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HOW MUCH PROTECTION DO INJUNCTIONS AGAINST ENFORCEMENT OF ALLEGEDLY UNCONSTITUTIONAL STATUTES PROVIDE?

*Vikram David Amar**

INTRODUCTION

The federal "Partial Birth Abortion Ban Act of 2003" ("the Act") authorizes fines and/or jail terms of up to two years for any doctor who performs a so-called "partial birth abortion"—a procedure Congress tried to define in the Act itself.[1] The Act also authorizes civil damage actions against doctors who engage in the prohibited conduct.[2]

Unsurprisingly, in the weeks following the Act's passage, a number of federal district courts issued temporary restraining orders ("TROs") and preliminary injunctions that prohibited, at least for the time being, the Justice Department from enforcing the new law.[3] The restraining orders were issued by the district courts in large part because of the very significant possibility that the Act, when carefully and fully considered by courts on the merits, will end up being invalidated as unconstitutional.[4]

As other contributors to this Issue are explaining in much more detail, the Supreme Court's decision in *Planned Parenthood of Pennsylvania v. Casey*[5] establishes that the government cannot place an "undue burden" on a woman's right to terminate a nonviable fetus.[6] The Act arguably fails this test. And for this reason, many commentators believe the Act will be struck down by the federal courts of appeal and/or the Supreme Court (should it weigh in).[7]

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1. *See* 18 U.S.C. § 1531(b)(1) (2003).

2. *See id.* § 1531(c).

3. *See, e.g.*, Nat'l Abortion Fed'n v. Ashcroft, 287 F. Supp. 2d 525, 526 (S.D.N.Y. 2003).

4. *See, e.g., id.*

5. 505 U.S. 833 (1992).

6. *Id.* at 837.

7. *See, e.g.*, Edward Lazarus, *The New Anti-"Partial Birth Abortion" Legislation: Is It a Political Watershed, or Not?*, Findlaw's Legal Commentary (Oct. 30. 2002), *at* http://writ.news.find law.com/lazarus/20031030.html.

But what if the federal courts do the unexpected, and uphold the federal partial-birth abortion law? What happens to those doctors who have performed partial-birth abortions in the interim between two points in time—the point when an injunction against the Act's enforcement was issued, and the point when the Act is upheld by the last reviewing court?

Assuming no statute of limitations bar, could the Ashcroft Justice Department prosecute these doctors? Can civil damage remedies be pursued? These are the questions I want to consider in this short essay.

I. Is it Possible that the Federal Act Could Be Upheld on the Merits?

Most constitutional analysts think the Act is doomed. Indeed, some consider it "patently unconstitutional" because it suffers from the same two flaws that led the Supreme Court to invalidate the State of Nebraska's partial-birth abortion law three years ago, in *Stenberg v. Carhart*.[8] In particular, detractors urge, the Act does not provide a narrow and non-vague definition of the prohibited procedure itself, and the Act does not have an exception that would permit the procedure to be used when its use would be in the best interests of the mother's health.[9]

I take no position here on whether those who foresee the Act's ultimate invalidation by federal courts (including the Supreme Court) are right or wrong; indeed, I have not done enough thinking on the subject to have any quarrel with their reasoning. But I *do* know that the current Supreme Court can sometimes do, and has in fact done in recent years, many unexpected things in big cases.[10]

I also know there is one issue that the United States will raise—deference to Congressional "fact-finding"—as to which the Court has been all over the map in recent decades. Defenders of the federal Act argue that it is different from Nebraska's law in that Congress has made new findings to the effect that the partial-birth abortion procedure is never medically necessary and indeed is never safer for the mother than are other procedures. In Congress's words, "substantial evidence . . . demonstrates that a partial-birth abortion is never necessary to preserve the health of a woman [and] poses significant health risks to the woman upon whom the

8. 530 U.S. 914, 946 (2000); *see, e.g.*, Lazarus, *supra* note 7.

9. *See* Lazarus, *supra* note 7.

10. *See, e.g.*, McConnell v. FEC, 124 S. Ct 619 (2003); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 123 S. Ct. 1972, 1976-77 (2003).

procedure is performed and is outside the standard of medical care."[11] Such findings, defenders will urge, must be accepted by the courts.

In the 1960s, the Court did often seem to defer to Congress's findings. For example, in the context of racial discrimination in voting, the Court upheld Congressional power to regulate state governments based directly upon findings that Congress made about the existence of racist state policies.[12] But since the mid-1990s, the Court seems to be much less deferential, or at least much less consistently deferential. For example, it has held that the question of whether an activity "substantially affects interstate commerce" is ultimately one for the Court, and that Congressional findings on the matter carry relatively little weight.[13]

Perhaps one could distinguish the "existence of discrimination" question from the "substantially affects interstate commerce" question on the ground that the former is factual whereas the latter involves application of a legal standard to facts. But even within the realm of "factual" questions concerning the presence or absence of discrimination, the Court has been erratic.

For instance, just last term, in upholding the Family and Medical Leave Act as a valid exercise of Congress's powers to remedy illicit discrimination under the Fourteenth Amendment, the Court in *Nevada Department of Human Resources v. Hibbs*[14] seemed to defer to Congressional findings that were not much stronger than those that were rejected in cases over the previous five years, such as *Board of Trustees of the University of Alabama v. Garrett*,[15] which involved similar findings about discrimination in the context of the Americans With Disabilities Act.[16] In short, the Court has been anything but clear about which questions of fact, or which mixed questions of fact and law, are those as to which Congress is entitled to significant respect. And I have no sense of where the "medical need for partial birth abortions" would fall within the Court's deference matrix.

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11. Pub. L. 108-105, § 2, 117 Stat. 1201 (2003).

12. *See, e.g.*, City of Rome v. United States, 446 U.S. 156, 187 (1980); Katzenbach v. Morgan, 384 U.S. 641, 658 (1966); South Carolina v. Katzenbach, 383 U.S. 301, 337 (1966).

13. United States v. Morrison, 529 U.S. 598, 614, 627 (2000).

14. 538 U.S. 721 (2003).

15. 531 U.S. 356 (2001).

16. *See* Vikram Amar, *The New "New Federalism": The Supreme Court in Hibbs (and Guillen)*, 6 GREENBAG 349 (2003) (discussing the Court's inconsistent treatment of Congressional findings).

As to whether deference *ought* to be given, my own, somewhat tentative sense, is that while the Court generally should be more deferential to Congress than it has in the past decade and a half,[17] the Court ought not to be very deferential to Congress when Congress is operating in a context where the Court has already indicated that a heightened standard of review is appropriate. In other words, the Court's level of deference—even on factual matters—ought to correspond more generally to the "level of scrutiny" the Court applies in a given setting. Where "intermediate" or "strict" scrutiny has been adopted by the Court because of skepticism of legislative power in a given area, that skepticism ought to apply to legislative factual determinations as well as legal and policy judgments. To my mind, where the Court has gone wrong in recent times is its effective extension of "heightened scrutiny" to areas like Section 5 of the Fourteenth Amendment, where a lesser standard of review (akin to the "minimum rationality review" applied in *McCulloch v. Maryland*[18]) is more defensible.[19] But once the Court *legitimately* identifies a classification or activity, the regulation of which ought to trigger suspicions, those suspicions should apply to fact-finding as well.

In the context of abortion regulation, as I noted above, the Court has settled on a form of "undue burden" analysis that is effectively a kind of mid-level scrutiny.[20] This standard seems similar, though not identical, to the mid-level "intermediate scrutiny" often applied in the equal protection gender classification setting. In that

17. From the years 1995-2000, the Court struck down twenty-four Congressional enactments. *See* Akhil Reed Amar, *The Document and the Doctrine*, 114 HARV. L. REV. 26, 84 n.194 (2000) (and sources cited therein). Compare that with the early period of the Republic. During John Marshall's tenure as Chief Justice, *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed 60 (1803), was the only case clearly calling into question the validity of an Act of Congress. The next case in which a Congressional law was declared unconstitutional by the Court (in dicta no less) was *Dred Scott*, which was overruled by the Civil War. The first act of Congress of general applicability to be held invalid by the Court was the Legal Tender Act in *Hepburn v. Griswold*, 75 U.S. 603 (1870). That decision was itself promptly overruled by *Knox v. Lee*, 79 U.S. 457 (1871). Even taking into account that Congress passes many more laws today than it did in the eighteenth and nineteenth centuries, the attitude of the current Court is "activist" (defining activism only to mean lack of deference) by any historical standard.

18. 17 U.S. 316, 436 (1819).

19. *See* Evan Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1157 (2001).

20. *See* Alan Brownstein, *How Rights are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 872 (1984) (arguing that the level of scrutiny in *Casey* is reflected throughout "the fundamental rights case laws of the last forty years.").

realm, the Court has been somewhat independent in its analysis of the underlying facts said to justify a sex-based law.[21] In particular, the Court has focused on the process the legislature used to determine its facts, and the objective plausibility of the legislature's factual bottom lines. I would hope the same independent judicial judgment would apply to the Partial-Birth Abortion Act setting.

But let us suppose, in light of the volatility of the Court's treatment of such matters, that Justice O'Connor[22] finds that the Act is not as vague as was the Nebraska statute, and that Congress' "findings"—that the partial-birth abortion procedure is never "safe or safer than" other possible procedures from the standpoint of the mother's health—are entitled to deference, so that the factual predicate on which the Court based its *Carhart* decision no longer exists. That is, let us suppose that the Court upholds the Act.

The key question for my present purposes then becomes: what happens to those doctors who have performed partial-birth abortions in violation of the Act during the time a temporary restraining order (or other injunction by a lower court) was in effect? In other words, may these doctors be criminally prosecuted by a zealous Bush Administration Justice Department for acts violative of a statute that ultimately gets upheld? Can they be held civilly responsible?

Remarkably, there may be no straightforward answer to this question. To appreciate how that can be some, a brief bit of background is necessary.

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21. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 200 (1976) (striking down a law which prohibited beer sales to males under twenty-one years of age and to females under eighteen years of age, because statutory distinctions by gender are subject to scrutiny under the Equal Protection clause, and the goals of public health and safety do not justify this gender discrimination where the statistics do not "support the conclusion the gender-based distinction closely serves to achieve that objective."); United States v. Virginia, 518 U.S. 515, 557 (1966) (holding that a prestigious military college exclusively for males violated the Equal Protection clause).

22. Justice O'Connor has proven to be the key vote in all the cases that are hard to predict. She was the only person in the majority of each and every one of the Court's thirteen 5-4 decisions last year. Some commentators, including John Yoo, have called her, because of her centrality in modern outcomes on the Court, the most "powerful woman in American history." *See, e.g.*, *Newshour with Jim Lehrer: The Power of One* (PBS television broadcast, Jan. 12, 2004).

II. Temporary Restraining Orders, Preliminary Injunctions, and "Permanent" Relief —A Remedies Primer

When a statute is passed that prohibits someone's activity, and that person believes the statute is unconstitutional, he appears to face a dilemma. He can comply with the statute, but then he gives up what he believes is a constitutional right to do something. On the other hand, he can flout the statute, and invoke as a defense in his prosecution the statute's unconstitutionality. If he prevails on his constitutional defense, the prosecution will be terminated; unconstitutionality of the underlying statute is always a complete defense to any prosecution. But—and herein lies the apparent dilemma—what if he *loses* on his constitutional defense? Then he goes to jail. In other words, thus far, the only way he can enjoy the activity he thinks he has a right to engage in is to risk going to jail if he turns out not to be a good predictor of constitutional law.

That's where injunctive relief comes in—it is supposed to be a way around the dilemma. A person can go to court and say: "I am ready, willing, and anxious to engage in conduct that this statute purports to prohibit. I would like an order from the court stating that this statute is unconstitutional, and an injunction against the prosecutor barring him from enforcing the statute against me."

Oftentimes courts will respond by questioning the "ripeness" of the plaintiff's constitutional challenge. Do we really know plaintiff plans to engage in the prohibited conduct? Do we really know that the statute will be enforced against the plaintiff in any event? But assuming a person can demonstrate that her case is ripe, she can seek injunctive relief. The first kind of injunction she is likely to obtain is a "preliminary injunction" (or its close cousin, the temporary restraining order). These remedies are injunctions that a court might issue *before* it has had time to hold a full-blown trial or similar proceeding to decide which side is ultimately right about the statute's constitutionality. Such "preliminary" relief—i.e., relief pending further proceedings—may be given if a plaintiff can show that there is some good chance she will ultimately prevail at trial on the merits, and that she will suffer some serious injury (that money awarded later cannot undo) in the meantime unless an injunction is issued. In doctrinal terms, these two factors are called the relative "likelihood of success on the merits" of both sides, and

the "balance of hardships" between the parties. Courts considering preliminary relief must assess them both.[23]

That is exactly what happened right after the Partial-Birth Abortion Act was signed into law; various district courts granted preliminary relief—pending a full-blown resolution on the merits—against the Justice Department, on the ground that the federal Act may very well be unconstitutional under *Carhart*, and that women will suffer in the meanwhile if the law is enforced. For example, the district court judge in Nebraska who temporarily enjoined the federal Act observed: "The law challenged here appears to suffer from a . . . vice" similar to the one found in the Nebraska statute in *Carhart*, and the "health of women may be harmed if I" do not issue an injunction.[24]

All injunctive relief, of course, including preliminary injunctions, binds only the defendants before the court, and applies only to protect the specific plaintiffs who have brought the suit. Thus, the Nebraska district court injunction to which I just adverted is of no help to other doctors who are not parties to that very suit. That is why the plaintiffs in the various lawsuits filed promptly around the country right after the Act's passage were *organizations and associations of thousands of doctors*. These thousands of doctors had to be included as parties to the cases, or else they would not be protected by the injunctions that issued.

Nor can the doctrine of collateral estoppel, or issue preclusion, be used to protect non-parties from federal government overreaching. Defendants other than the federal government are often estopped, or precluded, from relitigating a particular legal or factual question against a new opponent when they have already lost against a prior opponent on the same legal or factual question. The reason courts permit this offensive non-mutual issue preclusion is that the defendant had his day in court on the issue in an earlier case, and should be stuck with the result.[25] But the Supreme Court has held that the federal government is not subject to this non-mutual issue preclusion doctrine, because the federal government is involved in so much litigation, and to bind it to a loss on an issue

23. *See, e.g.*, Kenyeres v. Ashcroft, 538 U.S. 1301, 1303 (2003) (stating courts evaluate requests for stay by measuring "an applicant's likelihood of success on the merits and to take account of the equity interests involved."); Los Angeles Mem'l Comm'n v. Nat'l Football League, 791 F.2d 1356, 1372-73 (9th Cir. 1986) (in considering preliminary relief, the court assessed both the likelihood of success on the merits and the balance of hardships between the parties).

24. Carhart v. Ashcroft, 287 F. Supp. 2d 1015, 1016 (D. Neb. 2003).

25. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979).

in any one case would "freeze" into law results that may need to be revisited.[26]

By contrast, once a law is struck down on the merits as unconstitutional on its face by the Supreme Court, such a ruling will prohibit enforcement against anyone—not just the parties in the Supreme Court case—because the Supreme Court's facial invalidation of the statute would bind all judges in the land. Prosecutors who tried to enforce the statute would not be violating an injunction, but they would be wasting everyone's time (arguably in violation of due process), unless there was a reason to believe the Supreme Court had changed its mind.[27]

If a preliminary injunction prohibiting the enforcement of the Partial-Birth Abortion Act is followed up by a permanent injunction entered after the district court holds the statute invalid on the merits, and that injunction is in turn affirmed by a U.S. Court of Appeals and the U.S. Supreme Court (as may happen in the case of the federal Partial-Birth Abortion Act), things are relatively simple.

But what happens if a preliminary injunction is not followed by an invalidation of the statute. That is, what if the district court after hearing all the evidence decides the law is constitutional after all? Or what if a district court's permanent injunction is reversed by the Court of Appeals? Or what if the Supreme Court upholds the statute when the case gets up there? What then?

If any of these things were to happen in the federal, Partial-Birth Abortion Act setting, matters might get complicated. It is clear that after such reversals of course, doctors could no longer rely on the relief granted them earlier in the case. That is, doctors clearly could be held responsible for any partial-birth abortion they performed *after* a higher decision upholding the Act came down. But what about conduct that was performed while the injunction was in effect? Are doctors immunized for acts disobedient to the statute undertaken while the injunction preventing enforcement was in effect?

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26. United States v. Mendoza, 464 U.S. 154, 163 (1984).

27. Note, in this regard, the difference between precedent and preclusion. Precedent binds non-parties, but can be revisited and overruled by the appellate courts. By contrast, preclusion, where it applies, forecloses a court from reexamining at all the issue(s) as to which preclusion operates. For that reason, applying non-mutual estoppel against the federal government is thought to be a much more problematic than are the constraints reflected by the doctrine of stare decisis.

A. The *Edgar v. MITE* Decision

The Supreme Court has never really made up its mind on any of this. It has been twenty years since members of the Supreme Court really engaged these questions at all. Of the three Justices who took up the issue in some detail two decades ago, only Justice John Paul Stevens remains on the Court today.

The question arose in the 1982, Edgar v. MITE Corp. case,[28] which involved an Illinois statute that tried to regulate corporate takeover offers. MITE Corp. challenged the constitutionality of the Illinois statute on the ground that the statute unduly burdened interstate commerce, and was preempted by federal law.

On February 2, 1979, MITE obtained a preliminary injunction from a federal district court restraining the Illinois Secretary of State from invoking the provisions of the Illinois statute to block MITE's intended takeover of another company.[29] On February 5, in violation of the provisions of the Illinois law, MITE published its takeover offer in the Wall Street Journal.[30]

On February 9, the district court entered a judgment declaring the Illinois statute unconstitutional; the court then permanently enjoined the Secretary from enforcing the Illinois statute against MITE.[31] The U.S. Court of Appeals for the Seventh Circuit affirmed the district court's ruling, and thus the injunction against enforcement remained intact.[32] The Illinois Secretary of State, however, sought review of the constitutionality of the statute in the U.S. Supreme Court, and the Court granted review.[33] Some members of the Court addressed the immunity provided by preliminary injunctions within a larger debate about whether the case was moot. If the case were moot when it reached the Supreme Court, dismissal of the case would have been required.

Justice Stevens wrote separately, stressing that, in his view, the case would be moot *unless* Illinois might still prosecute MITE for conduct undertaken while the preliminary injunction was in effect. Because Justice Stevens thought such prosecution would be permissible, there was to his mind still a live case or controversy for the Court to review:

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28. 457 U.S. 624 (1982).
29. *Id.* at 629.
30. *Id.*
31. *Id.*
32. *Id.* at 630.
33. *Id.*; *see* Edgar v. Mite Corp., 451 U.S. 968 (1981) (the Supreme Court noted probable jurisdiction).

> If . . . the injunction granted the MITE Corp. a complete immunity from state sanctions for any acts performed while the injunction was outstanding, I would [conclude] that the case is moot. On the other hand, if the injunction did no more than it purported to do, setting aside the injunction would remove its protection and MITE would be subject to sanctions in the state courts. Those courts might regard the fact that an injunction was outstanding at the time MITE violated the Illinois statute as a defense to any enforcement proceeding, but unless the federal injunction was tantamount to a grant of immunity, there is no federal rule of law that would require the state courts to absolve MITE from liability.[34]

Justice Thurgood Marshall, joined by Justice William Brennan, strongly disagreed. They argued that the case was in fact moot because there was no longer a takeover offer on the table and a federal court injunction—even a preliminary injunction—ought to be understood as conferring complete immunity for acts undertaken while the injunction was in effect.[35]

Justice Marshall's approach would give federal judges the power to grant complete immunity from punitive sanctions to persons who desire to test the constitutionality of a state statute: "[F]ederal courts . . . have the power to issue a preliminary injunction that offers permanent protection from penalties for violations of the statute that occurred during the period the injunction was in effect. Determining whether a particular injunction provides temporary or permanent protection becomes a question of interpretation."[36]

Justice Stevens rejected the premise underlying Justice Marshall's approach, contending that, regardless of the wisdom of this rule, "federal judges have no power to grant such blanket dispensation from the requirements of valid legislative enactments."[37]

1. *The Problem with Justice Stevens's Position: How Far Does Its Logic Go?*

Several aspects of Justice Stevens's position are not entirely clear. As I will explain, pushing Stevens's reasoning to its logical endpoint seems quite scary. Yet Justice Stevens does not clearly identify where the stopping point in his argument would be, and

34. *Edgar*, 457 U.S. at 647. It may be surprising today that Justice Stevens expressed this view, inasmuch as he is thought as one of the most "liberal" members of the current Court.

35. *See id.* at 655-64.

36. *Id.* at 656-57.

37. *Id.* at 649.

why. First, Justice Stevens says, at various points, federal courts lack the power to block prosecution of a *state* statute found to be valid.[38] Is his view inspired only by federalism worries, or—as some of his broader language and most of his logic suggests—in Justice Stevens's view, do federal courts also lack the power to block prosecutions under a *federal* statute?

Second, Justice Stevens does not limit his argument to preliminary injunctions, which means that it might also apply to permanent injunctions and declarations of unconstitutionality issued by the district court. Stevens bluntly opines that a federal declaration of unconstitutionality "reflects [no more than] the opinion of the federal court that the statute cannot be enforced."[39] As a result, Justice Stevens would at some level leave the plaintiffs in a Catch-22: Give up an activity that they believe (and a district court agrees) is constitutionally protected, or risk criminal prosecution down the road if the district court is reversed.

This Catch-22 would continue until the Supreme Court decisively affirmed the issuance of the injunction (or denied review)—and indeed, might even continue through the entire statute of limitations period! After all, what if the Court overruled its own precedent and later held the statute constitutional? Under a very broad reading of Justice Stevens's logic, perhaps backward-looking prosecutions could be brought even then.

2. *The Problem with Justice Marshall's Position: Where Do Courts Get The Power?*

On the other hand, Justice Marshall never really answers Justice Stevens's complaint: Where do federal courts get the power in the first place to immunize illegal conduct under a statute that is eventually validated?

With respect to federal enactments like the Partial Birth Abortion Ban Act, Congress could undoubtedly give the federal courts the power to immunize persons for criminal and civil liability under the Act for conduct committed during the time any federal court injunction were in effect. The source of Congress's power to do so would be the same source (whatever that may be) that gives Congress the power to create the underlying civil or criminal liability under the Act in the first place. In this setting, the greater power to regulate a given activity subsumes the lesser power to immunize

38. *See id.* at 648.

39. *Id.* at 650 (quoting Steffel v. Thompson, 415 U.S. 452, 469-70 (1974)).

some subset of that activity from regulation. Congress could authorize federal courts to provide this immunity simply by creating an affirmative defense under the Act for conduct undertaken in reasonable reliance on a judicial injunction in a case in which the person was a party. This is essentially the position adopted by the Model Penal Code, which has been embraced by many states (but not Illinois, the state at issue in *Edgar v. MITE*) with respect to immunity for state law violations.[40]

Whether Congress could authorize federal courts to provide immunity from liability under *state* statutes during the time while federal injunctions are in force—the precise question in *MITE*—is a more complicated question. I would argue that Congress does indeed have that power, under its authority to establish a federal judiciary, and to provide those federal courts the jurisdiction to hear federal question cases. In other words, Congress's power under Article I, section 8, to pass all laws necessary and proper[41] to facilitate the Article III power given to the federal judiciary to hear cases "arising under this Constitution"[42] allows Congress to facilitate access to the federal judiciary for people who challenge state laws as violative of the federal Constitution. And although some people may raise federal, constitutional challenges to state laws in the absence of immunity, many more will do so if the immunity is provided.

The reality is that many people cannot wait months or years to vindicate what they believe to be their constitutional rights. Yet waiting for a final Supreme Court ruling (or denial of review) in a particular case will typically take months or years. If plaintiffs must wait that long to rely on a ruling—and perform the acts they have wanted to perform all along—then they may not bother to bring their cases in the first place. Instead, they may simply forgo their desires, and perhaps their rights, and forget about challenging the statute altogether. Concomitantly, changes of circumstances may also sap their resolve, by technically mooting their cases.

On the other hand, the provision of federal court immunity will certainly increase the number of federal claims raised in the federal courts. And for Congress to enjoy valid constitutional authority to provide immunity, thereby effectively temporarily displacing or preempting state law that may ultimately be upheld as constitutional in the federal courts, Congress's grant of immunity need not

40. MODEL PENAL CODE § 2.04(3) (1962).
41. U.S. CONST. art. I, § 8, cl. 18.
42. U.S. CONST. art. III, § 2, cl. 1.

be absolutely necessary to the goal of facilitating access to federal courts for federal claimants, but rather only need be helpful or conducive to that goal.[43]

The Supreme Court recently validated this line of reasoning in an analogous setting. To facilitate the bringing of federal claims in federal courts, Congress provided under 28 U.S.C. section 1367 for so-called "supplemental" jurisdiction by the federal courts over state law claims arising out of the same case or controversy as the federal claims.[44] Because some such state law claims would ultimately be remanded by the federal courts to the state courts, and because some plaintiffs might be deterred from bringing their federal and state law claims in federal court by the fear that the statute of limitations might expire on their state law claims by the time those claims are remanded to state court, Congress enacted section 1367(d). It provides that the state statute of limitations should be tolled during the time a supplemental state law claim is pending in federal court.[45] Congress's power to do so—to effectively preempt the states' statutes of limitation—was challenged, and ultimately upheld last Term in *Jinks v. Richland County*.[46]

In affirming Congress's power to displace state law in order to facilitate access of federal claims into federal court, the Court observed:

> [Section] 1367(d) is necessary and proper for carrying into execution Congress's power 'to constitute Tribunals inferior to the supreme Court,' and to assure that those tribunals may fairly and efficiently exercise '[t]he judicial Power of the United States. As to 'necessity': The federal courts can assuredly exist and function in the absence of § 1367(d), but we long ago rejected the view that the Necessary and Proper Clause demands that an Act of Congress be '*absolutely* necessary' to the exercise of an enumerated power. Rather, it suffices that § 1367(d) is 'conducive to the due administration of justice in federal court . . . because . . . it eliminates a serious impediment to access to the federal courts on the part of plaintiffs pursuing federal claims . . . .'[47]

But in the context of injunctions that are later vacated—my subject today—Congress has not enacted any such law to provide im-

43. *See* McCulloch v. Maryland, 17 U.S. 316, 355-57 (1818) (interpreting the necessary and proper clause as not requiring strict mathematical necessity).

44. 28 U.S.C. § 1367(a) (2000).

45. § 1367(d).

46. 538 U.S. 456, 123 S. Ct. 1667 (2003).

47. *Id.* at 1671 (citations omitted).

munity, with respect to either federal or state law liability. So where do federal courts get the power to confer this immunity, if not from Congress? If the power comes from anywhere, it must come directly from the Constitution.

III. POSSIBLE CONSTITUTIONAL SOURCES FOR FEDERAL COURTS' POWER TO IMMUNIZE

One possibility is that federal courts themselves have the power to facilitate access to the federal courts for federal claimants, whether or not this access is explicitly authorized by Congress. This suggestion is undermined by the commonly accepted wisdom that Congress need not vest federal courts with anything close to the full extent of what Article III allows. Ordinarily, as courts of limited jurisdiction, federal courts must scrupulously respect Congressional as well as constitutional limits on their jurisdiction.[48]

On the other hand, there are at least some examples of the Supreme Court fashioning doctrine on its own, in seeming tension with ostensibly constitutional limitations, in order to promote access of federal claimants to federal courts. Perhaps the most prominent example is the so-called "capable of repetition yet evading review" exception to mootness.[49] Under this exception, a case that the Court considers technically moot will nonetheless be heard if such review is the only way that the plaintiff's federal question can ever be addressed by the court.[50] Another example of federal courts attempting to expand their jurisdiction to facilitate access is the so-called "jurisdiction by necessity" exception to personal jurisdictional requirements, alluded to by the Supreme Court in *Shaffer v. Heitner*.[51]

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48. *See, e.g.*, 28 U.S.C. § 1332 (2000) (requiring a minimum amount-in-controversy for district courts to have original jurisdiction over a civil action); Louisville & N.R. Co. v. Mottley, 211 U.S. 149, 153 (1908) (requiring a "well-pleaded" complaint for district courts to have jurisdiction).

49. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 125 (1973); *cf.* Defunis v. Odegaard, 416 U.S. 312, 319 (1974) (rejecting the exception to mootness where the issues raised will not "in the future evade review.").

50. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974) ("The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 605, 612-14 (1992) (noting that perhaps the mootness exception simply proves that mootness is not a constitutional doctrine).

51. 433 U.S. 186, 211 n.37 (1977). Note, however, that this exception has never been formally used by the Supreme Court to hear a case. Note also that this "exception" and the "capable of repetition yet evading review" exception, applies only when federal court access would otherwise be completely impossible, not merely—as in the

Moreover, another possible constitutional source for the power for federal courts to fashion immunity on their own is the Due Process idea embodied in the Fifth and Fourteenth Amendments. Due process means, among other things, that one cannot be prosecuted unless she has been provided adequate notice that her actions are criminal. A contrary judicial ruling upon which one relied could undermine any argument that she did not, in fact, receive proper notice.

The Supreme Court has seemed sensitive to this concern when it has reversed its own earlier position on a particular act's criminality. In cases such as *James v. United States*,[52] it has held that Due Process means that the federal government cannot punish someone for the commission of an act that the Court had earlier held, in other cases, to be non-criminal under the statute in question.[53]

One could imagine applying this logic to say that when a defendant has obtained a permanent injunction against enforcement of a statute, she cannot be punished for violating that statute. Indeed, reliance on a permanent injunction that you yourself obtained may be thought to be more reasonable than reliance on an early case involving other parties. Whereas, reliance on a preliminary injunction is much trickier, since the injunction itself does not make any final determination of constitutionality—finding at most only a "likelihood" of success on the merits.

But *James* and similar precedents could also be limited, on several grounds, to exclude their application to lower federal court injunctions. First, it is important to note that the Supreme Court, while allowing reliance on its own rulings, has been loath to allow reliance on lower federal court rulings as to the scope of a federal criminal law, especially when lower courts are themselves divided.[54]

Second, it may be worth mentioning that the *James* line of cases dealt with judicial determinations of the *meaning* of federal criminal statutes, not their constitutionality.[55] That might make a difference when it comes to notice. Someone who acts believing that her behavior is not criminal under a given statute in the first place is

context of injunctive immunity—simply made more difficult. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 419 n. 13 (1984).

52. 366 U.S. 213 (1961).

53. *Id.* at 222.

54. *See* United States v. Rogers, 466 U.S. 475, 484 (1984). I should note that some commentators, such as Trevor Morrison, have criticized the Court's failure to extend the *James* principle to protect reliance on some lower court rulings.

55. *See James*, 366 U.S. at 222.

arguably more innocent than someone who knowingly violates a statute because she feels it is unconstitutional. Put another way, some people may argue (although I do not know that I would be among them) that uncertainty (or lack of notice) about a law's validity may be different than uncertainty (or lack of notice) about a law's coverage.

If a statute gives fair warning that conduct is criminal, that may, in the Court's eyes, be enough to render such conduct prosecutable—even if the statute is enjoined for some time by lower courts. In *Lanier v. United States*,[56] for example, the Court used language suggesting that it might take this view, finding a due process problem only when someone is prosecuted for "conduct that *neither the statute nor any prior judicial decision* has fairly disclosed to be within its scope."[57] The Court, in other words, may decide that statutory warning is always fair warning.

IV. PUNITIVE LIABILITY v. COMPENSATORY LIABILITY

Even if one concluded that federal courts had the power, under either of the theories suggested above, to confer immunity on their own from criminal liability for violations of a law while an injunction was in effect, it is unclear that such immunity would or could extend to compensatory liability. For example, in *Edgar v. MITE*, even Justice Marshall, who argued most broadly in favor of a presumption of immunity, noted that the government might, if the law that was violated while an injunction was in effect was ultimately upheld as a valid law, seek to obtain non-criminal relief:

> I believe that injunctions should ordinarily be interpreted only as providing permanent protection from *penalties*. The state should be barred from penalizing the offeror for acts that took place during the period the injunction was in effect. However, if a court determines the state statute is valid, the State should be free to provide a remedy for the continuing effects of acts that violated the statute. In particular, a State should be permitted to dismantle a successful acquisition that violated a valid statute.[58]

Perhaps Justice Marshall was a bit careless in this passage, and what he meant was simply that a wrongdoer should not continue to benefit by his wrongdoing—that restitutionary principles require that a wrongdoer disgorge any ill-gotten gains. But Justice Mar-

56. 520 U.S. 259 (1997).
57. *Id.* at 266 (emphasis added).
58. Edgar v. MITE Corp., 457 U.S. 624, 661 n.10 (1982).

shall did not say that immunity should not cover restitutionary remedies; he said that immunity should be limited to "penalties."[59]

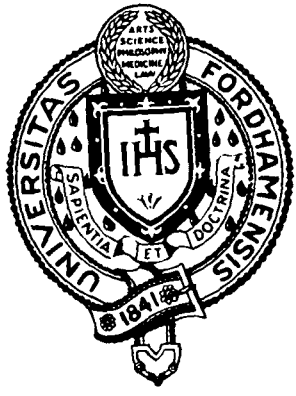
Are civil compensatory damages a "penalty" under this approach? For instance, what are we to make of the cause of action that the Partial Birth Abortion Ban Act creates for fathers and husbands against doctors who perform the procedures?[60] Are these non-penal since they are compensatory (in theory)? Or are they "penalties" because they take away from the doctors more than the doctors obtained for performing the illegal acts? This is another set of questions that need attention.

These issues the Supreme Court and Congress have so far left open—of whether a federal court injunction can be relied upon to confer immunity from prosecution, and if so what kind of immunity—ought to be resolved, one way or the other, so that litigants know where they stand.

Granted, it may well be that the federal and state prosecutors are unlikely to "reach back" and prosecute persons who acted at a time an injunction was in effect. But, on the other hand, some prosecutors might well be tempted to do so, especially when it comes to politically charged matters like so-called partial-birth abortion.

As the impeachment of Bill Clinton, the contested Presidential election of 2000, and the California gubernatorial recall illustrate, we have a tendency not to look at unresolved areas of law until a political crisis forces us to. But that has proven to be a great mistake. For these reasons, Congress and the federal judiciary should clarify things so that people can know how much—or how little—injunctive relief is really worth, in the Partial Birth Abortion Ban Act setting, and beyond.

59. *Id.*
60. 18 U.S.C. § 1531(c) (2003).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