-based injuries would have been injury in fact if the causation elements could be established.⁹⁰

Clarifying that any sort of concrete harm “counts” for standing is important not only to uncertain enforcement cases but also to broader debates about what injuries may satisfy Article III. The Court's recent decisions in *TransUnion LLC v. Ramirez*⁹¹ and *Uzuegbunam v. Preczewski*⁹² both featured difficult arguments about the sufficiency of purely *legal* injuries—violations of the plaintiff's constitutional or statutory rights without any accompanying “actual” or consequential damage.⁹³ But both opinions acknowledged cases indicating that

⁸⁷ See *id.* at 24-25 (concluding plaintiffs' “informational injury” arising from FEC's failure to require certain disclosures was “sufficiently concrete and specific” to satisfy injury requirement for standing).

⁸⁸ See *FDA v. All. for Hippocratic Med.*, 144 S. Ct. 1540, 1556 (2024).

⁸⁹ See *id.* at 1556-57.

⁹⁰ See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562-63 (1992) (“Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing.”); *Allen v. Wright*, 468 U.S. 737, 756 (1984) (recognizing denial of opportunity to attend desegregated public schools resulting from white flight as “one of the most serious injuries” recognized by U.S. legal system).

⁹¹ 141 S. Ct. 2190, 2210-12 (2021) (rejecting standing for persons whose legal rights under the Fair Credit Reporting Act had been violated, but who had not experienced any “actual” injury).

⁹² 141 S. Ct. 792, 801 (2021) (holding plaintiffs' entitlement for nominal damages for denial of First Amendment rights made case justiciable under Article III).

⁹³ Compare *TransUnion*, 141 S. Ct. at 2213 (rejecting standing based on “bare procedural violations[s] [of the plaintiffs' legal rights] divorced from any concrete harm” (first alternation in original) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016))), and *Uzuegbunam*, 141 S. Ct. at 804 (Roberts, C.J., dissenting) (“[A]n award [of nominal damages] represents a judicial determination that the plaintiffs' interpretation of the law is correct—nothing more.”), with *TransUnion*, 141 S. Ct. at 2218 (Thomas, J., dissenting) (“The principle that the violation of an individual right gives rise to an actionable harm was widespread at the founding, in early American history, and in many modern cases.”), and *Uzuegbunam*, 141 S. Ct. at 798 (majority opinion) (stating common law courts “reasoned that *every* legal injury necessarily causes damage, so they awarded nominal damages absent evidence of other damages”).

a violation of constitutional rights, without more, *would* suffice for standing.⁹⁴ Some scholars have thus thought that *constitutional* rights must be a separate category where legal injury suffices, and some statements from the Court might be read to support that assertion.⁹⁵ But the Court has also squarely held that “there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right.”⁹⁶ The better distinction is that the constitutional rights cases *TransUnion* cited involved rights to engage in certain activities that the plaintiffs asserted were lawfully protected.⁹⁷ The prevention of lawful activity, as in *Friends of the Earth*, constitutes injury in fact.⁹⁸

The Court’s private litigation decision in *MedImmune, Inc. v. Genentech, Inc.*⁹⁹ is also helpful on this point. That case involved a patent dispute between two biotech companies. MedImmune had signed a license agreement to use Genentech’s patents, but it later concluded that a key patent covered by the license was invalid. When Genentech threatened to sue for infringement, MedImmune elected to pay the royalties to avoid the potential for treble-damages liability under the patent laws. It then sued Genentech for a declaratory judgment that the patent was invalid and unenforceable.¹⁰⁰ The district court dismissed the suit, however, based on a Federal Circuit decision holding “that a patent licensee in good standing cannot establish an Article III case or controversy with regard to validity, enforceability, or scope of the patent because the license agreement ‘obliterate[s] any reasonable apprehension’ that the licensee will be sued for infringement.”¹⁰¹ Under the Federal Circuit’s approach,

⁹⁴ See *TransUnion*, 141 S. Ct. at 2204 (citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (first citing *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (abridgement of free speech); and then citing *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (infringement of free exercise))) (acknowledging “traditional harm [sufficient for Article III standing] may also include harms specified by the Constitution itself”); *Uzuegbunam*, 141 S. Ct. at 800 (emphasizing importance of nominal damages to vindicate rights “such as due process or voting rights, that were not readily reducible to monetary valuation”).

⁹⁵ See Cass R. Sunstein, *Injury in Fact, Transformed*, 2021 SUP. CT. REV. 349, 365-66 (“[T]raditional harms would ‘include harms specified by the Constitution itself’ . . .” (quoting *TransUnion*, 141 S. Ct. at 2204)).

⁹⁶ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576 (1992) (rejecting arguments that it might treat standing to challenge violations of constitutionally prescribed procedures differently from violations of statutory ones).

⁹⁷ See *TransUnion*, 141 S. Ct. at 2204. *Lukumi* involved a pre-enforcement challenge to an animal cruelty law prohibiting religious rituals in which plaintiffs wished to engage. See *Lukumi*, 508 U.S. at 526-28. *Summum* arose from denial of a permit to erect a religious monument in a public park. See *Summum*, 555 U.S. at 465-66. Neither involved any “enforcement-based” harm to the plaintiff besides promulgation or a measure or decision prohibiting what the plaintiffs wished to do.

⁹⁸ See Bradley & Young, *supra* note 7, at 1597-98.

⁹⁹ 549 U.S. 118 (2007).

¹⁰⁰ *Id.* at 121-22.

¹⁰¹ *Id.* (alteration in original) (quoting *Gen-Probe Inc. v. Vysis, Inc.*, 359 F.3d 1376, 1381 (Fed. Cir. 2004)).

district courts hearing declaratory judgment actions assessed the actual likelihood of a suit to enforce the patent under the “totality of the circumstances” through “a pragmatic inquiry that focuses on not only the conduct of the patentee but also the conduct of the putative infringer.”¹⁰²

The Supreme Court rejected the Federal Circuit’s view.¹⁰³ The case makes clear that questions about *public* enforcement of the law being necessary to standing apply to *private* enforcement as well.¹⁰⁴ In this case, the relevant “law” was a federal patent that MedImmune believed to be invalid. If that law were to be enforced, it would be by the patentholder, Genentech—a private entity. The Federal Circuit’s rule thus tracked *Poe* in holding that if enforcement would never occur, there was no justiciable case or controversy.¹⁰⁵ As Justice Scalia explained, by continuing to pay royalties, MedImmune made “what would otherwise be an imminent threat at least remote, if not nonexistent. As long as those payments are made, there is no risk that respondents will seek to enjoin petitioner’s sales. Petitioner’s own acts, in other words, eliminate the imminent threat of harm.”¹⁰⁶

The Court analogized this situation to a long line of public law cases, in which plaintiffs wishing to engage in constitutionally protected activity were allowed to challenge a law without first violating it, even though “the plaintiff had eliminated the imminent threat of harm by simply not doing what he claimed the right to do.”¹⁰⁷ In *Steffel v. Thompson*,¹⁰⁸ for example, the plaintiff wished to distribute handbills protesting the Vietnam War, but he desisted after being warned by police that a state statute prohibited that activity. Similarly, in *Terrace v. Thompson*,¹⁰⁹ state law forbade renting the plaintiff’s farm to a noncitizen, on pain of forfeiture, fines, and other penalties. Both cases found the plaintiffs’ constitutional challenge to these laws justiciable, notwithstanding the certainty that the plaintiffs would escape prosecution so long as they continued to observe the respective laws.¹¹⁰

¹⁰² *Gen-Probe*, 359 F.3d at 1379-80.

¹⁰³ The Court decided *MedImmune* under the Declaratory Judgment Act, 28 U.S.C. § 2201, but it made clear in its opening sentence that it was construing “Article III’s limitation of federal courts’ jurisdiction to ‘Cases’ and ‘Controversies,’ reflected in the ‘actual controversy’ requirement of the Declaratory Judgment Act.” See *MedImmune*, 549 U.S. at 120-21.

¹⁰⁴ *Id.* at 134 n.12 (“Article III does not favor litigants challenging threatened *government* enforcement action over litigants challenging threatened *private* enforcement action.”).

¹⁰⁵ *Id.* at 128-29.

¹⁰⁶ *Id.* at 128.

¹⁰⁷ *Id.* at 129 (first citing *Terrace v. Thompson*, 263 U.S. 197, 216 (1923); then citing *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926); then citing *Ex parte Young*, 209 U.S. 123, 147-48 (1908); and then citing *Steffel v. Thompson*, 415 U.S. 452, 458-60 (1974)).

¹⁰⁸ 415 U.S. at 456.

¹⁰⁹ 263 U.S. at 212-13.

¹¹⁰ *Id.* at 215-16; *Steffel*, 415 U.S. at 459.

In *MedImmune*, as well as *Steffel* and *Terrace*, there was little doubt the laws *would* be enforced if they were violated.¹¹¹ In that sense, they were unlike *Poe*. But those cases did not rely on some future enforcement injury. All agreed in *MedImmune* that the plaintiff could have staved off enforcement indefinitely through compliance with the license agreement.¹¹² The injury was that “the threat-eliminating behavior was effectively coerced.” The law as it stood told *MedImmune* that it *must* do something (pay royalties pursuant to the license) that it thought it had a legal right not to do, and that was injury enough.¹¹³ Likewise, Mr. Steffel was able to avoid all threat of sanctions simply by keeping his anti-war leaflets at home; his injury was that the law compelled him not to exercise his right to free speech.¹¹⁴ The question is whether the plaintiff’s standing in such cases turns on the likelihood of some follow-on enforcement action if the plaintiff chooses not to observe that legal obligation.

The view that plaintiffs lack cognizable injury unless their actions are required not just by legal obligation but by the threat of enforcement sanctions raises two principal difficulties. The first is that, by assuming that the only relevant harms stem from enforcement, the uncertain enforcement doctrine converts a relatively straightforward legal question (Does the law prevent/require activity that the plaintiff wishes to engage in/avoid?) into a probabilistic one (How likely is the government to enforce this law against the plaintiff?).¹¹⁵ How are courts to determine how likely enforcement actions actually are? Enforcement policies turn on a host of variables, including political choices about priorities and resource allocation, or unexpected events like natural disasters or crime surges. They vary from jurisdiction to jurisdiction and can change over time. And surely representations that enforcement is unlikely in one case cannot bind the executive in future ones.¹¹⁶

More fundamentally, how are courts to determine how certain enforcement must be to satisfy Article III? The Constitution specifies no probability thresholds for standing; any number of thresholds might be functionally plausible, but none can plausibly be traced to the “case or controversy” or “judicial power” language in the Judicial Article.¹¹⁷ Most of the confusion in

¹¹¹ See *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) (acknowledging defendant’s letter to plaintiff as a threat to file suit).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See *Steffel*, 415 U.S. at 456.

¹¹⁵ Another question—“How reasonable is the plaintiff’s *fear* of enforcement?”—is likely to collapse into the same inquiry.

¹¹⁶ If the executive could bind itself not to enforce the law, that would be a *de facto* repeal—thus invading the province of the legislature and possibly violating the Executive’s obligation to “take Care that the Laws be faithfully executed.” U.S. CONST. art. II, § 3, cl. 5.

¹¹⁷ See *Bradley & Young*, *supra* note 7, at 1574-75 (making similar point about courts’ attempts to assess probability of injury in general).

this area of the law stems from looking for injury in the wrong place. “No answer,” as Alexander Bickel said, “is what the wrong question begets.”¹¹⁸

2. The Good, the Bad, and the Puzzled

Oliver Wendell Holmes famously argued in *The Path of the Law* that “[i]f you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict.”¹¹⁹ This is basically the view that the Supreme Court took in *Poe*: Bad people want to know whether, if they use contraceptives, the police will arrest them and throw them in prison or impose a fine. And if the answer is, “not likely,” then the bad person sustains no injury from the law’s existence because, absent sanctions, they will not refrain from the illegal behavior.¹²⁰

For Justice Holmes, legal rules themselves are merely predictions about likelihood of enforcement. As he put it, “a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this way or that way by judgment of the court;—and so of a legal right.”¹²¹ To say that the probability of enforcement is *all* that the law amounts to seems like an extreme way of putting the central problem of this Article. But if such statements seem extreme, it must be because we are used to thinking that a statute or other legal rule creating rights or obligations has some force independent of the sanctions that may follow if the rule is broken. Whether that is true—or whether our law of standing should *take* it to be true—is the central question of this subsection.

Justice Holmes’s “bad man” harkens back, in turn, to early positivist theories of law.¹²² The threat of sanctions lies at the heart of John Austin’s early positivist

¹¹⁸ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 103 (1962).

¹¹⁹ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897); see also JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 21 (Wilfrid E. Rumble ed., 1995) (1832) (defining commands, including legal commands, as “desire” backed by “the power and purpose of the party commanding to inflict an evil or pain in case the desire be disregarded”).

¹²⁰ See discussion *supra* accompanying notes 35-47; see also, e.g., *Navegar, Inc. v. United States*, 103 F.3d 994, 1001 (D.C. Cir. 1997) (Wald, J.) (“It is, in sum, this threat of prosecution which creates the ‘injury in fact’ required under standing doctrine, for the threat forces appellants to forego the manufacture and transfer of the weapons specified in the Act.”).

¹²¹ Holmes, *supra* note 119, at 458; see also Mark Strasser, *Holmes on Law and Morality*, 44 ALTA. L. REV. 377, 387 (2006) (observing “the bad man’s view of law . . . primarily focuses on knowledge of the law as a means of understanding and predicting the ‘material consequences’ of particular courses of conduct” (footnotes omitted) (quoting Holmes, *supra* note 119, at 459)).

¹²² See FREDERICK SCHAUER, *THE FORCE OF LAW* 21 (2015); Wilfrid E. Rumble, *The Legal Positivism of John Austin and the Realist Movement in American Jurisprudence*, 66 CORN. L. REV. 986, 1011-12 (1981) (tracing Holmes’s “bad man” conception to Austin’s views); see also MARK DEWOLFE HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS 1841-*

theory, which held that laws are commands issued by the sovereign.¹²³ The distinguishing feature of such commands from other expressions of desire is “the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded.”¹²⁴ As one scholar observes, “Austin’s argument implies that the possibility of incurring a sanction is a necessary condition for the existence of law.”¹²⁵ This aspect of Austin’s thought influenced not only Justice Holmes but also the later legal realists.¹²⁶ And although Austin seems to have thought that even the remote possibility of incurring a sanction was sufficient to create a legal obligation,¹²⁷ the realists suggested “that the existence of legal duties or rights depends upon the probability of incurring sanctions.”¹²⁸

As many other scholars have pointed out, this is an incomplete account of why people follow the law and how they respond to legal prohibitions. H.L.A. Hart famously argued that law has force from an “internal point of view” by providing normative reasons for acting, or refraining from acting, wholly apart from possible sanctions that might be imposed in response to illegal conduct.¹²⁹ Following Hart, Scott Shapiro explains that “[t]he good citizen . . . takes the obligations imposed by the law as providing a new moral reason to comply. The rules are taken as reasons quite apart from the sanctions that would attend their violation or the moral considerations that independently apply to the actions required.”¹³⁰ On this view, the Poes might have alleged that they needed to use contraception in order to avoid certain serious health risks, but that they were constrained by the laws of Connecticut not to do so.¹³¹ If the Poes were the law-

1870, at 194 (1957) (“The Austinian strain in Holmes’s thought was vigorous and persistent.”).

¹²³ See AUSTIN, *supra* note 119, at 18-24; see also SCOTT J. SHAPIRO, LEGALITY 52-56 (2011) (describing Austin’s theory).

¹²⁴ AUSTIN, *supra* note 119, at 21.

¹²⁵ Rumble, *supra* note 122, at 1011.

¹²⁶ See *id.* at 1011-14; SCHAUER, *supra* note 122, at 21.

¹²⁷ See AUSTIN, *supra* note 119, at 23 (“[W]here there is the smallest chance of incurring the smallest evil, the expression of a wish amounts to a command, and therefore, imposes a duty.”).

¹²⁸ Rumble, *supra* note 122, at 1012-13.

¹²⁹ See H.L.A. HART, THE CONCEPT OF LAW 86-88 (1961). See generally Scott J. Shapiro, *What Is the Internal Point of View?*, 75 *FORDHAM L. REV.* 1157 (2006) (developing Hart’s argument).

¹³⁰ SHAPIRO, *supra* note 123, at 70.

¹³¹ It appears that is *not* what they actually argued. Justice Frankfurter purported to reject the plaintiffs’ claim “[i]nsofar as appellants seek to justify the exercise of our declaratory power by the threat of prosecution,” and he noted that the plaintiffs had failed to allege “in terms” that “Ullman threatens to prosecute them” in particular. *Poe v. Ullman*, 367 U.S. 497, 501, 507 (1961). But *Poe* has never been understood as turning on a pleading error. And the Court made clear “that the mere existence of a state penal statute would constitute insufficient grounds to support a federal court’s adjudication of its constitutionality in proceedings brought against the State’s prosecuting officials if real threat of enforcement is wanting.” *Id.* at 507.

abiding sort—*good* people, not Holmesian bad ones—then the state law would prevent them from engaging in activity that they viewed as both medically essential and constitutionally protected, whether or not the state ever stepped in to prosecute violations.

People wishing to comply with the law may nonetheless be unsure what their legal obligations actually are. This is particularly true when statutes on the books may conflict with constitutional rights, state laws are arguably preempted by federal laws, or regulatory measures may stretch beyond their statutory mandates. Professor Hart thus memorably characterized the law-abiding person as not simply “good” but “puzzled”; rejecting Holmes’s “bad man,” Hart asked, “[w]hy should not law be equally if not more concerned with the ‘puzzled man’ or ‘ignorant man’ who is willing to do what is required, if only he can be told what it is?”¹³² Taking the Poes as puzzled people, their injury would not be simply that they could not exercise their alleged right to use contraception, but also that they were forced to live in a state of legal uncertainty regarding their right to protect their health.¹³³ In this, they were like the *MedImmune* plaintiffs, adversely impacted by a legal requirement but prevented from facing any enforcement action by their own compliance with the law.¹³⁴ But whether we think of the Poes’ injury as arising from compliance with the statute or from uncertainty about whether compliance was required, their injury would stem from the mere existence of the Connecticut statute.

This is not to say that uncertainty about the law is itself injury in fact. As a legal academic, there are any number of legal questions I have wondered about for years, but that does not give me standing to sue to have them answered. To establish standing, uncertainty must produce some sort of cost,¹³⁵ or plausibly

¹³² HART, *supra* note 129, at 39; *see also* Shapiro, *supra* note 129, at 1159 (“The law not only directs officials to punish those who do not comply with the rules, but it also provides guidance for those who want to live up to their obligations.”); Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1126-28 (2013) (discussing how legal rules can constrain even in absence of formal enforcement).

¹³³ *See Poe*, 367 U.S. at 536 (Harlan, J., dissenting) (insisting Poes’ “enjoyment of [their] privacy is . . . substantially impinged upon, when they are told that if they use contraceptives . . . the only thing which stands between them and being forced to render criminal account of their marital privacy is the whim of the prosecutor”). The Court’s vagueness jurisprudence strongly suggests that inability to know one’s legal obligations can be an injury, so long as they concern activities in which the plaintiff is actually engaged or about to engage. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 58-59 (1999) (plurality opinion) (“[T]he purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law.”).

¹³⁴ *See supra* text accompanying notes 99-102 (discussing *MedImmune*).

¹³⁵ *See, e.g., Aetna Life Ins. v. Haworth*, 300 U.S. 227, 239 (1937) (upholding jurisdiction over an insurer’s suit for a declaratory judgment that the policy was no longer in force, and noting that absent such a determination the insurer would be required to maintain significant financial reserves).

cause the plaintiff to do or refrain from doing something.¹³⁶ But given the presumption that laws are constitutional in our legal system,¹³⁷ a plaintiff's wish to be sure that she has a valid rights claim before engaging in protected activity that a law prohibits should generally be considered reasonable.

The Poes' case actually was even more compelling, even from a perspective requiring some injury beyond the plaintiff's felt legal compulsion not to engage in protected activity. The Poes alleged that they wanted to use contraception, and they had sought medical advice from a third party—their physician, Dr. Buxton—to do so. Buxton in turn said that he was deterred from giving advice by his fear of prosecution under the state's law.¹³⁸ Surely the inability to obtain medical advice is injury in fact under any reading of the Court's cases.¹³⁹ Nor is that injury speculative in *Poe*; the denial of advice had already occurred. One might, I suppose, say that the likelihood of enforcement was so low that it was unreasonable for Dr. Buxton to be deterred—but that seems like a strange argument for the State to make.¹⁴⁰ And what if Buxton had alleged simply that he was a law-abiding sort of doctor, and he was unwilling to give advice that would violate state law?¹⁴¹ It is one thing to say that people generally disregard unenforced laws, but quite another to insist that people *should not* feel obliged to voluntarily comply with the law.

Two caveats are worth noting. First, the argument here is not that the mere existence of a law is inherently injurious, allowing plaintiffs to dispense with the need to show some sort of actual injury to themselves. The injury is that compliance with the law may require plaintiffs to do or refrain from doing something against their wishes. If plaintiffs have not actually altered their behavior in compliance, and have no plans to do so, then they would have no

¹³⁶ See, e.g., *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 954-55 (1984) (finding that a professional fundraiser had standing to challenge a limit on use of charitable contributions to pay fees because the limit had deterred charities from hiring the fundraiser).

¹³⁷ See, e.g., *S.A. Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 61 (1973) (Stewart, J., concurring) (stating that “the basic presumption of the constitutional validity of a duly enacted state or federal law” is “one of the first principles of constitutional adjudication”).

¹³⁸ See *Poe*, 367 U.S. at 498-500. As the Court pointed out, the Connecticut statute “outlaw[ed] only the use of contraceptive materials,” not sale or “the giving of information concerning their use.” *Id.* at 499 n.2 (emphasis added) (citing CONN. GEN. STAT. REV. § 53-32 (1958) (repealed 1971)). But Justice Frankfurter acknowledged that Dr. Buxton could have been prosecuted as an accessory to violation of the use statute. See *id.* (citing CONN. GEN. STAT. REV. § 54-196 (1958) (repealed 1971)).

¹³⁹ Cf. *FEC v. Akins*, 524 U.S. 11, 21 (1998) (resting standing on respondents' inability to obtain information about campaign-related contributions, a much flimsier informational injury).

¹⁴⁰ All governments, after all, have a strong interest in voluntary compliance with the law.

¹⁴¹ The case came up through the Connecticut courts at the demurrer stage—the equivalent of a motion to dismiss. *Poe*, 367 U.S. at 500. So it should not have been open to the state to challenge Dr. Buxton's assertion as to why he had not given the requested advice. See *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (“When there are well-pleaded factual allegations, a court should assume their veracity . . .”).

injury on this theory.¹⁴² Second, some laws employ conditions precedent to their requirements bearing on particular individuals. A New Hampshire statute generally authorizing speech restrictions outside abortion clinics, for example, created no legal obligations constraining protestors until the clinics took certain statutorily prescribed actions to designate “buffer zones.” Unsurprisingly, the First Circuit held that protestors lacked standing to challenge the law when they could not establish that any clinic in the state had yet designated such a zone.¹⁴³ Such cases seem closely analogous to those barring challenges to a rule that is not yet “final.”¹⁴⁴ A more difficult problem arises when a state statute speaks in general terms, and it is not clear whether the plaintiff’s conduct is covered.¹⁴⁵ As I discuss in Section I.C, that situation is better handled under the ripeness doctrine.¹⁴⁶

Professor Hart’s argument for the internal force of legal rules seems broadly accepted in jurisprudential circles.¹⁴⁷ Similarly, social psychologists empirically investigating why people comply with the law have found that many comply out of deference to the law’s legitimacy and not just because they fear enforcement sanctions.¹⁴⁸ Compliance may occur either because some people morally agree

¹⁴² See, e.g., *Reddy v. Foster*, 845 F.3d 493, 503 (1st Cir. 2017) (holding plaintiffs lacked standing to challenge New Hampshire law permitting speech restrictions outside abortion clinics, in part because they had not alleged that Act “has forced any sidewalk counselor or protestor to refrain from any expressive activities”). They might still be injured by the collateral consequences of some unenforced laws discussed in the next subsection. See, e.g., *Canna Provisions, Inc. v. Garland*, 738 F. Supp. 3d 111, 119-21 (D. Mass. 2024) (holding marijuana businesses operating legally under state law had standing to challenge federal marijuana restrictions based on allegations that banks, credit card companies, and other private actors refused to deal with plaintiffs because they were violating federal prohibition).

¹⁴³ See *Reddy*, 845 F.3d at 502. If one may be allowed a quibble, the Court of Appeals described this problem as failure to satisfy a “precondition to enforcement.” *Id.* It certainly was that, but if enforcement is not always necessary to injury, then the critical point is that designation of a buffer zone was also a precondition to the imposition of any legal obligations whatsoever on the plaintiffs.

¹⁴⁴ See, e.g., *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

¹⁴⁵ See, e.g., *Steffel v. Thompson*, 415 U.S. 452, 454-56 (1974) (involving challenge to general state criminal trespass statute that plaintiff alleged would be applied against him for distributing handbills protesting Vietnam War).

¹⁴⁶ See *infra* text accompanying notes 226-39.

¹⁴⁷ See, e.g., Shapiro, *supra* note 129, at 1170 (summarizing reasons why “[s]anction-centered theories must be rejected”); John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 FORDHAM L. REV. 1563, 1591 (2006) (arguing that Hart’s recognition of duties distinct from likelihood of sanction provides superior frame for approaching tort law); see also SCHAUER, *supra* note 122, at 33 (“Legal philosophers since Hart have tended to accept [his] account of how law can create obligations . . .”).

¹⁴⁸ See TOM R. TYLER, WHY PEOPLE OBEY THE LAW 59, 62 (2006) (detailing evidence that perceived legitimacy has an “independent influence on compliance” with laws); Andrew V. Papachristos, Tracey L. Meares & Jeffrey Fagan, *Why Do Criminals Obey the Law? The Influence of Legitimacy and Social Networks on Active Gun Offenders*, 102 J. CRIM. L. &

with the substance of particular laws or because people accept the moral legitimacy of the law *in general*—whether or not they also agree with a particular law on the merits.¹⁴⁹ The latter sort of compliance is more important for my present purpose, because plaintiffs trying to get into federal court to challenge a particular law will generally not be fans of that law’s substance; they may, however, feel constrained to comply by their general respect for *all* laws’ legitimacy.

The argument for law’s sanction-independent force has its critics, however. The late Frederick Schauer, for example, wrote a characteristically thoughtful and cogently argued book suggesting that legal studies have over-emphasized the internal point of view to the point of neglecting coercion’s pervasive and valuable role.¹⁵⁰ Collecting empirical evidence, he concluded “it is far from clear that sanction-independent obedience to law, whether on the part of officials or of ordinary citizens, is nearly as common as many theorists and others believe.”¹⁵¹ Professor Schauer contended that most voluntary compliance stems from moral or prudential agreement with particular laws; he found, however, “substantial support for the hypothesis that unenforced law that does not track people’s law-independent preferences and judgments (including moral judgments) is often ineffective.”¹⁵²

What does Professor Schauer’s critique mean for our question, which is whether courts should recognize law as capable of inspiring injurious compliance even if that law is not enforced? First, Schauer acknowledged that the force of law is logically distinct from the existence of coercive sanctions, and he does not deny that some people, at some times and places, obey the law simply out of a sense of internal obligation.¹⁵³ Schauer’s project was to coax philosophers of law to consider external coercion as an important motivating factor for compliance alongside internal compulsion, whether or not coercion is logically essential to the existence of law,¹⁵⁴ and he was probably right about that. My project here is different, however. The question for standing purposes is whether it is either conceptually impossible that plaintiffs would alter their

CRIMINOLOGY 397, 399-400 (2012) (finding significant voluntary compliance with the law even among criminals).

¹⁴⁹ See TYLER, *supra* note 148, at 25.

¹⁵⁰ See generally SCHAUER, *supra* note 122.

¹⁵¹ *Id.* at 6; see also RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 223 (1990) (noting that Holmes’s “bad man” view “overlooks the people who obey the law *because* it is the law,” but suggesting that there “may not be many ‘good men’ in the specific sense of people who comply with laws merely out of respect for law”).

¹⁵² SCHAUER, *supra* note 122, at 65.

¹⁵³ See *id.* at 41 (“[I]t is a mistake to ignore coercion-free internalization entirely.”); see also Shapiro, *supra* note 129, at 1165-67 (arguing that the internal point of view is necessary to render legal reasoning intelligible).

¹⁵⁴ See SCHAUER, *supra* note 122, at 40-41 (“[I]f coercive law is the dominant instantiation of law as it is experienced, the fact that some law, even some important law, is noncoercive should be recognized but should not distort an inquiry into the nature of the social phenomenon that is law.”).

behavior to conform to legal requirements even in the absence of enforcement, or so unlikely that a court could appropriately discount allegations to that effect.¹⁵⁵

The question in a standing case is whether the individual plaintiff can point to a concrete and particularized injury traceable to the law they challenge. Although many people obey the law either because of a threat of sanctions or out of moral agreement with the law's substance, the internal compulsion of legality plays a particularly important role in providing a reason for "moral outliers" to comply.¹⁵⁶ General theory and policy discussions of the law should recognize when outliers are outliers, but standing law needs to preserve the ability of individuals to challenge laws even if their opposition to those laws is idiosyncratic. As Chief Justice Marshall said in *Marbury v. Madison*,¹⁵⁷ "[t]he province of the court is, solely, to decide on the rights of *individuals*."¹⁵⁸ Plaintiffs arguing that an unenforced law has nonetheless compelled them to engage in or forgo conduct contrary to their legal rights should not be tossed out of court simply because most people might be expected to behave or feel differently.

Framing standing rules based on skepticism that plaintiffs really comply with the law absent sanctions likewise distorts the ordinary rules of procedure. If Dr. Buxton had argued in *Poe* that he was compelled by his respect for the law not to advise his patients on how to use contraceptives, the state might have questioned whether that was really his motivation—or whether he was simply trying to set up a test case in court.¹⁵⁹ Under normal rules of pleading and

¹⁵⁵ Cf. *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974) (denying standing to challenge operation of the criminal justice system, because "[w]e assume that respondents will conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct").

¹⁵⁶ See SCHAUER, *supra* note 122, at 59-61.

¹⁵⁷ 5 U.S. (1 Cranch) 137 (1803).

¹⁵⁸ *Id.* at 170 (emphasis added).

¹⁵⁹ The Court rejected an argument that purposefully incurring an injury in order to facilitate a test case warranted denying the plaintiff standing in *FEC v. Cruz*, 142 S. Ct. 1638 (2022). Federal election law barred campaigns from using more than \$250,000 of funds raised after election day to repay a candidate's personal loans to the campaign. *Id.* at 1645-46 (first citing 52 U.S.C. § 30116(j); and then citing 11 C.F.R. § 116.12(a)). Senator Ted Cruz knowingly structured his campaign finances in such a way as to trigger this prohibition, resulting in a \$10,000 shortfall in the campaign's inability to repay an earlier loan from Cruz. *Id.* at 1646. The parties agreed that this shortfall amounted to injury in fact, but the FEC argued that it was not traceable to the statute because Cruz had willingly incurred it. *Id.* at 1646-47. The Court said that "[w]e have never recognized a rule of this kind under Article III." *Id.* at 1647. Moreover, because Cruz had complied with the statute, there was no prospect of any enforcement action or sanction under the law; as in *MedImmune*, the plaintiff's injury resulted from his voluntary compliance with the law. *Id.*; see *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007). There was, however, no suggestion that the FEC would not have enforced the prohibition if Cruz had violated it.

proof—which generally govern the issue of standing like everything else¹⁶⁰—Buxton’s allegations concerning his motives would have to be taken as true at the motion to dismiss (or demurrer) stage, and a factual dispute about his state of mind would ordinarily get him past summary judgment as well. The Court might treat the question as whether Buxton’s injury was *traceable* to the challenged law (rather than his own decision to comply), but the Court has generally discounted causation allegations as unduly “speculative” only when plaintiffs are not directly subject to the regulations they challenge and their traceability or redressability arguments involve probabilistic actions by third parties not before the court.¹⁶¹

The argument so far is that, from a descriptive standpoint, courts cannot rule out the possibility that some people comply out of respect for the law even when enforcement is highly unlikely—and that ought to be sufficient to allow plaintiffs alleging that they have done so to establish standing. But there are also important normative reasons not to construct standing doctrine around the assumption that only sanctions matter. The law depends heavily on voluntary compliance. As Scott Shapiro has observed, sanctions “are terribly expensive. . . . Indeed, a regime whose only means of persuasion was force would quickly bankrupt itself.”¹⁶² In any number of situations, from filing income taxes to observing traffic laws to compliance with anti-pollution regulations, the likelihood of detecting noncompliance may be low and sanctions may be insufficiently severe to deter violations. Certainly the public has an interest in fostering a culture of legitimacy-based compliance to the extent that it can.¹⁶³

Perhaps what the courts say in standing cases has little impact on efforts to build such a culture. But it cannot promote the rule of law for the Supreme Court to say publicly that people should simply ignore laws on the books like Connecticut’s contraception law or the ACA’s individual mandate to buy health

¹⁶⁰ See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (“When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue.”).

¹⁶¹ Compare, e.g., *Cruz*, 596 U.S. at 296-97 (upholding standing of party subject to regulation despite government’s argument as to motive), with *FDA v. All. for Hippocratic Med.*, 144 S. Ct. 1540, 1562-63 (2024) (rejecting on traceability grounds anti-abortion doctors’ argument that they would be indirectly injured by loosening regulation of abortion pill), and *Warth v. Seldin*, 422 U.S. 490, 504-07 (1975) (rejecting standing for persons seeking to buy moderately priced housing to challenge allegedly exclusionary zoning laws regulating what sort of properties can be built).

¹⁶² SHAPIRO, *supra* note 123, at 71.

¹⁶³ See, e.g., *Mobil Oil Corp. v. Att’y Gen. of Va.*, 940 F.2d 73, 75 (4th Cir. 1991) (“Public policy should encourage a person aggrieved by laws he considers unconstitutional to seek a declaratory judgment against the arm of the state entrusted with the state’s enforcement power, all the while complying with the challenged law, rather than to deliberately break the law and take his chances in the ensuing suit or prosecution.”).

insurance. If we want people to voluntarily comply with the law without always depending on threats of sanctions, then the law should not treat such compliance as fanciful, naïve, or inconsequential.

3. Collateral Injury from Unenforced Laws

Even if we accept that sanctions or the threat of sanctions are necessary for standing, current doctrine tends to ignore a wide range of possible sanctions and injuries that laws may inflict even if the government never brings a formal enforcement action. Sometimes people may obey a law that the government does not enforce because they fear other sorts of sanctions, such as peer disapproval or collateral consequences imposed by the government. And even if people do *not* obey an unenforced law, such laws may nonetheless injure them. Either way, such persons may well have sufficient injury in fact to satisfy Article III.

Prior to the Court's decision in *Lawrence v. Texas*,¹⁶⁴ for example, anti-sodomy laws had largely escaped judicial scrutiny on the ground that they were seldom enforced.¹⁶⁵ Christopher Leslie has persuasively argued, however, that "the very existence of sodomy laws creat[ed] a criminal class of gay men and lesbians, who [were] consequently targeted for violence, harassment, and discrimination because of their criminal status."¹⁶⁶ Such unenforced laws may create a pervasive stigmatic harm, an injury that the Court has acknowledged as sufficient for standing in other contexts.¹⁶⁷ That sort of stigma in turn may motivate a wide range of collateral legal consequences—for example, in employment or family law situations.¹⁶⁸ Even laws that do not single out a

¹⁶⁴ 539 U.S. 558 (2003) (invalidating Texas's anti-sodomy statute on privacy grounds).

¹⁶⁵ See Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 108 (2000). As Professor Leslie explains, the nonenforcement of sodomy laws was always something of a myth. *See id.* at 108 n.31 (noting sodomy laws were: (1) enforced against conduct that was public, forcible, or involved a minor; (2) occasionally *were* invoked against private, consensual adult conduct; (3) were often indicted and used for leverage in plea negotiations; and finally (4) were frequently enforced by government officials other than criminal prosecutors and by private action). Courts dismissing challenges to other offenses on nonenforcement grounds typically do not stop to inquire whether the laws in question may be enforced in similar ways.

¹⁶⁶ *Id.* at 103; *see also* *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 532-33, 536 (1925) (rejecting defendant's claim of prematurity based on adverse effect of mere enactment of state statute barring private schools on those schools' enrollments, before statute had even gone into effect).

¹⁶⁷ See Leslie, *supra* note 165, at 115-16 (identifying negative impacts of "criminal" designation); *Allen v. Wright*, 468 U.S. 737, 755 (1984) ("There can be no doubt that this sort of noneconomic injury [racial stigma] is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing."). *Allen* made clear, however, that stigma will often count only in the context of direct discrimination against the individual plaintiff. *See id.* This requirement would make it difficult, in some cases, to challenge unenforced laws based on this injury alone.

¹⁶⁸ See Leslie, *supra* note 165, at 136-52 (detailing types of discrimination that have occurred upon criminalization); Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 145 (1988) ("By branding all gays as

particular class of persons may expose violators to a wide range of “social sanctions injuring one’s reputation and hurting one’s livelihood.”¹⁶⁹

The government may also impose collateral consequences for lawbreaking, even if particular laws are not directly enforced. Consider, for example, marijuana regulation in states that have eliminated their state-law prohibitions on the drug’s use. The federal statute barring marijuana use remains in force, but federal enforcement is often politically unpopular and federal enforcement resources are so limited that federal arrests are extremely unlikely.¹⁷⁰ The Obama Administration’s DOJ even went so far as to largely disavow any enforcement in states where no state-law prohibition exists.¹⁷¹ But the DOJ memorandum illustrates several potential limits on government policies of nonenforcement. First, the memorandum was commendably nuanced in identifying different situations (such as distribution to minors) where enforcement might remain appropriate. These nuances, however, may deter more broadly by rendering the scope of nonenforcement ambiguous. Second, the memorandum spoke only to criminal enforcement; it did *not* address other ways in which the federal drug laws may bite. Marijuana businesses may have trouble securing financing because federal banking law prohibits financial transactions involving illegal activity; federal tax laws may impose additional consequences; and state ethics rules may forbid lawyers to counsel clients engaging in activities that remain illegal under federal law.¹⁷² Third, the DOJ memorandum said nothing about suspending federal agency regulations imposing consequences on agency employees using illegal drugs.¹⁷³

criminals, the sodomy prohibition provides a justification for other forms of discrimination . . . in such areas as employment, professional licensing, free speech, immigration, adoption, and child custody.”).

¹⁶⁹ Jason R. LaFond, *Injury-in-Fact, Justice-in-Fiction: Toward a More Realistic Definition of “Injury” in the Context of Unenforced Criminal Laws*, 13 RICH. J.L. & PUB. INT. 1, 11-13 (2009) (discussing social science research into social sanctions resulting from criminalization).

¹⁷⁰ See Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1465 (2009).

¹⁷¹ See Memorandum from James M. Cole, Deputy Att’y Gen., DOJ, on Guidance Regarding Marijuana Enf’t to All U.S. Att’ys 3 (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/3UE7-RP67>].

¹⁷² See Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RES. L. REV. 597, 600-03 (2015); Erwin Chemerinsky, Jolene Forman, Allen Hopper & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 91 (2015).

¹⁷³ See Jory Heckman, *Blunt Truth: No ‘Significant Changes’ for Federal Employees if Biden Administration Reclassifies Marijuana*, FED. NEWS NETWORK (May 1, 2024, at 18:37 ET), <https://federalnewsnetwork.com/hiring-retention/2024/05/blunt-truth-no-significant-changes-for-federal-employees-if-biden-administration-reclassifies-marijuana> [<https://perma.cc/XUX7-LMTC>] (noting continuing broad federal restrictions on marijuana use by federal employees).

Nonenforcement of the criminal law may reflect a change in public attitudes regarding a particular kind of conduct. And over time, the collateral consequences of violating such laws may well ebb in response to the same forces. But as both the gay rights and marijuana examples attest, there may well be a fairly long lag for that change, if it occurs at all. The basic point is twofold: Laws often establish or contribute to social norms that may be enforced informally whether or not the police arrest violators, and statutory prohibitions often have complex interconnections with other bodies of law, triggering legal consequences that violators of nominally unenforced laws may not anticipate. Unenforced laws may thus injure violators in ways other than direct enforcement, and rational persons may choose to observe those laws in order to avoid such consequences—even if they have little reason to fear fines or jail time.

B. *Redressability Without Enforcement*

Even if plaintiffs can have injury in fact whether or not a law is enforced against them, they might nonetheless fail a second constitutional requirement: that the plaintiffs' injury must be redressable by the requested relief. The leading case here is *California v. Texas*, which involved a challenge to the ACA's individual mandate to buy health insurance. The Supreme Court had narrowly sustained that provision in 2012 by construing the mandate as an exercise of the taxing power,¹⁷⁴ but five years later Congress set the amount of the mandate's tax penalty to zero, effective in the 2019 tax year.¹⁷⁵ In 2018, Texas and several other states, as well as two individual plaintiffs, challenged the individual mandate as unconstitutional because it could no longer be defended as a tax. They also argued that the rest of the ACA was not severable from the individual mandate. The plaintiffs sought a declaratory judgment on both these points, as well as injunctive relief barring enforcement of the ACA's remaining requirements.¹⁷⁶

The plaintiffs convinced the district court and the court of appeals,¹⁷⁷ but the Supreme Court dismissed their case for lack of standing. The individual plaintiffs alleged that the law compelled them to buy health insurance. Justice Breyer, writing for the majority, assumed that the plaintiffs' "pocketbook injury satisfies the injury element of Article III standing," but concluded that "the plaintiffs nevertheless fail to satisfy the traceability requirement."¹⁷⁸ That was because "the statutory provision, while it tells them to obtain that coverage, has no means of enforcement. With the penalty zeroed out, the Internal Revenue Service ("IRS") can no longer seek a penalty from those who fail to comply."

¹⁷⁴ Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 567 U.S. 519, 567-68 (2012).

¹⁷⁵ Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017) (codified at 26 U.S.C. § 5000A(c)).

¹⁷⁶ *California v. Texas*, 141 S. Ct. 2104, 2112-13 (2021).

¹⁷⁷ *See id.*

¹⁷⁸ *Id.* at 2113-14.

As a result, “there is no possible Government action that is causally connected to the plaintiffs’ injury—the costs of purchasing health insurance.”¹⁷⁹

One “Government action” comes to mind, of course: the statute itself, which commanded the plaintiffs (and everyone else) to buy health insurance.¹⁸⁰ The plaintiffs followed that law and incurred their injury. People preferring not to buy health insurance might continue to comply with the ACA for a number of reasons, including ignorance that the tax penalty had been repealed, fear that noncompliance might have unanticipated collateral consequences or that their peers would condemn them for failing to live up to their “shared responsibility” obligations,¹⁸¹ or respect for the law’s own normative force.¹⁸² In *California v. Texas*, the individual plaintiffs—John Nantz and Neill Hurley—each filed sworn declarations with the district court explaining why they continued to comply:

I value compliance with my legal obligations, and believe that following the law is the right thing to do. The repeal of the associated health insurance tax penalty did not relieve me of the requirement to purchase health insurance. I continue to maintain minimum essential health insurance coverage because I am obligated to comply with the Affordable Care Act’s individual mandate, even though doing so is a burden to me.¹⁸³

¹⁷⁹ *Id.* at 2114.

¹⁸⁰ See 26 U.S.C. § 5000A(a) (“An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.”); *Nat’l Fed’n of Indep. Bus. v. Sebelius (NFIB)*, 567 U.S. 519, 562 (Roberts, C.J.) (“The most straightforward reading of the mandate is that it commands individuals to purchase insurance.”).

¹⁸¹ The original version of the ACA dubbed the tax penalty a “shared responsibility payment,” see *NFIB*, 567 U.S. at 539, presumably reflecting the idea that all persons have an obligation to join the health insurance risk pool in order to keep premiums down for the less fortunate. See, e.g., Tina Rulli, Ezekiel J. Emanuel & David Wendler, *The Moral Duty to Buy Health Insurance*, 308 JAMA 137, 137 (July 11, 2012) (outlining premium-reducing effect of individual mandate).

¹⁸² See, e.g., CONG. BUDGET OFF., FEDERAL SUBSIDIES FOR HEALTH INSURANCE COVERAGE FOR PEOPLE UNDER AGE 65: 2018 TO 2028, at 20-21 (2018), <https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/53826-healthinsurancecoverage.pdf> (recognizing variety of factors relevant to assessing effect of repealing tax penalty, “including people’s tendency to comply with laws” and “widespread and growing expectations that most people should have coverage”); CHRISTINE EIBNER & SARAH A. NOWAK, COMMONWEALTH FUND, THE EFFECT OF ELIMINATING THE INDIVIDUAL MANDATE PENALTY AND THE ROLE OF BEHAVIORAL FACTORS 11 (2018), https://www.commonwealthfund.org/sites/default/files/2018-07/Eibner_individual_mandate_repeal.pdf [<https://perma.cc/G6DT-P54D>] (noting “lack of consensus” in literature on factors driving response to mandate and elimination of tax penalty, and stating that some studies “have found a taste for compliance that does not vary with the penalty’s size”).

¹⁸³ Declaration of John Nantz at 3, *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018) (No. 4:14-CV-00167). The language of the two declarations is almost identical on this point. See Declaration of Neill Hurley at 3, *Texas v. United States*, 340 F. Supp. 3d 579 (No. 4:14-CV-00167) (omitting “health insurance” descriptor from “tax penalty” as well as “even though doing so is a burden to me”).

Not one of the opinions in the case discussed these declarations or the possibility that people may sometimes obey the law—and thereby incur injury—just because it is the law.¹⁸⁴ Reports of Justice Holmes’s death appear to have been exaggerated, as the current Justices *all* regarded the ACA from the perspective of a bad man.

If the arguments in Section I.A are persuasive, then this aspect of *California v. Texas* was mistaken. But Justice Breyer quickly turned to a second argument that requires separate consideration. Because the individual mandate was unenforceable, no relief that the Court could give would *redress* the plaintiffs’ injury. Plaintiffs had sought both a declaratory judgment that the individual mandate was unconstitutional and injunctive relief barring enforcement of the rest of the ACA, which they claimed was inseverable from the mandate. The Court set the injunction claim to one side on the ground that plaintiffs had not argued that the other parts of the ACA were unconstitutional.¹⁸⁵ It then considered whether a declaratory judgment could redress the plaintiffs’ injury.

At first glance, the clear answer seems to be yes. Mr. Nantz and Mr. Hurley were, in Professor Hart’s terms, “puzzled men.” They were willing to abide by the individual mandate if it were legally valid—whether or not sanctions might be forthcoming for disobedience—but they had a highly plausible doubt whether the law in question exceeded Congress’s constitutional powers. They thus fell into the heartland of Congress’s purpose in enacting the Declaratory Judgment Act,¹⁸⁶ which was to allow parties to resolve legal uncertainty in circumstances when other forms of relief might not be available or have adverse consequences.¹⁸⁷ Declaratory judgments are the remedy of choice for the puzzled person.

¹⁸⁴ See Brief for the Cato Inst. as Amicus Curiae in Support of Respondents Hurley & Nantz at 17-18, *California v. Texas*, 141 S. Ct. 2104 (2021) (No. 19-840) (highlighting these declarations).

¹⁸⁵ *California v. Texas*, 141 S. Ct. at 2115. It is not at all clear this should have mattered. The question is whether such an injunction would have redressed the injury that the individual plaintiffs alleged. That injury was their obligation to buy health insurance under the mandate. Surely an injunction barring enforcement of the ACA in its entirety solely because it was incurably dependent on the mandate would have necessarily entailed a judgment that the mandate was unconstitutional. That requested injunction might have done *more* than necessary to redress the plaintiffs’ injury, but it would certainly have redressed it. Discounting the claim for an injunction barring enforcement of the entire ACA makes sense only if one assumes—as Justice Breyer may have done—an affirmative answer to the most hotly contested merits question, that is, whether the individual mandate was severable from the rest of the ACA. But standing ordinarily depends on the plaintiffs’ claims as pled, whether or not those claims are correct on the merits. See, e.g., *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 800 (2015) (“One must not ‘confus[e] weakness on the merits with absence of Article III standing.’” (alteration in original) (quoting *Davis v. United States*, 564 U.S. 229, 249 n.10 (2011))).

¹⁸⁶ 28 U.S.C. § 2201.

¹⁸⁷ See, e.g., Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1100-01 (2014) (“[M]embers of Congress, the bar, and the academy saw the Declaratory Judgment Act as an effort in law reform. They saw it as extending to federal

Justice Breyer suggests two problems with this argument. The first is that “[r]emedies . . . ‘ordinarily operate with respect to specific parties,’” and there was no appropriate party against whom the declaration could be sought.¹⁸⁸ After all, once the tax penalty was gone the ACA conferred authority on no one at all. Plaintiffs had named the Secretary of Health and Human Services in the complaint, for example, but they could not “enjoin the Secretary . . . because he ha[d] no power to enforce § 5000A(a) against them.”¹⁸⁹ This is a good argument against an injunction, because the standard way to challenge government action is to sue the officer responsible for taking that action for an injunction against carrying it out.¹⁹⁰ That maneuver is necessitated by the need to avoid sovereign immunity, which under the “party of record” rule bars suits against government entities but not against their officers.¹⁹¹ Such suits, as the Court recently made clear, are not available against officers who have no role in enforcing the law that the plaintiff seeks to enjoin—basically because one cannot enjoin someone who has no prospect of harming you.¹⁹²

Fair enough. But what about the claim for a declaratory judgment? Sovereign immunity was no worry in *California v. Texas*, because the United States has waived immunity and allowed itself to be sued—in its own name—for most suits seeking relief other than money damages.¹⁹³ The lawsuit was thus appropriately styled “Texas v. United States” in the district court, and no one argued sovereign immunity as a defense.¹⁹⁴ Certainly the United States’ enactment of a law is the

courts a remedial innovation that could reduce legal uncertainty . . .”); *United States v. Doherty*, 786 F.2d 491, 498-99 (2d Cir. 1986) (collecting statements of Declaratory Judgment Act’s purpose).

¹⁸⁸ *California v. Texas*, 141 S. Ct. at 2115-16 (quoting *Murphy v. Nat’l Collegiate Athletic Ass’n*, 584 U.S. 453, 488 (2018) (Thomas, J., concurring)).

¹⁸⁹ *Id.* at 2116.

¹⁹⁰ *See, e.g., Ex parte Young*, 209 U.S. 123, 155-56 (1908); HART & WECHSLER, *supra* note 12, at 927.

¹⁹¹ *See Young*, 209 U.S. at 150; *United States v. Lee*, 106 U.S. 196, 215-16 (1882). *See generally* *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824) (stating the party of record rule).

¹⁹² *See Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 532-33 (2021) (finding sovereign immunity for state-court judge and state-court clerk defendants). More precisely, *Ex parte Young* rests on a long tradition of antisuit injunctions, which are not available unless the defendant is likely to sue the plaintiff in the foreseeable future. *See generally* John Harrison, *Ex parte Young*, 60 STAN. L. REV. 989 (2008). An officer without enforcement authority cannot be a defendant in such a case.

¹⁹³ 5 U.S.C. § 702. The “United States” is no mere abstraction in such cases. To the extent that anti-government litigation engages fictional parties, it is the officer who stands in for the United States that plays an arguably fictional role. *See, e.g., Lee*, 106 U.S. at 213-15 (acknowledging United States was “real party in interest” in officer suit challenging conduct undertaken on government’s behalf).

¹⁹⁴ *See Texas v. United States*, 340 F. Supp. 3d 579, 579 (N.D. Tex. 2018), *aff’d in part and vacated in part*, 945 F.3d 355 (5th Cir. 2019), *rev’d sub nom., California v. Texas*, 141 S. Ct. 2104.

government action that directly caused the plaintiffs' injuries arising out of their obligation to comply.

Could declaratory relief redress the plaintiffs' injury? If the plaintiffs' injury resulted from being required by the law to purchase health insurance, then an authoritative declaration that the act was unconstitutional would relieve the plaintiffs of that legal obligation. Justice Breyer's second objection, however, was that a declaratory judgment "cannot alone supply jurisdiction otherwise absent."¹⁹⁵ He derived this conclusion from the proposition that the Declaratory Judgment Act generally does not expand the jurisdiction of the federal courts.¹⁹⁶ That proposition, however, requires some unpacking.

This "no expansion" principle has meant several things. First, it restates the truism that "just like suits for every other type of remedy, declaratory-judgment actions must satisfy Article III's case-or-controversy requirement."¹⁹⁷ No statute could modify Article III, and the Declaratory Judgment Act underscores this by limiting the remedy to cases of "actual controversy."¹⁹⁸ But saying that the plaintiffs cannot seek a declaratory judgment unless they have standing begs the question in *California v. Texas*. The Court says they don't have standing because they can't get a declaratory judgment, but they can't get a declaratory judgment because they don't have standing. This is a false dilemma. If plaintiffs suffer injury because they are bound to comply with the law, and an authoritative statement that the law is invalid would redress that injury, then whether the statement appears as a declaration rather than an injunction makes no difference.

The second thing the "no expansion" idea sometimes conveys is Congress's intent that the Declaratory Judgment Act not expand federal courts' subject matter jurisdiction. Several key cases that Justice Breyer cited actually involved this question, not standing. For example, the famous case of *Skelly Oil Co. v. Phillips Petroleum Co.*¹⁹⁹ limits plaintiffs' ability to evade the well-pleaded rule. A party that anticipates being sued and has a federal defense that they would like to litigate in federal court cannot, under *Skelly Oil*, simply file a complaint asking for a declaratory judgment that their federal defense is correct.²⁰⁰ But this rests on the federal question statute, 28 U.S.C. § 1331.²⁰¹ Standing's

¹⁹⁵ *California v. Texas*, 141 S. Ct. at 2116.

¹⁹⁶ *Id.* at 2115-16 (citing, inter alia, HART & WECHSLER, *supra* note 12, at 841) (stating that the Act does "not conf[e]r jurisdiction over declaratory actions when the underlying dispute could not otherwise be heard in federal court").

¹⁹⁷ *Id.* at 2115 (citing *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126-27 (2007)).

¹⁹⁸ 28 U.S.C. § 2201(a).

¹⁹⁹ 339 U.S. 667 (1950), cited in *California v. Texas*, 141 S. Ct. at 2115.

²⁰⁰ *Id.* at 673-74 ("To sanction suits for declaratory relief as within the jurisdiction of the District Courts merely because . . . artful pleading anticipates a defense based on federal law would contravene the whole trend of jurisdictional legislation by Congress, disregard the effective functioning of the federal judicial system and distort the limited procedural purpose of the Declaratory Judgment Act.").

²⁰¹ See HART & WECHSLER, *supra* note 12, at 807-08 (distinguishing between statutory rules of jurisdiction and constitutional ones in federal question cases).

redressability requirement comes from Article III and addresses different concerns.

Justice Breyer seemed to read *Skelly Oil* and similar cases to say that, if plaintiffs' ability to sue in federal court depends on seeking a declaration, rather than some other form of relief, then they must lack standing because otherwise the courts' jurisdiction would be expanded.²⁰² If Justice Breyer was saying that one cannot get a declaratory judgment on its own, in the absence of some other kind of relief, then he was mistaken.²⁰³ *Nashville, Chattanooga & St. Louis Railway Co. v. Wallace*,²⁰⁴ which he cited for the proposition that "[declaratory] relief cannot alone supply jurisdiction otherwise absent,"²⁰⁵ insisted that "an award of process or execution to carry it into effect . . . is not an indispensable adjunct to the exercise of the judicial function."²⁰⁶ There are thus circumstances in which declaratory relief may be available when no coercive remedy is possible. Remedies scholars recognize, for example, that "at the very beginning of a dispute, it will sometimes be possible to obtain a declaratory judgment but not (yet) an injunction."²⁰⁷

Moreover, the federal Declaratory Judgment Act has long been understood to expand the set of *parties* that can bring a dispute into federal court, even though

²⁰² See *California v. Texas*, 141 S. Ct. at 2116.

²⁰³ See, e.g., *Steffel v. Thompson*, 415 U.S. 452, 459-60 (1974) (finding case or controversy could exist concerning plaintiff's right to distribute leaflets protesting Vietnam War even though plaintiff had appealed only denial of declaratory relief). *Steffel* said that "[t]he express purpose of the Federal Declaratory Judgment Act was to provide a milder alternative to the injunction remedy." *Id.* at 467 (quoting *Perez v. Ledesma*, 401 U.S. 82, 111 (1971) (Brennan, J., concurring in part)). But the Act would do little good if a declaration could only be sought in tandem with an injunction. Justice Breyer's statement in *California* is also in serious tension with the *Lyons* "rule" that one must establish standing separately for each remedy requested. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983). How would one do that, if standing to seek declaratory relief is always parasitic on some other remedy?

²⁰⁴ 288 U.S. 249 (1933).

²⁰⁵ *California v. Texas*, 141 S. Ct. at 2116.

²⁰⁶ *Wallace*, 288 U.S. at 263; see also *id.* at 264 ("[T]he Constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies. The judiciary clause of the Constitution defined and limited judicial power, not the particular method by which that power might be invoked."). The *Wallace* case, decided prior to the federal Declaratory Judgment Act, signaled the Court's approval of declaratory remedies by upholding jurisdiction over an appeal from the Tennessee state courts even though the plaintiff sought only declaratory relief. See *id.* at 264-65.

²⁰⁷ See *Bray*, *supra* note 187, at 1133; see also David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 19 (1964) (stating declaratory judgment is "substitute for the injunction" that "may possibly be available before there is cause for traditional relief"); *United States v. Doherty*, 786 F.2d 491, 498 (2d Cir. 1986) (observing that the Declaratory Judgment Act allows decisions "in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy").

it does not expand the set of *disputes* that can be heard there.²⁰⁸ The declaratory plaintiff may lack any other cause of action, but “[f]ederal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question.”²⁰⁹ Patent litigation is the paradigm case. Parties who fear being sued for patent infringement frequently file declaratory actions to establish the invalidity of the patent, relying on the declaratory defendant’s hypothetical ability to bring a coercive federal patent action if they wished.²¹⁰ Justice Breyer cited *MedImmune*, which was just such a case.²¹¹ This established rule demonstrates that parties *can* secure declaratory relief even if no other remedies are available. As *MedImmune* showed, declaratory judgments are precisely the right vehicles to redress the injuries of “puzzled” parties that are bound to comply with laws they think are invalid.

All this leads us back where we began. Article III requires redressability, but what it takes to redress an injury depends on the injury’s nature in the first place. If injury stems from enforcement of the law, then an injunction may be necessary to prevent that enforcement; in that scenario, plaintiffs must identify an officer with authority to enforce the law as their defendant. But if the plaintiff is injured by the compulsion of the law itself, then that injury can be remedied by an authoritative statement that the law is invalid. A declaratory judgment suffices for that purpose, and so the plaintiff’s ability to sue boils down to two questions: (1) is there a defendant against whom a binding declaration can be secured?; and (2) has the dispute advanced to the point that it poses a live case or controversy? The United States was available to meet the first question in *California v. Texas*; in Part II, I will discuss a more interesting variant involving private enforcement. As for the second question—a live dispute—I argue in the next Section that once

²⁰⁸ See HART & WECHSLER, *supra* note 12, at 842-43 (“A broader reading of *Skelly Oil* would uphold jurisdiction over a declaratory action if jurisdiction would exist in a hypothetical nondeclaratory action brought by *either party* against the other.”). Although the casebook describes the matter as contested, it notes that the Supreme Court has endorsed this view and has consistently accepted jurisdiction over such cases. *Id.* (citing *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 15-22 (1983)). Indeed, the Hart & Wechsler authors cite *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S. 191, 197 (2014)—which Justice Breyer also relied upon—for this very proposition. See *id.* at 843; *California v. Texas*, 141 S. Ct. at 2116 (citing *Medtronic*, 571 U.S. at 197).

²⁰⁹ *Franchise Tax Bd.*, 463 U.S. at 19.

²¹⁰ See HART & WECHSLER, *supra* note 12, at 843.

²¹¹ *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126-27 (2007), cited in *California v. Texas*, 141 S. Ct. at 2115. *MedImmune* lacked any coercive remedial option against Genentech, because the Patent Act, 35 U.S.C. § 281, provides a cause of action for patentholders against infringers but no such right for patent licensees to establish a patent’s invalidity. *MedImmune*, 549 U.S. at 130-34. It also had a contract claim that it did not owe royalties under its license from Genentech. *Id.* at 135. But the plaintiff appeared to assert no right to anything other than a declaration that the patent’s invalidity obviated its obligation to pay royalties under the license. See *id.* at 122-25. For *MedImmune*, it was a declaration or nothing.

the plaintiff shows injury, the liveliness of the controversy is primarily a matter of the timing doctrines and the law of remedies.

Before moving on, however, it is important to be clear about what *California v. Texas* does *not* mean. In that case, enforcement was *impossible*—federal law simply provided no mechanism for it. That is what made it so difficult to find an appropriate defendant against whom relief can be secured that would redress the plaintiff's injury. Remedies against government action are built around the vehicle of officer suits, so if there is no officer empowered to enforce the law, then traditional remedies may not be available. But in the more common uncertain enforcement case—cases like *Poe* or *United Farm Workers*—a government officer or agency has *power* to enforce the law, but to some extent they have chosen not to do so. In those cases, the problem has been addressed as one of injury. If we acknowledge that compliance with the law may produce injury even when the law is not enforced, then there is no doubt that the officer empowered to enforce that law is the appropriate defendant. And by giving the plaintiff an authoritative ruling that they need not comply with the law, a declaratory judgment redresses the plaintiff's injury.

C. *Enforcement, Ripeness, and Remedies*

Having said all this, enforcement will sometimes be relevant under the ripeness doctrine. Consider *Poe* along with its more famous sequel, *Griswold v. Connecticut*.²¹² In *Griswold*, Connecticut did choose to enforce the contraception statute, prosecuting the state director of Planned Parenthood and a Yale Medical School professor as accessories to violations of the statute and imposing a \$100 fine on each.²¹³ Reaching the merits, the Court held Connecticut's anti-contraception statute unconstitutional for violating the right to marital privacy.²¹⁴ *Griswold*'s reasoning is famously elusive, but Justice Douglas's majority opinion stressed the potential intrusiveness of *enforcement*—that is, that because the Connecticut statute regulated *use* of contraceptives, it could require “the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives.”²¹⁵ That is not what actually happened in *Griswold*; no married couples were prosecuted, and no “sacred precincts” were searched.²¹⁶ It thus seems fair to wonder whether the Court really had the requisite concrete facts before it to evaluate the intrusiveness of enforcing the Connecticut law. Where the actual character of enforcement is relevant to the merits of the plaintiff's claim, prudential concerns may warrant postponing decision until enforcement has occurred.

²¹² 381 U.S. 479, 484 (1965).

²¹³ *Id.* at 480.

²¹⁴ *See id.* at 486.

²¹⁵ *Id.* at 485.

²¹⁶ *Id.* at 480; *see also* Cary Franklin, *Griswold and the Public Dimension of the Right to Privacy*, 124 YALE L.J.F. 332, 337 (2015) (discussing how *Griswold* did not concern the marital bedroom but instead a clinic open to the public).

This sort of concern is the standard fare of the timing doctrines—ripeness and mootness. Ripeness is more likely to pose a problem than mootness in the uncertain enforcement context, because the question is usually whether a plaintiff may seek pre-enforcement review of a law or government policy.²¹⁷ Like standing, these doctrines generally seek to ensure the “functional requisites of effective adjudication”—that is, pragmatic aspects of a case’s posture that affect the court’s ability to reach an informed decision on the merits of the plaintiff’s claims.²¹⁸ Those requisites include “[c]oncrete facts and adversarial presentation” that “frame[] the issues for judicial resolution,” “illuminate the competing interests,” and define the scope of the ruling that results.²¹⁹ From this perspective, the courts should not decide cases where, as Justice Harlan said in *Poe*, “the records presented for adjudication [of] a controversy [are] so artificially truncated as to make the cases not susceptible to intelligent decision.”²²⁰

Both standing and ripeness address these underlying prudential concerns, and courts and commentators frequently either express confusion about the distinction between the two doctrines or simply lump them together. As Judge Janice Rogers Brown put it, “standing and ripeness tend to merge in preenforcement challenges to criminal statutes.”²²¹ Even *Hart & Wechsler*—in which one might hope for a principled statement of the difference—asserts that ripeness “substantially replicate[s] the standing inquiry” in many respects.²²² The reason for confusion is easy to understand: Standing requires the plaintiff to have an injury, but the doctrine accepts that *future* injury may count. That led federal courts to the limiting principle that future injury can ground a plaintiff’s standing only if it is “imminent”²²³ or “certainly impending.”²²⁴ These sound like timing rules, and in fact the Court’s standing jurisprudence is developing a line of seemingly timing-based standing cases under an “imminence” requirement—seemingly redundant with the ripeness doctrine.²²⁵

²¹⁷ If the government announced an intention to *stop* enforcing a policy after the plaintiff had filed a challenge to it, especially if the plaintiff had no damages arising from a prior instance of enforcement, then mootness might become a concern.

²¹⁸ Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 51 (1984).

²¹⁹ *Id.*; HART & WECHSLER, *supra* note 12, at 75.

²²⁰ *Poe v. Ullman*, 367 U.S. 497, 528 (1961) (Harlan, J., dissenting).

²²¹ *Ord v. District of Columbia*, 587 F.3d 1136, 1149 (D.C. Cir. 2009) (Brown, J., dissenting in part).

²²² See HART & WECHSLER, *supra* note 12, at 219-20.

²²³ *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210 (2021).

²²⁴ *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013); see also *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (“[T]he injury or threat of injury must be both ‘real and immediate,’ not ‘conjectural’ or ‘hypothetical.’”).

²²⁵ See *Bradley & Young*, *supra* note 7, at 1611-18 (discussing overlap and distinctions between the two doctrines).

Although standing and ripeness are both concerned with the appropriate timing of adjudication, they address it through quite different doctrinal inquiries. The standing cases try to assess just how immediate the future harm is, but the only analytical tools on offer are a string of adjectives and adverbs. In *Clapper*, for example, the Justices debated whether the standard for future harm should be “reasonably probable” or “clearly impending.”²²⁶ These phrases are trying to capture two distinct concepts—temporal proximity and probability of occurrence—but each is hard to actually measure, and Article III specifies a constitutional threshold for neither.

Ripeness doctrine, however, pursues a far more tractable analysis. Under the *Abbott Laboratories* test, courts assess the fitness of the merits issues for judicial review and the hardship to the parties if adjudication is delayed.²²⁷ The first prong asks whether, given the lack of enforcement against the plaintiff or the distance in time of any injury, the court lacks sufficient information about the case to resolve the issues on the merits. *Abbott Laboratories v. Gardner*²²⁸ found that criterion satisfied because the issue was a purely legal one concerning the consistency of an agency interpretive regulation with the underlying statute.²²⁹ But a companion case, *Toilet Goods Association v. Gardner*,²³⁰ concerned an agency regulation requiring manufacturers to give “free access” for FDA inspectors to their facilities. The Court found the case unripe because the appropriateness of the access requirement under the governing statute could be much better evaluated once the FDA had actually carried out some inspections.²³¹

In *Toilet Goods*, the plaintiffs challenged a rule that did not govern their own conduct; rather, it provided the government with an enforcement tool.²³² One could thus say that the rule did not impose any obligations on the plaintiffs until the government elected to enforce it against them. The *Toilet Goods* plaintiffs may thus have lacked any cognizable injury, so that one need not resort to ripeness at all. But ripeness may limit adjudication even in cases where the plaintiff does have an injury arising from an obligation imposed by law. In *Mitchell*, for example, the plaintiffs were federal employees who wanted to engage in political activity that would violate the Hatch Act.²³³ The Act

²²⁶ Compare *Clapper*, 568 U.S. at 409 (requiring threats of future injury to be “certainly impending”), with *id.* at 431-33 (Breyer, J., dissenting) (arguing for “reasonable probability” standard). But see *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (treating two standards as interchangeable).

²²⁷ See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967); HART & WECHSLER, *supra* note 12, at 220-22.

²²⁸ *Abbott Laboratories*, 387 U.S. at 136.

²²⁹ *Id.* at 149.

²³⁰ 387 U.S. 158, 161-62 (1967).

²³¹ *Id.* at 163-64.

²³² *Id.* at 164 (“This is not a situation in which primary conduct is affected . . .”).

²³³ *United Pub. Workers v. Mitchell*, 330 U.S. 75, 81-83 (1947); see also discussion *supra* notes 43-50.

unquestionably applied to them, and it caused them injury by broadly forbidding them from engaging in a whole class of activity.²³⁴ But because the plaintiffs had not yet specified what *sort* of political activity they wished to engage in, and the balance between their speech rights and the government's interests in avoiding the appearance of corruption might turn on the particular sort of activity at issue, the issues would not have been fit for judicial review.²³⁵ Ripeness doctrine thus guards the court's ability to resolve the case based on adequate information even in cases where the plaintiff has an injury in fact that suffices for standing.

A somewhat more difficult situation arises when plaintiffs challenge a general regulatory provision that may or may not actually cover their conduct. In *Steffel v. Thompson*, for instance, plaintiffs wishing to distribute leaflets opposing the Vietnam War challenged a general state trespass statute.²³⁶ Mr. Steffel was able to avoid any ripeness problems because the police had warned him that they viewed his conduct as violating the statute and indeed arrested one of Steffel's companions when he persisted.²³⁷ But what if that had not happened, and the courts had to determine whether general language should be construed to reach constitutional activity? So long as the language could reasonably be read to cover Steffel, he would have a decent claim to be injured by the obligation it imposed not to engage in protected conduct.²³⁸ One might then treat the question as one of ripeness and ask whether the issues are really fit for judicial review. But especially if the statute is a criminal one, the potential hardship of denying pre-enforcement review may outweigh any lack of certainty on the merits;²³⁹ besides, statutory construction is something courts are generally committed to doing, even if the evidence of legislative meaning is murky.

The courts' reluctance to provide pre-enforcement review in many such cases comes from federalism concerns, which generally suggest that the state courts should have the first crack at construing a state criminal statute.²⁴⁰ Federal courts sometimes abstain from deciding such cases under the *Pullman* doctrine,²⁴¹ either dismissing or staying the federal case and directing the parties to litigate the meaning of the state law in state court. Or—what is much the same thing—

²³⁴ See 18 U.S.C. § 61h (1946) (current version at 5 U.S.C. §§ 7323-7324).

²³⁵ *Id.* at 89-91.

²³⁶ 415 U.S. 452, 454-55 (1974).

²³⁷ *Id.* at 459.

²³⁸ See, e.g., *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003) (finding standing in a similar case).

²³⁹ See, e.g., *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 152-53 (1967) (emphasizing plaintiffs' interests in pre-enforcement review where statute imposes criminal penalties).

²⁴⁰ See, e.g., *Douglas v. City of Jeannette*, 319 U.S. 157, 162-64 (1943) (stating federal courts should interfere with state enforcement proceedings only "to prevent irreparable injury which is clear and imminent" to respect "independence of the states").

²⁴¹ *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 500-01 (1941) (holding federal courts may abstain when unsettled state-law issue may avoid resolving an uncertain federal constitutional question).

the court may certify the question of statutory coverage to the state supreme court for a definitive ruling.²⁴²

Abstention is a remedial doctrine, grounded in the discretionary nature of equitable relief.²⁴³ Courts may also employ the more standard requirements for particular forms of relief to limit judicial review of unenforced laws.²⁴⁴ Although I have argued that having to comply with a law may itself cause a plaintiff injury in fact, that injury will not always amount to the irreparable and immediate harm necessary to support an injunction.²⁴⁵ The Supreme Court has said that “[w]hen enforcement actions are imminent,” there may be “no adequate remedy at law.”²⁴⁶ This may push plaintiffs challenging unenforced laws toward other remedies, such as declaratory relief, that may be available when injunctions are not.²⁴⁷ But like the ripeness rules under *Abbott Laboratories*, the standards for injunctive and declaratory relief are likely to be more familiar, well-developed, and manageable for courts than divining how likely enforcement must be to satisfy Article III. It is a mistake to ask standing doctrine to provide all the relevant limits on federal judicial action, especially when other longstanding doctrinal tools may be better suited to the task.

One might plausibly view decisions like *Poe v. Ullman* or *California v. Texas* as instances of judicial statesmanship. After all, the Court’s technical rulings on standing allowed it to avoid potentially controversial decisions recognizing a new unenumerated right and striking down a high-profile federal program, respectively.²⁴⁸ Alexander Bickel famously urged the Supreme Court to use the

²⁴² See HART & WECHSLER, *supra* note 12, at 1116 (discussing certification as either alternative to or vehicle for *Pullman* abstention); *Majors*, 317 F.3d at 724-25 (resolving dispute over meaning of not-yet-enforced state law by certifying question to Indiana Supreme Court).

²⁴³ See *Quackenbush v. Allstate Ins.*, 517 U.S. 706, 717-18 (1996) (“The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction . . . Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies . . .” (first alteration in original) (quoting *Pullman*, 312 U.S. at 500)).

²⁴⁴ See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-13 (1983) (denying injunctive relief without real and immediate threat of recurrence).

²⁴⁵ See, e.g., *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (“It is a ‘basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.’” (alteration in original) (quoting *O’Shea v. Littleton*, 414 U.S. 488, 499 (1974))).

²⁴⁶ *Id.*

²⁴⁷ See, e.g., *Bray*, *supra* note 187, at 1095 (observing “a declaratory judgment is sometimes available earlier than an injunction in the lifecycle of a dispute”).

²⁴⁸ See, e.g., Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 960 (2008) (arguing judges must consider not only doctrinal consistency but also the effect of their rulings on judicial legitimacy); see also *California v. Texas*, 141 S. Ct. 2104, 2123

“passive virtues”—that is, justiciability doctrines concerning when the Court should *not* decide issues on their merits—to avoid such controversial rulings.²⁴⁹ Standing featured prominently in Professor Bickel’s catalog of means by which the Court can avoid decision.²⁵⁰ And one could argue that the uncertain enforcement doctrine is a particularly effective vehicle for avoiding controversy, because the Executive’s decision not to enforce a controversial law or Congress’s decision to cut back the means of enforcement or resources available to enforcers could reflect political efforts to tamp down controversy in a particular area.²⁵¹ Judicial deference to such decisions might well achieve Bickel’s goals in many instances.

The trouble is that standing purports to be a principled body of rules—not a general prudential doctrine meant to facilitate discretionary judgments in individual cases. It is jurisdictional, meant to be decided at the threshold, and it is litigated in a frightful number of cases. Because of the bewildering complexity of the circumstances in which standing must be applied, and the incentives that litigants on both sides have to push the doctrine to its limits, it is unlikely that we will ever have a completely coherent set of standing doctrines. But it subverts the effort to make the doctrine as consistent as possible to suggest that the ordinary rules can be suspended in cases of extraordinary controversy.²⁵²

There is, moreover, only a short step between using standing as a filter for cases that truly threaten the Court’s legitimacy and using it as a screen for cases that may be unlikely to succeed on the merits—or that raise claims to which particular judges are unsympathetic. The more that standing turns on discretionary judgments about whether enforcement is likely enough, or whether the plaintiffs “really” complied with a law because they felt compelled by it or for other reasons, the less consistent judgments on standing will be. That will only feed the already widespread perception that standing rulings mask political or policy judgments about the merits of the plaintiff’s claims.²⁵³ My own view is that standing doctrine is considerably more principled than its critics

(2021) (Alito, J., dissenting) (“In all three episodes [of “our epic Affordable Care Act trilogy”], with the Affordable Care Act facing a serious threat, the Court has pulled off an improbable rescue.”).

²⁴⁹ See BICKEL, *supra* note 118, at 199-200.

²⁵⁰ See *id.* at 122-24 (using standing beyond pure injury requirement to justify declining merits adjudication, preserving judicial discretion to avoid deciding constitutional questions).

²⁵¹ Many instances of political branch nonenforcement might fit this hypothesis. In *Poe*, for instance, one can readily see Connecticut’s decision to keep the anti-contraception law on the books but largely abandon efforts to enforce it as a political compromise. See *id.* at 144-48 (discussing *Poe*). But the Republican Congress’s zeroing-out of the ACA’s tax penalty seems much more likely to have been an effort to set up a test case in the Supreme Court.

²⁵² See generally Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964) (criticizing Bickel).

²⁵³ See, e.g., Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1746 (1999).

recognize,²⁵⁴ but the uncertain enforcement doctrine presents one of the severest tests.

II. THE UNCERTAIN ENFORCER

What if the uncertainty concerns not so much *whether* the law will be enforced, but *who* will enforce it? The leading example of this problem is S.B. 8, a Texas statute enacted in 2021 imposing strict restrictions on abortion.²⁵⁵ S.B. 8's notoriety—and its interest for an article on standing—arises from its authors' effort to configure enforcement to thwart legal challenges. To that end, S.B. 8 categorically disempowered government officers and agencies from enforcing the law and relied exclusively on private attorneys general.²⁵⁶ This created several difficulties for persons wishing to challenge the law. Because the statute foreclosed government enforcement altogether, it raised a similar problem to *Poe* and *California v. Texas* in that there could be no prospect of injury in fact traceable to a government enforcement action. If private parties sought to enforce the law, of course, then an abortion provider could raise a constitutional defense in that suit. But any effort to seek *anticipatory* relief—the avenue of choice in modern constitutional litigation—would raise doubts about selecting a proper defendant. And even if an appropriate private defendant could be found, how could an abortion provider prevent endless follow-on litigation by securing an order binding all potential enforcers of the law?

Because Texas's S.B. 8 was an attempt to circumvent the constitutional right to abortion recognized in *Roe v. Wade*,²⁵⁷ the *Dobbs v. Jackson Women's Health Organization*²⁵⁸ decision overruling *Roe* undercut both the impetus for the statute and the constitutional argument against its prohibition of abortions. But other jurisdictions are copying S.B. 8's uncertain enforcer template in efforts to undercut other liberties, such as LGBTQ+ rights or the right to bear arms.²⁵⁹

²⁵⁴ See Bradley & Young, *supra* note 7, at 1562 (“[S]ome coherence is still possible by focusing on the core principles and underlying goals of [standing] doctrine.”).

²⁵⁵ S.B. 8, 87th Leg., Reg. Sess., ch. 62, § 3, 2021 Tex. Gen. Laws 125, 125-31 (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201-.212 (West 2025)).

²⁵⁶ See HEALTH & SAFETY §§ 171.207-.208.

²⁵⁷ 410 U.S. 113 (1973).

²⁵⁸ 142 S. Ct. 2228 (2022).

²⁵⁹ See, e.g., CAL. BUS. & PROF. CODE § 22949.64 (West 2025) (prohibiting public enforcement of certain statutory restrictions on firearms); BUS. & PROF. § 22949.65 (permitting “any person” other than state officer to bring suit for violations of statute, and providing for statutory damages for each gun sold, without regard to whether plaintiff has suffered any private injury); see also Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORN. L. REV. 1187, 1210 (2023) (“In 2021 and 2022, bills that made use of S.B. 8’s enforcement verbatim scheme were introduced, pre-filed, or filed in ten states. Four states—California, Idaho, Oklahoma, and Texas—enacted laws that copied its scheme.” (footnote omitted)); Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. 1483, 1486 (2022) (“S.B. 8 is part of a new wave of private causes of action, including those that task members of the public with enforcing laws banning transgender people from using bathrooms or playing on sports teams that correspond with their gender identities.”).

Even in the abortion context, moreover, a private-enforcement scheme like S.B. 8 may continue to have an impact to the extent that political checks (especially in more progressive localities within a state) may limit *public* enforcement of anti-abortion laws.²⁶⁰ On the other hand, private enforcement regimes like S.B. 8 may raise constitutional problems beyond their conflict with fundamental rights. In any event, Texas S.B. 8 posed a federal courts exam for the country, and working through an answer illuminates a variety of important questions about justiciability, remedies, and constitutional structure.

A. *Injury in Fact in Uncertain Enforcer Cases*

Substantively speaking, Texas's S.B. 8 is a restrictive abortion statute—but not all that different from laws enacted in several other states.²⁶¹ Dubbed “the Texas Heartbeat Act,”²⁶² the law bars doctors from “knowingly perform[ing] or induc[ing] an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child” except in case of medical emergency.²⁶³ The enforcement provision effectively extends the prohibition to all “knowing[ly] . . . conduct that aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion.”²⁶⁴ What makes the statute interesting, though, is its provision that S.B. 8 “shall be enforced exclusively through the private civil actions” provided in the statute.²⁶⁵ Those actions may be brought by “[a]ny person, other than an officer or employee of a state or local governmental entity.”²⁶⁶ There is no requirement that the plaintiff show any sort of private injury; rather, successful plaintiffs are entitled to a statutory bounty of “not less than \$10,000 for each abortion that the defendant performed or induced . . . [or] aided or abetted,” as well as costs and attorney’s fees.²⁶⁷ The statute underscores, however, that “[n]o enforcement of

²⁶⁰ See, e.g., Emma Bowman, *As States Ban Abortion, the Texas Bounty Law Offers a Way to Survive Legal Challenges*, NPR (July 11, 2022, at 05:00 ET), <https://www.npr.org/2022/07/11/1107741175/texas-abortion-bounty-law> [<https://perma.cc/H57T-PGW4>] (suggesting private civil enforcement may remain attractive to anti-abortion forces because criminal laws offer “too much discretion to the more progressive prosecutors who might fail to enforce [an anti-abortion] law”).

²⁶¹ See Doris W. Chiu, Anna Berstein, Alice F. Cartwright & Rachel K. Jones, *Why Six-Week Abortion Bans Make It Impossible for Many People to Get Care*, GUTTMACHER (Oct. 7, 2024), <https://www.guttmacher.org/2024/10/why-six-week-abortion-bans-make-it-impossible-many-people-get-care> [<https://perma.cc/GW7N-KRPX>] (stating Florida, Georgia, Iowa, and South Carolina have implemented six-week abortion bans).

²⁶² Texas Heartbeat Act, S.B. 8, 87th Leg., Reg. Sess., ch. 62, § 1, 2021 Tex. Gen. Laws 125, 125.

²⁶³ TEX. HEALTH & SAFETY CODE ANN. §§ 171.204(a), 171.205(a) (West 2025).

²⁶⁴ HEALTH & SAFETY § 171.208(a)(2).

²⁶⁵ HEALTH & SAFETY § 171.207(a).

²⁶⁶ HEALTH & SAFETY § 171.208(a).

²⁶⁷ HEALTH & SAFETY § 171.208(b)(2)-(3). Plaintiffs may also seek “injunctive relief sufficient to prevent the defendant from violating this subchapter.” § 171.208(b)(1).

this subchapter . . . may be taken or threatened by this state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person.”²⁶⁸

In *Whole Woman’s Health v. Jackson*,²⁶⁹ a group of abortion providers sought pre-enforcement review of S.B. 8’s constitutionality in federal court, arguing on the merits that the statute violated the federal constitutional right to an abortion recognized in *Roe*. They sought both declaratory and injunctive relief against a variety of defendants, including: the state attorney general; a state judge and clerk of court; officials of the Texas Medical Board and Board of Nursing with licensing authority over medical professionals in the state; a putative defendant class of all non-federal judges and clerks of court in Texas with jurisdiction to enforce S.B. 8; and a private individual, Mark Dickson, who was the head of Right to Life East Texas, an anti-abortion organization.²⁷⁰ The plaintiffs seem to have argued standing primarily in terms of the threat that S.B. 8 would be enforced against them, either by a private suit under S.B. 8’s civil right of action or collaterally by regulatory action by the state licensing boards empowered to sanction medical professionals performing procedures in violation of state law.²⁷¹

As litigated, *Whole Woman’s Health* devolved into a series of disputes about who had authority to enforce S.B. 8, whether docketing a case (by state judges and clerks of court) amounted to enforcement action, the likelihood of the various forms of enforcement against the plaintiffs, and the like.²⁷² The Supreme Court treated these disputes as chiefly relevant to sovereign immunity, not standing.²⁷³ That treatment tends to confirm the argument in Part I of this Article—that is, that the law injured the plaintiffs simply by prohibiting them from engaging in activity that they wished to engage in and that they believed was protected by the Constitution. Uncertainty about how and by whom the law

²⁶⁸ HEALTH & SAFETY § 171.207(a).

²⁶⁹ 142 S. Ct. 522, 530-31 (2021).

²⁷⁰ *Whole Women’s Health v. Jackson*, 556 F. Supp. 3d 595, 607-08 (W.D. Tex. 2021), *aff’d in part and rev’d in part*, *Whole Woman’s Health*, 142 S. Ct. at 522.

²⁷¹ *Id.* at 614-16.

²⁷² Notwithstanding S.B. 8’s language purporting to bar all public enforcement, both the district court and a majority of the Supreme Court determined that the statute did not bar enforcement by state medical licensing officials, whom state law charged with taking actions against medical professionals violating the Texas Health and Safety Code (including S.B. 8). *Id.* at 611-13; *Whole Woman’s Health*, 142 S. Ct. at 535-37. This is the sort of collateral enforcement mechanism that may injure persons subject to the law even absent direct enforcement. On remand, however, the Fifth Circuit certified a question to the Texas Supreme Court inquiring whether S.B. 8 permitted enforcement by state licensing officials, *Whole Woman’s Health v. Jackson*, 23 F.4th 380, 387-89 (5th Cir. 2022), which the Texas court answered in the negative, *Whole Woman’s Health v. Jackson*, 642 S.W.3d 569, 583 (Tex. 2022). That left no defendant against whom the federal action could proceed. As I discuss *infra*, a different group of plaintiffs have done considerably better in state court under the state constitution.

²⁷³ See *Whole Woman’s Health*, 142 S. Ct. at 531-32, 534.

would be enforced went not to the plaintiffs' standing but to the question whether they could find an appropriate defendant against whom they could secure a remedy.

The Texas abortion statute regulates abortion providers' behavior, requiring them to check for an unborn child's heartbeat and prohibiting them from performing an abortion if a heartbeat is detected.²⁷⁴ This has the practical effect of prohibiting most abortions after a gestational age of six weeks.²⁷⁵ Whether or not any further enforcement action occurs, the law imposes a legal obligation and at least some abortion providers are likely to comply as a result. Both Chief Justice Roberts and Justice Sotomayor, dissenting, agreed that S.B. 8 "effectively chill[s] the provision of abortions in Texas."²⁷⁶ But to say that the law has a "chilling effect" on abortion hardly does the statute—or any statute—justice. S.B. 8 *prohibits* abortions, and that is an injury to people who would otherwise be performing them. Enforcement might bring further harm, but being legally obligated to forgo constitutionally protected conduct in which one would otherwise engage is sufficient for Article III injury in fact.

Even under the Court's uncertain enforcement precedents, S.B. 8 should not pose a serious impediment to finding injury in fact. *United Farm Workers* requires plaintiffs to allege "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute" as well as "a credible threat of prosecution thereunder."²⁷⁷ This standard seems clearly met. The state government has not suggested that S.B. 8 should not or will not be enforced; indeed, given the diffuse nature of private S.B. 8 enforcement, it is hard to imagine who could issue such a disavowal. And although there do not seem to have been a flood of S.B. 8 suits, there have been some.²⁷⁸ Abortion providers in Texas seem to have found the threat of enforcement more than credible; many of the largest providers have stopped

²⁷⁴ See TEX. HEALTH & SAFETY CODE ANN. § 171.203(b) (West 2025) (prohibiting performing abortion without checking for heartbeat); see also *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2498 (2021) (Sotomayor, J., dissenting) (observing "the Act immediately prohibits care for at least 85% of Texas abortion patients and will force many abortion clinics to close").

²⁷⁵ See Paul J. Weber, *Texas Governor Signs Law Banning Abortions Early as 6 Weeks*, ASSOCIATED PRESS (May 19, 2021, at 14:35 ET), <https://apnews.com/article/texas-health-abortion-government-and-politics-ba02cd7c3f02b1eb5c87094257ee4db2> [<https://perma.cc/7DUB-ZJHV>].

²⁷⁶ *Whole Woman's Health*, 142 S. Ct. at 544 (Roberts, C.J., concurring in judgment in part and dissenting in part); see also *id.* at 547 (Sotomayor, J., concurring in judgment in part and dissenting in part) ("[T]he threat of [S.B. 8's] punitive measures creates a chilling effect that advances the State's unconstitutional goals.").

²⁷⁷ *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

²⁷⁸ See *Whole Woman's Health*, 142 S. Ct. at 542 (Thomas, J., concurring in part and dissenting in part) (noting three private civil complaints had been filed in S.B. 8 actions).

operation in the wake of S.B. 8's passage.²⁷⁹ Under the traditional test, the private and civil nature of S.B. 8 enforcement provides no reason to believe that there is no "credible threat of enforcement" under the law.²⁸⁰ The key standing problem, however, involves redressability.

B. *Redressability, Appropriate Defendants, and Pre-Enforcement Review*

As in *California v. Texas*, uncertainty about enforcement can undermine plaintiffs' ability to show that some form of obtainable judicial relief can redress their injury. Indeed, Justice Breyer's opinion in the previous term's ACA case was arguably the worst precedent for the *Whole Woman's Health* plaintiffs—a fact that Justice Breyer and the other dissenters (all of whom had been in the *California v. Texas* majority) never acknowledged. That is because the easiest route to redressing the plaintiffs' injury in a federal court challenge to S.B. 8 runs through distinguishing sharply between the requirements for injunctive and declaratory relief. As in the ACA case, the *Whole Woman's Health* opinions did not even mention the plaintiffs' claims for declaratory relief.²⁸¹ But because neither case considered the issue, neither bars the way for declaratory relief to produce a different result.

Injunctive relief is problematic in uncertain enforcement cases for two reasons. The first is because remedies law will not ordinarily grant an injunction unless the plaintiff can show imminent harm arising from the law's enforcement. As the Court pointed out early in the *Whole Woman's Health* litigation, "federal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves."²⁸² It is hard to see how a plaintiff could meet this requirement without identifying a party about to enforce S.B. 8 against them. The second, and related, problem is sovereign immunity. *Ex parte Young*²⁸³ permits suits for an injunction to prevent a state officer from enforcing an unconstitutional state law. But the Court agreed with Justice Thomas in the S.B. 8 case that *Ex parte Young* permits injunctions only against officials with some sort of enforcement

²⁷⁹ Shefali Luthra, *Even If Texas' Six-Week Abortion Ban Is Overturned, Clinics Will Close*, 19TH (Sep. 1, 2021, at 17:25 ET), <https://19thnews.org/2021/08/texas-abortion-six-week-ban-clinics-close-their-doors> [<https://perma.cc/38LM-NL45>].

²⁸⁰ The state trial court hearing challenges to S.B. 8 found that abortion providers had standing to challenge the statute based on a "real and serious threat of civil enforcement with ruinous \$10,000-plus judgments." *Van Stean v. Tex. Right to Life*, No. D-1-GN-21-004179, 2021 WL 12394878, at *11 (Tex. 96th Dist. Ct. Dec. 9, 2021), *aff'd*, 704 S.W.3d 6 (Tex. App. 2024), *rev'd per curiam*, 702 S.W.3d 348 (Tex. 2024). The trial court read Texas precedent to apply the *United Farm Workers* standard. *Id.* Appeals on this question are ongoing. *See Van Stean*, 702 S.W.3d at 357-58 (*per curiam*) (reversing state court of appeals for affirming trial court's order on merits without considering plaintiffs' standing to sue); *see also infra* note 310 (discussing *Van Stean* litigation).

²⁸¹ *But see* *Whole Women's Health v. Jackson*, 556 F. Supp. 3d 595, 602 (W.D. Tex. 2021) (noting plaintiffs sought both injunctive and declaratory relief).

²⁸² *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) (opinion on application for injunctive relief) (citing *California v. Texas*, 141 S. Ct. 2104, 2115-16 (2021)).

²⁸³ 209 U.S. 123, 161-62 (1908).

authority.²⁸⁴ These two points proved fatal to the plaintiffs' challenge once the Texas Supreme Court held that *no* Texas official had authority to enforce S.B. 8—including the licensing board officials whom the U.S. Supreme Court had suggested might have such authority.²⁸⁵

But what about a declaratory judgment? One elegant solution, suggested by one of my students in class discussion, would be a friendly suit between a woman seeking an abortion and her doctor who has agreed to provide one. If the doctor becomes unwilling to perform the abortion after detecting a heartbeat because of S.B. 8, the woman could sue for breach of contract. The court would then have to decide whether S.B. 8 was a valid law in order to adjudicate the doctor's defense of legal impossibility.²⁸⁶ That the suit is a friendly one should not matter, as long as the defendant has actually injured the plaintiff by not providing the abortion. Such suits are common, and the Court has generally rejected them only when the circumstances are such as to distort the presentation of the legal issues or to deprive the court of adversary presentation of the issues.²⁸⁷ Under the federal rules, plaintiffs would have to serve the state attorney general with a copy of the complaint, likely resulting in their intervention to defend the statute.²⁸⁸ As the Court made clear in *United States v.*

²⁸⁴ *Whole Woman's Health*, 142 S. Ct. at 540 (Thomas, J., concurring in part and dissenting in part) (“[A]n *Ex parte Young* defendant must have ‘some connection with the enforcement of the act’—i.e., ‘the right and the power to enforce’ the ‘act alleged to be unconstitutional.’” (quoting *Ex parte Young*, 209 U.S. at 157, 161)); see also *id.* at 532 (majority opinion) (applying this argument to explain why federal court could not grant injunctions against state judges or clerks of court, who do not “enforce” state law in relevant sense); *id.* at 536-37 (agreeing with Justice Thomas's interpretation of *Young* but disagreeing as to application to licensing board officials).

²⁸⁵ See *supra* note 272 (discussing state licensing officials as possible collateral enforcers).

²⁸⁶ See, e.g., *Centex Corp. v. Dalton*, 840 S.W.2d 952, 954 (Tex. 1992) (stating that under “the general doctrine of impossibility due to illegality[,] ‘the performance of a contract is excused by a supervening impossibility caused by the operation of a change in the law’” (quoting *Houston Ice & Brewing Co. v. Keenan*, 88 S.W. 197, 199 (Tex. 1905))). Alternatively, the woman might sue someone who had agreed to pay for her abortion (a partner, or an insurer) but declined to do so after the fetal heartbeat was detected in order to avoid aiding and abetting an illegal abortion under S.B. 8.

²⁸⁷ See, e.g., *United States v. Johnson*, 319 U.S. 302, 305 (1943) (rejecting collusive suit testing constitutionality of federal rent controls on ground that the defendant was controlling both sides of litigation and had arranged the factual playing field in his favor). For a famous example of a friendly suit that drew no justiciability objection (although failing on the merits), see *Plessy v. Ferguson*, 163 U.S. 537 (1896); and STEVE LUXENBERG, *SEPARATE: THE STORY OF PLESSY V. FERGUSON, AND AMERICA'S JOURNEY FROM SLAVERY TO SEGREGATION*, at xvii (2019) (recounting how opponents of segregation engineered a friendly dispute between Homer Plessy and the railroad, which viewed segregated cars as an inefficient way to run its business).

²⁸⁸ See FED. R. CIV. P. 5.1 (requiring party “drawing into question the constitutionality of a federal or state statute” to “promptly . . . file a notice of constitutional question” with the relevant Attorney General, and providing that officer with a right to intervene). S.B. 8 prohibits the Attorney General or other state officers from intervening “in an action brought under this section,” TEX. HEALTH & SAFETY CODE ANN. § 171.208(h) (West 2025)—that is, a

Windsor,²⁸⁹ Article III is satisfied if the parties are adverse in the sense that one has actually injured the other; lack of adversariness concerning the arguments in the case is a prudential concern that can be obviated by the presence of intervenors or *amici*.

One drawback of such a strategy would be that the case would not arise under federal law,²⁹⁰ so the plaintiff would either have to hail from out of state or be willing to litigate in state court. This would not preclude review of any federal issues by the U.S. Supreme Court, however, and in any event a ruling that a state statute is unconstitutional from the state supreme court would be at least as valuable as one from the Fifth Circuit.²⁹¹ The more serious objection is that a declaratory judgment would bind only the parties (and the state, if it intervenes to defend the statute)—and not the host of potential private plaintiffs who might seek to enforce the law against providers and their clients. But this problem afflicts more traditional challenges directed against the states as well. The main advantage of the friendly option is that it yields a precedential judgment on the statute's constitutionality without having to worry about sovereign immunity or whether, under *Ex parte Young*, the defendant is able and likely to enforce the statute against the plaintiff.

A more conventional option would involve one or more abortion providers suing the state attorney general, but seeking only declaratory relief. If the plaintiffs' injury is that they are bound by S.B. 8 not to perform abortions that they would otherwise perform, then an authoritative judgment that S.B. 8 is unconstitutional would redress it. The fact that the defendant government official has no authority to enforce the law, fatal in both *California v. Texas* and *Whole Woman's Health*, should not matter because the suit would not seek to enjoin enforcement; what matters is that the attorney general does have authority to *defend* the statute.²⁹² Many states, including Texas, have replicated Federal

civil suit to enforce S.B. 8—but it doesn't purport to restrict intervention in other sorts of suits in which S.B. 8's constitutionality might be at issue.

²⁸⁹ 570 U.S. 744, 760 (2013) (stating that an Article III case or controversy existed despite agreement between the parties on the merits and that "adversarial presentation of the issues" could be assured "by the participation of *amici curiae* prepared to defend with vigor the constitutionality of the legislative act").

²⁹⁰ The plaintiff would plead breach of contract, the defendant would raise legal impossibility under S.B. 8, and S.B. 8's unconstitutionality would come in as an answer to the defendant's defense. See *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 153 (1908) (explaining that to support federal question jurisdiction, the federal issue must arise on the face of the plaintiff's well-pleaded complaint).

²⁹¹ A federal circuit court's decision of a federal issue, after all, binds the parties but not the state courts. See, e.g., *Abela v. Gen. Motors Corp.*, 677 N.W.2d 325, 327 (Mich. 2004); David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. U. L. REV. 759, 771 (1979).

²⁹² State law varies considerably on the more contested question of whether state attorneys general have a *duty* to defend state laws that they believe in good faith violate the federal constitution. See generally Neal Devins & Saikrishna Bangalore Prakash, *Fifth States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100 (2015).

Rule of Civil Procedure 5.1, which requires notice and an opportunity to intervene to be given to the U.S. Attorney General or state attorneys general whenever civil litigation calls into question the constitutionality of their respective laws.²⁹³ And some states, again including Texas, have interpreted their declaratory judgment statutes as providing a right to sue the state attorney general (and possibly the state itself) to determine the validity of a state law.²⁹⁴

Courts have not generally explored how *Ex parte Young*'s reasoning applies to declaratory actions; rather, they have lumped declarations in with injunctions as forms of prospective relief that may be sought under the doctrine.²⁹⁵ And so cases typically discuss the two crucial aspects of *Young*—its recognition that officer suits for prospective relief do not implicate sovereign immunity and its creation of a federal right of action to seek such relief in order to prevent violations of the federal Constitution—in terms of coercive relief. But courts have generally assumed that *Young* covers all forms of prospective relief, and that assumption finds support in both the party of record rule (which is not restricted to particular forms of relief)²⁹⁶ and *Young*'s origins in the tradition of anti-suit injunctions.²⁹⁷ After all, declaratory judgments have become the preferred remedy in many suits by potential defendants seeking to forestall litigation by other parties.²⁹⁸ There is, then, a good argument that a purely declaratory claim brought against the Texas attorney general should not meet the same obstacles that the claims for injunctive relief encountered in *Whole*

²⁹³ See FED. R. CIV. P. 5.1; see also TEX. GOV'T CODE ANN. § 402.010 (West 2025) (requiring a party in litigation “challenging the constitutionality of a statute of this state” to file a form giving notice to the attorney general and giving the attorney general time to intervene before entry of final judgment in the suit).

²⁹⁴ See TEX. CIV. PRAC. & REM. CODE ANN. § 37.004(a) (West 2025) (“A person . . . whose rights . . . are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder.”); *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 n.6 (Tex. 2009) (stating that the Texas Declaratory Judgment Act requires that the State be made a party when a state statute is challenged and waives its sovereign immunity); *Texas Dep’t of Transp. v. Sefzik*, 355 S.W.3d 618, 622 (Tex. 2011) (per curiam) (“The state may be a proper party to a declaratory judgment action that challenges the validity of a statute.”).

²⁹⁵ See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 653, 664-65 (1974) (upholding district court’s order, which granted both injunctive and declaratory relief, insofar as that relief was prospective in nature, but focusing discussion on injunction).

²⁹⁶ See *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 857 (1824) (“It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the 11th amendment . . . is, of necessity, limited to those suits in which a State is a party on the record.”).

²⁹⁷ See Harrison, *supra* note 192, at 996-1008.

²⁹⁸ See, e.g., *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 121-22 (2007); see also James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex parte Young*, 72 STAN. L. REV. 1269, 1358-59 (2020) (arguing *Young* should be interpreted flexibly to reflect gap-filling functions of equity and common-law practice).

Woman's Health. And if it does, similar suits could probably be brought in state court, given somewhat clearer state case law on waivers of immunity.²⁹⁹

The remaining option is to litigate S.B. 8's constitutionality against a private party who has filed or is about to file a suit to enforce S.B. 8 against an abortion provider. If a private party files suit under S.B. 8 against an abortion provider, then of course the provider would be entitled to defend by arguing that S.B. 8 is unconstitutional.³⁰⁰ This scenario might be unattractive to abortion providers, either because a suit to enforce the law would probably be brought in state court or because the defendant would be at risk of suffering significant penalties if their constitutional defenses were unsuccessful.³⁰¹ But our law has generally regarded the state courts as an adequate forum in which to assert federal constitutional rights, so long as U.S. Supreme Court review is available on appeal.³⁰² And in fact, the Texas state court that considered constitutional challenges to S.B. 8—a state multidistrict litigation court convened to exercise jurisdiction over S.B. 8 cases arising throughout the state—struck the statute down on state constitutional grounds.³⁰³ Similarly, although it is probably fair to say that pre-enforcement review has become the norm in cases challenging the validity of laws and regulations,³⁰⁴ that is a fairly recent development.³⁰⁵ Until the mid-twentieth century, the ordinary way to challenge a statute was to violate it and raise constitutional defenses to any ensuing enforcement action, so it can hardly be unconstitutional to require parties to follow that route.³⁰⁶

²⁹⁹ See, e.g., cases cited *supra* note 294 (recognizing that Texas permits declaratory actions against the State challenging validity of state statutes).

³⁰⁰ S.B. 8 purports to limit the defenses that a defendant may raise in certain ways, see, e.g., TEX. HEALTH & SAFETY CODE ANN. § 171.209 (West 2025) (imposing limitations on standing, affirmative defenses, and courts' ability to find an undue burden). That said, state law cannot narrow the scope of federal constitutional rights.

³⁰¹ See, e.g., *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 547-58 (2021) (Sotomayor, J., concurring in judgment in part and dissenting in part) (describing the choice between ceasing to perform abortions or facing enforcement actions in state court as a "constitutionally intolerable choice" (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994))).

³⁰² See HART & WECHSLER, *supra* note 12, at 307-11.

³⁰³ See *Van Stean v. Texas Right to Life*, No. D-1-GN-21-004179, 2021 WL 12394878, at *28 (Tex. 96th Dist. Ct. Dec. 9, 2021) (declaring S.B. 8 unconstitutional). Both the state's chief justice, who selected the judge to hear the state multidistrict litigation ("MDL"), and the MDL judge that the chief justice selected, were elected Republican judges.

³⁰⁴ See, e.g., HART & WECHSLER, *supra* note 12, at 221-22.

³⁰⁵ See ADMIN. CONF. OF THE U.S., RECOMMENDATION 82-7, JUDICIAL REVIEW OF RULES IN ENFORCEMENT PROCEEDINGS 1 (1982), <https://www.acus.gov/sites/default/files/documents/82-7.pdf> ("Prior to the Supreme Court's decision in *Abbott Laboratories v. Gardner* . . . direct [pre-enforcement] review was generally difficult to obtain because of technical defenses such as lack of ripeness or lack of standing, and most review of rules took place in the context of enforcement proceedings.").

³⁰⁶ See HART & WECHSLER, *supra* note 12, at 761 ("[T]here is little clear authority for a general right to obtain anticipatory relief.").

Persons subject to suit under a law like S.B. 8 have some federal court options, however. One is to try to identify likely plaintiffs who might enforce the law against them and sue them first in federal court for an injunction or declaratory judgment (or both) that S.B. 8 is unconstitutional. Abortion providers and organizations supporting abortion rights have attempted to do this in a number of recent suits in federal and state courts, some brought in Texas and others in jurisdictions as far as Washington, D.C., or Chicago.³⁰⁷ The difficult part, of course, is how to generate evidence that any particular private party is likely to file suit to enforce S.B. 8 in the immediate future, and against whom they would likely file that suit. Plaintiffs have relied on public statements by groups like Texas Right to Life in support of S.B. 8, as well as pre-litigation discovery requests for depositions by parties investigating the factual basis for an S.B. 8 suit.³⁰⁸ The results have been mixed. Three federal cases have been dismissed on standing grounds, generally because the defendants disavowed any intent to sue the plaintiffs.³⁰⁹ The suits brought in Texas state court, which appear to have had the strongest evidence that the defendant was likely to bring suit, have successfully passed motions to dismiss on standing grounds and resulted in both a temporary restraining order against one defendant and a declaratory judgment that S.B. 8 is unconstitutional.³¹⁰

³⁰⁷ The primary state court suit is *Van Stean*, which is now a multidistrict litigation case in state court in Austin. *See* *Tex. Right to Life v. Van Stean*, 729 S.W.3d 896, 896 (Tex. App. 2026). The Legislative Reference Library of Texas can generate a helpful collection of suits related to *Van Stean*, which captures many of the other efforts to sue potential S.B. 8 plaintiffs. *See Related Court Documents to Alison Van Stean vs. Texas Right to Life*, LEGIS. REFERENCE LIBR. TEX., <https://lrl.texas.gov/currentissues/clips/casePage.cfm?pageID=80&reportID=48431> [<https://perma.cc/9D5Z-QYV9>] (last visited May 1, 2026).

³⁰⁸ *See* TEX. R. CIV. P. 202 (allowing parties to petition state court for order allowing depositions to investigate claim prior to filing suit).

³⁰⁹ *N. Tex. Equal Access Fund v. Thomas More Soc’y*, 728 F. Supp. 3d 887, 898 (N.D. Ill. 2024) (dismissing for lack of traceability and personal stake); *N. Tex. Equal Access Fund v. Am. First Legal Found.*, 699 F. Supp. 3d 67, 79-80 (D.D.C. 2023) (finding the record did not support plaintiffs’ claim “that America First is poised to launch SB8 actions against them”); *Davis v. Sharp*, 656 F. Supp. 3d 687, 690 (W.D. Tex. 2023) (“Defendants . . . have unequivocally renounced any intention to sue Plaintiffs under S.B. 8. With that, Plaintiffs no longer can establish an adequate injury.”).

³¹⁰ *See Van Stean*, 2021 WL 12394878, at *27 (denying motion to dismiss); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Tex. Right to Life*, No. D-1-GN-21-004632, 2021 WL 4098191, at *1-2 (Tex. 53d Dist. Ct. Sep. 3, 2021) (granting temporary restraining order). On appeal, Texas Right to Life focused on its argument that the abortion providers’ suit violated the Texas Citizens Participation Act (“TCPA”), which prohibits lawsuits based on the exercise of rights to free speech, petition, or association. *See* TEX. CIV. PRAC. & REM. CODE §§ 27.001 to .011 (West 2025); *Texas Right to Life v. Van Stean*, 704 S.W.3d 6, 12 (Tex. App. 2023) (“Texas Right to Life urges that abortion and SB 8 are matters of public concern and that their efforts to provide the public with information about SB 8 and to solicit information from others about potential violations are ‘constitutionally protected communications.’” (citing PRAC. & REM. § 27.001(7)(b), (c))). Although the court of appeals rejected that argument, *Van Stean*, 704 S.W.3d at 13, the Texas Supreme Court recently reversed and remanded. *Tex. Right to Life v. Van Stean*, 702 S.W.3d 348, 357-58 (Tex. 2024).

In a possibly more promising variant of this strategy, an abortion provider would await an enforcement action filed under S.B. 8 in state court, then counter-sue the state court plaintiff in federal court for an injunction barring the state court lawsuit. The Anti-Injunction Act (“AIA”) would ordinarily bar this sort of countersuit.³¹¹ But the AIA exempts all suits brought under 42 U.S.C. § 1983, which allows plaintiffs to sue for violations of federal rights by persons acting under color of state law.³¹² While the matter is not entirely free from doubt, one would think that a private person suing to enforce S.B. 8 is acting under color of law,³¹³ and if not, it is because the State simply cannot delegate its sovereign law-enforcement power to persons who lack any personal injury of their own.³¹⁴ Section 1983 actions seeking to enjoin state court proceedings ordinarily have to contend with the *Younger* doctrine,³¹⁵ which requires federal courts to abstain from enjoining state enforcement proceedings.³¹⁶ But although the Court has construed action “under color of state law” for § 1983 purposes to cover private actors “delegated . . . a power ‘traditionally exclusively reserved to the State,’”³¹⁷ it has construed *Younger* abstention more narrowly. In particular, *Younger* almost never applies if no public institution is a party to the

(per curiam). The state supreme court held that the court of appeals should not have ruled that the TCPA did not apply to the lawsuit without first considering whether the abortion provider plaintiffs had standing to bring it in the first place. *Id.* at 351. The Texas Supreme Court did *not* actually assess the plaintiffs’ standing, remanding that question to the court of appeals. The Texas Third Court of Appeals held, in January of 2026, that the plaintiffs did have standing and affirmed the MDL court’s denial of Texas Right to Life’s motion to dismiss. *Van Stean*, 729 S.W.3d at 907-14, 921. That ruling will no doubt be appealed as this Article goes to press.

³¹¹ 28 U.S.C. § 2283 (barring federal courts from enjoining state court proceedings); *see also* *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234-35 (1922).

³¹² *See* *Mitchum v. Foster*, 407 U.S. 225, 243 (1972) (“§ 1983 is an Act of Congress that falls within the ‘expressly authorized’ exception of [the AIA].”).

³¹³ *See, e.g.*, Howard M. Wasserman & Charles W. “Rocky” Rhodes, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Limits and Opportunities of Offensive Litigation*, 71 AM. U. L. REV. 1029, 1080-81 (2022) (arguing the exclusivity of the private plaintiffs’ role in enforcing S.B. 8 renders them state actors under existing precedent).

³¹⁴ *See* discussion *infra* Section II.C (suggesting state *cannot* delegate enforcement power in this way—at least for purposes of suits in federal court).

³¹⁵ *See* *Younger v. Harris*, 401 U.S. 37, 43-46 (1971) (holding federal courts ordinarily may not enjoin criminal prosecutions pending in state court). Subsequent cases extend the *Younger* doctrine beyond criminal prosecutions to state civil enforcement actions. *See, e.g.*, *Huffman v. Pursue*, 420 U.S. 592, 594 (1975); HART & WECHSLER, *supra* note 12, at 1165-68 (discussing *Huffman* and the extension of *Younger* to civil cases).

³¹⁶ *See* ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 11.2.2, at 813-14 (9th ed. 2025) (“Section 1983 constitutes an exception to the Anti-Injunction Act, but not to the *Younger* doctrine. Accordingly, a federal court can enjoin state proceedings pursuant to § 1983 only if the case also fits within one of the exceptions to *Younger* abstention.”).

³¹⁷ *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156-57 (1978) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974)).

state court litigation; the only exception is for “civil proceedings involving certain orders . . . uniquely in furtherance of the state courts’ ability to perform their judicial functions.”³¹⁸

In this sense, a plaintiff enforcing S.B. 8 inhabits the worst of all possible worlds—enough of a state actor to be suable under § 1983, but not the state for purposes of *Younger* abstention. An abortion provider sued under S.B. 8 in state court could thus hope to obtain a federal injunction to enjoin the state court action. If that is right, then it would illustrate a broader point about novel statutes designed to avoid judicial review. Taking the state entirely out of the enforcement equation is something of a gimmick, and while one may gain an advantage in this way, one typically has to give up something in the process. Transferring enforcement to private plaintiffs involves giving up some of the special advantages that the state enjoys in litigation. One of those advantages is *Younger* abstention as a shield against being forced to litigate in federal court.

C. *Private Enforcement, Res Judicata, and the Post-Dobbs Problem with S.B. 8*

Much of the adverse reaction to Texas’s S.B. 8 seems to stem not so much from its disabling of public enforcement, but rather from its empowerment of *private* enforcement. Jon Michaels and David Noll, for example, argue that laws like S.B. 8 create “state-sponsored regimes of private coercion”:

S.B. 8 is merely one example of a broader trend among state legislatures to use private rights of action to penalize and suppress highly personal and often constitutionally protected activities. . . . By seizing on conduct that is front-and-center in today’s culture wars—and by deputizing (and subsidizing) private partisans to prosecute those wars against abortion providers, educators, and school administrators who support their gay and transgender students—these new laws unleash a form of legal vigilantism upon American society.³¹⁹

Professors Michaels and Noll are clearly not alone in seeing something new in S.B. 8’s delegation of public enforcement power to private persons.³²⁰ At the same time, the reaction is somewhat jarring, given the longstanding use of “private attorneys general” to enforce federal civil rights, environmental,

³¹⁸ *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013) (alteration in original) (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 367-68 (1989)).

³¹⁹ Michaels & Noll, *supra* note 259, at 1190-91 (footnote omitted).

³²⁰ See Erin Douglas, *Texas Abortion Law a “Radical Expansion” of Who Can Sue Whom, and an About-Face for Republicans on Civil Lawsuits*, TEX. TRIB. (Sep. 3, 2021, at 05:00 CT), <https://www.texastribune.org/2021/09/03/texas-republican-abortion-civil-lawsuits> [<https://perma.cc/PN8W-XD5Y>] (“The expansion has far-reaching legal implications . . . by challenging the very notion of what a court is for and emboldening civilians to enforce law, a duty traditionally left to the government.”).

securities regulation, and consumer protection statutes.³²¹ Indeed, other scholars on the political left have often suggested that standing decisions *limiting* private enforcement are a sinister vehicle for advancing right-wing political goals.³²²

It may help to lower the temperature. Delegating authority to enforce S.B. 8 to private parties creates three problems for the law's targets, only one of which ultimately seems substantial. The first is that privatizing enforcement tends to produce more of it. Limited public resources ordinarily constrain any law's enforcement; privatization leverages private resources to ramp up enforcement while sparing the public fisc.³²³ Whether this is good or bad depends largely on what one thinks of the particular legal norms being enforced, and much of the outrage about private enforcement of laws like S.B. 8 stems from disapproval of the underlying regulations. In any event, the conventional debate over whether private attorneys general are likely to over-enforce the law assumes that public enforcement remains available alongside private enforcement. The S.B. 8 template, however, categorically bars public enforcement—raising a serious question whether private enforcement will compensate for the public enforcement that is lost. Even critics of laws like S.B. 8 acknowledge that suits under them are quite rare.³²⁴

The second problem concerns the binding force of a judgment attacking a privately enforced law's constitutionality. If an abortion provider were sued under S.B. 8 and secured a judgment that it was unconstitutional, for example, that judgment would not bind future parties that might sue the provider.³²⁵ One federal trial court thus ruled that a provider lacked standing to challenge

³²¹ See, e.g., SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 10-16 (2010) (describing long tradition and increasing use of private suits to enforce federal statutes).

³²² See, e.g., Sunstein, *supra* note 95, at 370-71 (lambasting the Court's decision in *TransUnion* as ideologically motivated to benefit regulatory subjects at the expense of regulatory beneficiaries). For a more balanced view, see Zachary D. Clopton, *Substance and Form in Vigilante Federalism*, 108 CORN. L. REV. ONLINE 159, 161 (2023) ("Private enforcement . . . is just a tool. Tools can be used for good or ill.").

³²³ See BRIAN T. FITZPATRICK, *THE CONSERVATIVE CASE FOR CLASS ACTIONS* 33-37 (2019) (noting conservative preference for ex post private enforcement of laws rather than ex ante governmental enforcement). *But see* Margaret H. Lemos, *Privatizing Public Litigation*, 104 GEO. L.J. 515, 538, 540 (2016) (questioning whether outsourcing legal work is cost-effective for governments).

³²⁴ See Michaels & Noll, *supra* note 259, at 1201 ("Litigation enforcing educational gag laws has, so far, been modest . . ."); *id.* at 1206 ("The level of litigation under [anti-LGBTQ+ laws] is, again, modest."); *id.* at 1210 ("In what is now a familiar pattern, the number of cases filed under [anti-abortion laws] is low.").

³²⁵ S.B. 8 purports to limit the ability of a defendant to raise issue or claim preclusion, see TEX. HEALTH & SAFETY CODE ANN. § 171.208(e)(5) (West 2025), but this is not the problem. No doctrine of non-mutual issue or claim preclusion would bar new plaintiffs from having their day in court defending the law's validity. Of course, the precedential value of the prior decision might doom their efforts.

S.B. 8.³²⁶ The plaintiffs had sued an anti-abortion organization that, they alleged, was about to sue them under S.B. 8.³²⁷ The district judge pointed out, however, that any injunctive relief would not cover non-parties who might sue the plaintiffs in the future, nor would a judgment that S.B. 8 was unconstitutional be res judicata in such cases. This meant, the court concluded, that the plaintiffs' requested relief could not redress their injury.³²⁸

Although the court was right about the limits of its power to bind parties not before it, the conclusion that plaintiffs lacked standing does not follow. Just as the magnitude of a plaintiff's injury does not matter for standing purposes,³²⁹ the proportion of the plaintiff's injury that the requested relief will redress is not critical unless it will do no good at all.³³⁰ To the extent that a successful attack on the statute binds the parties to the present litigation—and serves as a precedent for others—that satisfies the redressability standard.

Moreover, the res judicata problem is not unique to statutes like S.B. 8 that rely *exclusively* on private enforcement. The existence of a public enforcer provides a natural target for an action to enjoin the enforcement of a federal statute. But if, for instance, a company charged by the Securities and Exchange Commission ("SEC") with securities fraud obtained a judgment that a securities regulation was invalid or unconstitutional, that judgment would ordinarily bind only the parties to the litigation. Thousands of shareholders, possessing a private right of action under the statute, would still be free to bring suit against the company and try their own luck at defending the statute's constitutionality, because our rules of res judicata guarantee each litigant an opportunity to prove their case.³³¹ That follow-on litigation most likely would *not* occur in this scenario simply reflects the practical influence of adverse precedent, especially where the government has fully litigated the issue. An appellate court decision invalidating a statute like S.B. 8 would likely have a similar effect.³³² In any

³²⁶ N. Tex. Equal Access Fund v. Thomas More Soc'y, 728 F. Supp. 3d 887, 897 (N.D. Ill. 2024).

³²⁷ *Id.* at 891-92.

³²⁸ *Id.* at 896-97.

³²⁹ See *United States v. Students Challenging Regul. Agency Procs.*, 412 U.S. 669, 689 n.14 (1973) (requiring only an "identifiable trifle" to establish injury in fact).

³³⁰ See *Massachusetts v. EPA*, 549 U.S. 497, 525-26 (2007) ("[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury." (emphasis omitted) (quoting *Larson v. Valente*, 456 U.S. 228, 244 n.15 (1982))).

³³¹ See *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798 (1996) ("[I]n Anglo-American jurisprudence . . . one is not bound by a judgment *in personam* in a litigation . . . to which he has not been made a party This rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court.'" (citation omitted) (first quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); and then quoting 18 WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 4449 (1981))).

³³² With S.B. 8, inconsistent judgments are even less likely. The *Van Stean* defendants invoked the Texas multidistrict litigation procedure, ensuring that all similar cases would go to the same Texas trial court (which already pronounced S.B. 8 unconstitutional). See *supra*

event, the inability to secure a judgment binding all potential private enforcers is a problem endemic to private enforcement generally.

The truly troubling problem arising out of S.B. 8's unusual features is that it empowers private parties to sue in cases where they lack any private injury specific to them.³³³ Standing doctrine has long distinguished between public rights ("those that belong to the body politic") and private rights (those that "are held by discrete individuals").³³⁴ The interest in "[t]he penal law (which includes not only criminal law but also fines and forfeitures recoverable through civil process)" falls into the "public rights" category.³³⁵ This is why the government may prosecute crimes in federal court without showing an injury in the way a private litigant must; the public interest suffices for standing when the sovereign is the plaintiff.³³⁶

Even crimes have both a public and private dimension, however. Hence private individuals injured by a criminal act can pursue the perpetrator in tort.³³⁷ Modern regulatory statutes tend to follow this pattern. The federal securities laws, for instance, define crimes exclusively prosecuted by the government as well as private rights of action to compensate private shareholders who have their own injuries traceable to a legal violation.³³⁸ Similarly, the Supreme Court has required, since the 1970s if not earlier, that while Congress can empower private actors to sue to vindicate public rights like a clean environment, those actors must be able to show their own private injury as a prerequisite for standing.³³⁹ Federal statutes attempting to provide a broader private right to sue

note 307 (tracking related S.B. 8 litigation). In litigation under similar statutes in different states, plaintiffs may be able to invoke similar procedures.

³³³ See, e.g., Wasserman & Rhodes, *supra* note 313, at 1082 ("S.B. 8 plaintiffs . . . need not show any personal injury, stake, or connection to the abortions over which they sue. They replace the executive in vindicating a purely public, non-personal policy goal . . ." (footnote omitted)).

³³⁴ Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 693 (2004).

³³⁵ *Id.* at 693 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *5).

³³⁶ See *id.* at 695.

³³⁷ See *id.* at 696.

³³⁸ See 15 U.S.C. § 78ff(a) (providing criminal penalties for willful violations of statute or particular rules or regulations); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730-31 (1975) (stating purchasers or sellers of security who have private damages may sue to enforce prohibition of securities fraud under Securities Exchange Act § 10b and SEC Rule 10b-5).

³³⁹ See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573-78 (1992) (collecting cases); *Sierra Club v. Morton*, 405 U.S. 727, 734-38 (1972) (concluding litigants may invoke public interest but must have suffered particular injury to establish standing); Woolhandler & Nelson, *supra* note 334, at 701-04 (tracing this requirement much further back).

have been held unconstitutional to the extent that they permit private enforcement by plaintiffs who lack their own injury in fact.³⁴⁰

A statute like Texas's S.B. 8 is hard to square with these principles. The public interest in preventing violations of state abortion prohibitions is a public right. The legislature could empower someone with a private interest—a woman who had not given her informed consent to the procedure, for example—to enforce that right without offending traditional standing principles. But to empower parties with no personal interest in the subject matter of their suit is to delegate the sovereign's authority to enforce public rights to a private actor.³⁴¹ No federal court has yet had occasion to dismiss such a plaintiff's attempt to enforce S.B. 8, but several recent standing cases seem to require that outcome.

Start with the Court's decision upholding the *qui tam* provisions of the False Claims Act ("FCA") in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*.³⁴² The FCA permits private plaintiffs who uncover a fraud upon the U.S. government to sue on the government's behalf and retain a percentage of the ultimate recovery.³⁴³ In such a case, the *qui tam* plaintiff (the "relator") typically alleges no injury whatsoever of their own. *Stevens* upheld the Act on the theory that the United States has a financial injury that the relator is authorized to assert. But the Court stopped short of saying that governments may delegate just any interest; rather, it was important that the interest in recovery for fraud was a run-of-the-mill proprietary interest that any party could have—and that any party could assign to another.³⁴⁴ The interest, in other words, was a private right.

Stevens left open the question whether other government interests—in particular, the government's sovereign interest in enforcing the law—could be assigned to private parties.³⁴⁵ But the Court gave a big hint at the answer in

³⁴⁰ See, e.g., *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2197 (2021) (holding plaintiffs lacking injury in fact could not sue under FCRA); *Lujan*, 504 U.S. at 556 (holding plaintiff without sufficiently imminent injury could not sue under Endangered Species Act).

³⁴¹ See *Van Stean v. Tex. Right to Life*, No. D-1-GN-21-004179, 2021 WL 12394878, at *26-27 (Tex. 96th Dist. Ct. Dec. 9, 2021) (holding this delegation violated state constitution's separation of powers). Professor Tara Grove has argued that such delegations of power to enforce *federal* public rights would violate Article II, § 3's requirement that the President "take Care that the Laws be faithfully executed." Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 822 (2009). The Take Care Clause does not govern a *state* cause of action, of course, but to the extent this constitutional concern about private delegations is reflected in Article III standing doctrine, see *id.* at 833-34, it would apply to S.B. 8 suits brought in federal court.

³⁴² 529 U.S. 765 (2000).

³⁴³ *Id.* at 769-70.

³⁴⁴ *Id.* at 773-74 ("Although we have never expressly recognized 'representational standing' on the part of assignees, we have routinely entertained their suits . . .").

³⁴⁵ It also avoided the question whether a *qui tam* relator could take advantage of the United States' ability as a superior sovereign to pierce the sovereign immunity of a state government, although it expressed "'serious doubt' on that score." *Id.* at 787; see also Ernest A. Young, *State Sovereign Immunity After the Revolution*, 102 TEX. L. REV. 697, 762-67

Hollingsworth v. Perry,³⁴⁶ involving standing to appeal a ruling invalidating a state constitutional amendment. California allows amendments to the state constitution to be approved by popular ballot initiative.³⁴⁷ Because initiatives often are enacted over the contrary wishes of state elected officials, California law allows the original proponents of the ballot initiative to intervene in court challenges to the initiative's validity.³⁴⁸ The Supreme Court held, however, that such intervenors could have Article III standing to appeal an adverse trial court ruling only if they were "agents" of the state government, and the intervenors were not agents because the state retained no control over the conduct of the litigation.³⁴⁹ The key point is that the state's right to defend the constitutionality of legislation is a sovereign interest, and if the state could simply assign it to any private party then there would have been no need to worry about an agency relationship. Similarly, an S.B. 8 plaintiff could not possibly be described as an "agent" of Texas on the criteria of retained control that *Hollingsworth* articulated.

Finally, consider the Court's more recent decision in *TransUnion LLC v. Ramirez*,³⁵⁰ which involved private rights to sue under the Fair Credit Reporting Act ("FCRA"). The plaintiffs were private persons who sought statutory damages under the FCRA after TransUnion added erroneous negative information to their credit files in violation of the Act.³⁵¹ The Court held that some of the plaintiffs had "actual" injuries because they had either experienced adverse consequences or their erroneous files had been viewed by third parties.³⁵² But a large subgroup of the class whose erroneous files had never been viewed by anyone lacked standing because, although their legal rights had been violated, no actual concrete injury had occurred.³⁵³ The important point for present purposes is that the statutory damages allowed to anyone who establishes a violation of the FCRA are analogous to the bounty offered to successful S.B. 8 plaintiffs. If the government could simply delegate its authority to enforce the public interest in compliance with the law to private persons—as Texas has in S.B. 8—then *TransUnion* would have been a much easier case and *all* the plaintiffs would have had standing. But if persons whose own credit files have been unlawfully altered cannot sue to enforce the FCRA without a further showing of actual and personal injury, then it is hard to see how Article III could

(2024) (discussing this question). The ability to sue a state—like the ability to enforce public rights like the criminal law—is an attribute of sovereignty. If one is nondelegable, then the other may not be either.

³⁴⁶ 570 U.S. 693 (2013).

³⁴⁷ See *id.* at 706-07 (outlining process of creating ballot initiatives in California).

³⁴⁸ See *id.* at 717-20 (Kennedy, J., dissenting) (explaining reasons why California allows such interventions).

³⁴⁹ See *id.* at 713 (majority opinion).

³⁵⁰ 141 S. Ct. 2190, 2206 (2021).

³⁵¹ *Id.* at 2197.

³⁵² See *id.* at 2208-09.

³⁵³ See *id.* at 2209-13.

permit Texas to delegate enforcement of its abortion laws to persons who cannot even show violation of a personal legal entitlement.

Crucially, the Court's Article III standing cases determine only who has standing to sue in *federal* court; as far as the federal Constitution is concerned, states are free to have their own rules of standing or no doctrine of standing at all.³⁵⁴ North Carolina, for example, has rejected any injury in fact requirement for at least some sorts of statutory causes of action.³⁵⁵ Texas lacks a "case or controversy" provision in its state constitution, but it does require plaintiffs to show standing to sue under the separation of powers and open courts provisions of the state constitution.³⁵⁶ In particular, the Texas Supreme Court has said that "our constitution's open-courts provision contemplates access to the courts for only those litigants who have suffered an actual injury . . . [T]o have standing an individual must demonstrate a particularized interest . . . distinct from that sustained by the public at large."³⁵⁷ On the other hand, that court has also suggested that this requirement applies "unless standing is conferred by statute."³⁵⁸

Texas law is thus not altogether clear as to the legislature's authority to grant standing without injury. The Texas trial court in the *Van Stean* litigation reconciled the cases in favor of a baseline injury requirement and held that S.B. 8 violated the principle of standing embodied in the state constitution's separation of powers and open courts provisions.³⁵⁹ Importantly, the court also found that delegating the state's enforcement power to persons who had not been injured by the violation of state law in question violated the state constitution's private delegation doctrine.³⁶⁰ That holding would remain as a state constitutional bar even if S.B. 8 were considered to be a valid statutory expansion of standing.³⁶¹

The extent to which *Van Stean* correctly applied Texas law, or to which other state constitutions may have rules barring private enforcement of public rights without showing private injury, is outside the scope of this paper. The key point

³⁵⁴ See, e.g., Rebekah G. Strotman, Note, *No Harm, No Problem (In State Court): Why States Should Reject Injury in Fact*, 72 DUKE L.J. 1605, 1607-08 (2023).

³⁵⁵ See Comm. to Elect Dan Forest v. Emps. Pol. Action Comm., 853 S.E.2d 698, 734 (N.C. 2021); Strotman, *supra* note 354, at 1614-17 (discussing *Dan Forest*).

³⁵⁶ See *In re Abbott*, 601 S.W.3d 802, 807 (Tex. 2020).

³⁵⁷ S. Tex. Water Auth. v. Lomas, 223 S.W.3d 304, 307 (Tex. 2007).

³⁵⁸ *Sneed v. Webre*, 465 S.W.3d 169, 180 (Tex. 2015). A long line of cases make similar statements, but most of them do not actually involve statutorily conferred standing. One exception is *Scott v. Board of Adjustment*, 405 S.W.2d 55, 57 (Tex. 1966), which held that a taxpayer may exercise a statutory right to appeal a board's decision granting a zoning variance without showing any "particular damage." The court's discussion suggests that none of the Texas statutes expanding standing in this way accord standing to "any person" as S.B. 8 does.

³⁵⁹ *Van Stean v. Tex. Right to Life*, No. D-1-GN-21-004179, 2021 WL 12394878, at *19-20 (Tex. 96th Dist. Ct. Dec. 9, 2021).

³⁶⁰ See *id.* at *26-27.

³⁶¹ The *Van Stean* court also held that S.B. 8's imposition of penalties violated the Due Process Clause of the Fourteenth Amendment because it lacked adequate procedural safeguards. See *id.* at *22-25.

is simply that Article III almost certainly bars this sort of enforcement scheme in federal court, and such schemes may encounter serious roadblocks in state court as well. Because this problem stems from limits on judicial power, it remains available to challenge S.B. 8 after *Dobbs* and can be used against other statutes patterned on S.B. 8's enforcement provisions whether or not they implicate fundamental substantive rights. Laws privatizing and dispersing enforcement are unlikely to thwart challenges—and they may trigger more grounds for potential invalidation.

CONCLUSION

Standing is about whether a *plaintiff* is a proper party to bring a lawsuit. When a party subject to a legal rule files suit to challenge it, courts should keep their eye on the central question whether the plaintiff has been harmed in some way. That question can and should generally be answered without regard to what the *defendant*—usually the party charged with enforcing the law—is likely to do or who the defendant is likely to be. Although plaintiffs must establish that their injury is traceable to the action they challenge and redressable by the requested relief, recognition that a plaintiff can suffer injury wholly on account of their own obligation to comply with the law clarifies that traceability and redressability can be satisfied even if a law has no enforcement mechanism at all. In particular, a declaratory judgment sought against a government official designated by law as responsible for defending their laws' validity can relieve a conscientious plaintiff of their injurious obligation to comply with an invalid law.

Other problems may remain, of course. Standing is not the only limit on judicial review, and collapsing all concerns about particular kinds of cases into standing is likely to distort and confuse the doctrine. Questions about whether a dispute has advanced far enough that a court can competently decide it, for example, are better asked under the rubrics of ripeness or the law of remedies. And concerns about appropriate defendants will often turn out to be more about sovereign immunity and its exceptions than they are about standing.

These principles are grounded in basic theories of the judicial power and what it means to be bound by law. But keeping them in view can help solve pressing current problems. Eschewing questions like “how likely is enforcement?” can help solve growing confusion about uncertain enforcement cases in the lower federal courts. And clear thinking about the nature of a plaintiff's injury and what can redress it should help unravel divisive puzzles like Texas's S.B. 8, without doing violence to enduring principles of justiciability.