



Constitutionally Unconstitutional? When State Legislatures Pass Laws Contrary to Supreme Court Precedent

Laura Bakst*

*State legislatures wield considerable power as a check on the federal government. While exceeding a federally-imposed floor on protected rights or declining to cooperate with federal priorities fall within the scope of appropriate state power, the line becomes murkier when state legislatures seek to pass laws that conflict with Supreme Court precedent. While scholars have addressed this issue in the context of the federal legislature, whether state legislatures have the power to pass laws in contravention of Supreme Court decisions remains undiscussed. This Essay answers that question. Part I describes why, based on constitutional law and history, it is beyond state legislative power to pass unconstitutional laws. Part II focuses on the costs of such actions, using abortion bans and legislative resistance to *Brown v. Board* as examples. Finally, Part III discusses the limited remedies available, given legislative and sovereign immunity and restrictions on taxpayer standing.*

* Copyright © 2019 Laura Bakst. J.D., Harvard Law School, 2018; B.S., Cornell University, 2015.

TABLE OF CONTENTS

INTRODUCTION	65
I. LIMITS ON STATE LEGISLATIVE POWER TO PASS UNCONSTITUTIONAL LAWS	66
II. THE ISSUE OF STATE LEGISLATIVE OVER-ACTIVISM	71
A. <i>Brown v. Board: The Danger of Legislative Defiance</i>	72
B. <i>Second-Order Elections and Democracy</i>	73
C. <i>Undermining Judicial Values</i>	74
D. <i>The Taxpayers' Bill</i>	81
III. THE RECOURSE PROBLEM	82
A. <i>Personal Capacity Suits: Immunity Under the Speech or Debate Clause</i>	83
B. <i>Official Capacity Suits: Sovereign Immunity and the Eleventh Amendment</i>	85
C. <i>Impeachment</i>	87
D. <i>State Taxpayer Suits</i>	87
E. <i>The Ballot Box</i>	90
CONCLUSION	91

INTRODUCTION

In today's politicized environment, states have taken a particularly active role in addressing issues typically handled on the federal level. For example, after President Trump withdrew the United States from the Paris Climate Agreement,¹ twenty-four states and Puerto Rico formed the U.S. Climate Alliance to "advance the goals of the Paris Agreement, aiming to reduce greenhouse gas emissions by at least 26-28 percent below 2005 levels by 2025."² Meanwhile, consistent with President Trump's campaign promise to appoint Supreme Court justices to overturn *Roe v. Wade*,³ conservative state legislatures have passed numerous abortion bans seeking to engineer a case for Supreme Court review.⁴ State attorneys general dragged the administration into federal court over its attempt to add a citizenship question to the 2020 census,⁵ while state legislatures enacted laws to create "sanctuary states" that limit state cooperation with federal immigration policy.⁶

State action as a check on federal power is an intentional and valuable feature of our governance structure, but the appropriate latitude for state resistance remains somewhat undefined. While much has been said about the federal legislature's ability or inability to enact unconstitutional laws, whether the same rules apply on the state level is notably absent from legal scholarship. This Essay thus explores the constitutionality of state legislative efforts to pass statutes that violate clearly established judicial precedent, and the impact on and recourse available in our constitutional system. Part I describes why state legislators who pass laws in violation of binding precedent exceed their constitutional power. Part II focuses on the costs associated with such legislative activism. Finally, Part III explicates the limited remedies available to combat these practices in light of the Constitution's grant

¹ See Michael D. Shear, *Trump Will Withdraw U.S. From Paris Climate Agreement*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html>.

² *Governors*, U.S. CLIMATE ALLIANCE, <https://www.usclimatealliance.org/governors-1> (last visited Sept. 4, 2019); *States United for Climate Alliance*, U.S. CLIMATE ALLIANCE, <https://www.usclimatealliance.org> (last visited Sept. 4, 2019).

³ See 410 U.S. 113 (1973); Dan Mangan, *Trump: I'll Appoint Supreme Court Justices to Overturn Roe v. Wade Abortion Case*, CNBC (Oct. 19, 2016, 9:31 PM), <https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html>.

⁴ See *infra* text accompanying notes 84–99.

⁵ See, e.g., *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2563 (2019) (eighteen states, sixteen other governmental entities, and the U.S. Conference of Mayors alleged that adding a citizenship question to the census violated the Administrative Procedure Act).

⁶ See, e.g., S.B. 54, 2017-2018 Leg. (Cal. 2007) (enacted).

of legislative and sovereign immunity and limitations on taxpayer standing.

I. LIMITS ON STATE LEGISLATIVE POWER TO PASS UNCONSTITUTIONAL LAWS

On the federal level, scholars have suggested that it is rarely, if ever, permissible for members of Congress to vote for unconstitutional bills.⁷ These arguments largely rest on congressional members' duty to "support and defend the Constitution of the United States" — a duty to which they swear in their oath of office⁸ — and their role as co-interpreters of the Constitution.⁹ Congress contributes to the "deeply collaborative process of constitutional interpretation" through its powers to make laws that "flesh out the bare bones of the Constitution's text," amend the Constitution, and advise and consent on judicial nominees.¹⁰ Though relevant to assessing the duties of state legislatures, these analyses are not dispositive for two reasons. First, they generally

⁷ See, e.g., William Baude, *Signing Unconstitutional Laws*, 86 IND. L.J. 303, 313 (2011) ("[M]embers of Congress may rarely be in a position where they can vote for an unconstitutional bill . . ."); Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587 (1975) ("[L]egislators are obligated to determine, as best they can, the constitutionality of proposed legislation [T]hey should consider themselves bound by, or at least give great weight to, the Supreme Court's substantive constitutional holdings."); Anant Raut & J. Benjamin Schrader, *Dereliction of Duty: When Members of Congress Vote for Laws They Believe to Be Unconstitutional*, 10 N.Y. CITY L. REV. 511, 511 (2007) ("Members of Congress have an obligation not to vote for legislation they believe to be unconstitutional.").

⁸ 5 U.S.C. § 3331 (2019); Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L.J. 175, 216 (1990) ("Faithfulness to their oath necessarily requires members of Congress and the President to consider the constitutionality of proposed policies as an important aspect of performing their duties."); Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1556 (2005) ("Per the oaths clause, congressmen must support the Constitution. Consistent with their duty to support the Constitution, congressmen cannot enact laws that are unconstitutional. Individual members of Congress, therefore, have the independent duty to review the constitutionality of proposed legislation before them and to oppose unconstitutional laws."); Raut & Schrader, *supra* note 7, at 515 ("By a plain reading of the Oath, members of Congress are thus obligated to strengthen the position of the Constitution, to uphold the authority of the Constitution, and to stand by the Constitution. It is this commonsense reading of the Oath that lays the foundation for the widely held belief that Senators and Representatives are obligated not to vote in favor of unconstitutional laws.").

⁹ See Paul A. Diller, *When Congress Passes an Intentionally Unconstitutional Law: The Military Commissions Act of 2006*, 61 SMU L. REV. 281, 286 (2008); Prakash & Yoo, *supra* note 8, at 1556.

¹⁰ Diller, *supra* note 9, at 285-86 (internal quotations omitted).

contemplate duties of federal legislators who conduct an independent constitutional evaluation and determine that a statute is *not* constitutional.¹¹ By contrast, in many cases where state legislators vote for unconstitutional laws,¹² they rely on the belief that the state statute is constitutional and conflicting Supreme Court precedent is erroneous.¹³ Second, legislators' role in interpreting legislative constitutionality is different on the state level, as they do not sit on equal footing with the federal branches in interpreting and implementing the Constitution.¹⁴

State legislators are typically required to swear an oath of office as articulated in their respective state constitution. Generally, state oaths of office are akin to the federal congressional oath,¹⁵ pledging to uphold the U.S. Constitution as well as the state constitution.¹⁶ To the extent that the federal oath of office prevents federal congresspersons from knowingly passing an unconstitutional law, the same analysis applies to all state lawmakers whose oath of office incorporates a similar duty.

But what of situations where a state legislator supports a bill that is unconstitutional according to the federal judiciary but which the legislator independently believes to be constitutional? Assuming the legislator is acting in good (albeit possibly erroneous) faith, supporting such a bill does not necessarily violate a duty to support and defend the

¹¹ See, e.g., Baude, *supra* note 7, at 312 (“[I]t is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision.” (quoting Andrew Jackson, Veto Message (July 10, 1832), *reprinted in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 567 (James D. Richardson ed., 1897))); Prakash & Yoo, *supra* note 8, at 1556 (“Individual members of Congress . . . have the independent duty to review the constitutionality of proposed legislation before them and to oppose unconstitutional laws.”).

¹² For the purposes of this Essay, references to unconstitutional state laws indicate state statutes that plainly conflict with established Supreme Court precedent.

¹³ See *infra* text accompanying notes 17–18.

¹⁴ See *infra* text accompanying notes 22–39.

¹⁵ See 5 U.S.C. § 3331 (2019).

¹⁶ See, e.g., MINN. CONST. art. IV, § 8 (“Each member . . . shall take an oath or affirmation to support the Constitution of the United States, the constitution of this state, and to discharge faithfully the duties of his office to the best of his judgment and ability.”); N.Y. CONST. art. XIII, § 1 (“I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of [the New York State legislature] according to the best of my ability.”); W. VA. CONST. art. VI, § 16 (“I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the State of West Virginia, and faithfully discharge the duties of Senator (or Delegate) according to the best of my ability.”).

Constitution. For example, the Alabama legislature passed a near wholesale ban on abortion this year, making clear in legislative findings that it “disagreed and dissented with [*Roe v. Wade*’s] finding,” likening abortion to genocide and crimes against humanity.¹⁷ Genuinely believing banning abortion is consistent with the Constitution, Alabama lawmakers seek to provoke the Supreme Court into reversing its abortion jurisprudence.¹⁸ The question then becomes what bearing, if any, clearly articulated Supreme Court constitutional precedent has on such legislatures’ ability to pass laws to the contrary.¹⁹

Fundamental constitutional principles of federalism and judicial supremacy suggest that state legislatures are not empowered to pass laws contrary to Supreme Court precedent. The Supremacy Clause makes clear that the U.S. Constitution is “the supreme law of the land,” trumping “anything in the Constitution or laws of any State to the contrary.”²⁰ Alexander Hamilton’s *Federalist No. 33* identifies the need for this vertical division of power:

But it is said that the laws of the Union are to be the supreme law of the land. But what inference can be drawn from this, or what would they amount to, if they were not to be supreme? . . . If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted [sic] to it by its constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government, which is only another word for political power and supremacy.²¹

The framers — cognizant of the dangers of an unlimited sovereign — sought to moderate federal authority. They therefore “split the atom of sovereignty. It was the genius of their idea that our citizens would have

¹⁷ H.B. 314, 2019 Leg., Reg. Sess. § 2(a), (i)-(j) (Ala. 2019); see also *id.* § 2(c) (citing Ala. Code § 13A-6-1 (1975) (treating abortion as homicide)). Notably, the Alabama legislature’s objections to *Roe* rested on moral rather than legal arguments. See *id.* § 2(i).

¹⁸ See Anna North, *Alabama Republicans Want to Overturn Roe v. Wade. Their Strategy Could Backfire.*, VOX (May 15, 2019, 4:00 PM), <https://www.vox.com/identities/2019/5/15/18624810/alabama-abortion-ban-supreme-court-exceptions-senate>.

¹⁹ Of course, once such statutes are passed courts are empowered to invalidate them. This Essay focuses instead on the legislature’s ability to enact the laws in the first place.

²⁰ U.S. CONST. art. VI, cl. 2.

²¹ THE FEDERALIST NO. 33, at 151 (Alexander Hamilton) (Terence Ball ed., 2003) (emphasis omitted).

two political capacities, one state and one federal, each protected from incursion by the other.”²² The vision for a dual sovereign is crystalized in the Tenth Amendment, which reserves to the states all “powers not delegated to the United States by the Constitution.”²³ States are thus free to independently legislate so long as they do not encroach on the Constitution and the limited powers it deems federal authority.

But as the Founders learned, the Supremacy Clause would be a bark with no bite without an enforcement mechanism. The earlier attempt at a looser federal-state association failed under the Articles of Confederation. The Articles were structured similarly to the United Nations: an inter-sovereign assembly — Congress — comprised of ambassadors from member states.²⁴ As Justice Story has described:

[The] Congress enjoyed some important powers on paper, [but] it had no means of carrying them out or of compelling compliance . . . [I]t had no explicit “legislative” or “governmental” power to make binding “law” enforceable as such in state courts; it lacked authority to set up its own general courts; and it could raise troops and money only by “requisitioning” contributions from each state. On paper, such requisitions were “binding.” In fact, they were mere requests. As one contemporary writer put it, Congress “may declare everything, but do nothing.”²⁵

Under the Articles, states refused to comply with requisitions, disobeyed judgments by central courts, and passed laws contrary to congressionally-entered treaties.²⁶ Against this backdrop, the Philadelphia Convention delegates drafted the Constitution, recalibrating the federalist vision in an attempt to balance the “centripetal and centrifugal political forces.”²⁷

The Framers’ views on who should police constitutional supremacy is clear from the Constitution’s text and early case law. Article III states: “The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to

²² U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

²³ U.S. CONST. amend. X.

²⁴ See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1447-48 (1987) (citations omitted).

²⁵ *Id.* at 1447 (quoting Story, J., COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 246 (1833)).

²⁶ See *id.* at 1447-48.

²⁷ *Id.* at 1448-50.

time ordain The judicial power shall extend to all cases, in law and equity, arising under this Constitution”²⁸ Roughly fifteen years after ratification, the Supreme Court would confirm its understanding of judicial supremacy in *Marbury v. Madison*,²⁹ the seminal decision on judicial review:

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. . . . It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.³⁰

In adjudicating the constitutionality of a federal law, *Marbury* thus “declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected . . . as a permanent and indispensable feature of our constitutional system.”³¹

In 1809, the Supreme Court returned to the issue of judicial supremacy, holding that state legislatures cannot “annul the judgments” of federal courts lest they “destroy rights acquired under those judgments, the constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals.”³² The Court elaborated on this in 1816, holding that Article III empowers federal courts to review state interpretations of federal and constitutional law.³³ Citing interests in uniformity and predictability, Justice Story decreed: “The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the constitution, may declare them to be of no legal validity.”³⁴

Finally, the idea of constitutional and judicial supremacy is acknowledged within some state constitutions that declare void any

²⁸ U.S. CONST. art. III, §§ 1-2.

²⁹ 5 U.S. (1 Cranch) 137 (1803).

³⁰ *Id.* at 177.

³¹ *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

³² *United States v. Peters*, 9 U.S. (1 Cranch) 115, 136 (1809).

³³ *See Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 328-42 (1816).

³⁴ *Id.* at 344.

unconstitutional state laws.³⁵ For example, “[i]n its express authorization of judicial review, the constitution of Georgia . . . provides: ‘Legislative acts in violation of this Constitution or the Constitution of the United States are void, and the judiciary shall so declare them.’”³⁶

These principles forecast the issue at the crux of the federal-state relationship: “From the very nature of things, the absolute right of decision, in the last resort, must rest somewhere”³⁷ What else is to stop a state legislature from dismissing the applicability of dormant Commerce Clause jurisprudence³⁸ or the incorporation of the Sixth Amendment’s right to a jury trial to the states?³⁹ Without a unitary framework for adjudicating the Constitution, there can be no union.

Thus, by its very nature, the Constitution commands that state lawmakers do not have the power to advance an independent interpretation of the Constitution in contravention of Supreme Court precedent. Once a statute is decreed unconstitutional by the Supreme Court, that statute must be considered objectively unconstitutional by state legislatures. Passing a law to the contrary, therefore, would violate a state oath of office to support and defend the Constitution of the United States.

II. THE ISSUE OF STATE LEGISLATIVE OVER-ACTIVISM

While at first blush the issue of state legislatures passing unconstitutional laws may appear benign, it is anything but. It is true that courts will likely be quick to strike down flagrantly unconstitutional statutes and legislative activism may seem normatively desirable, such as in challenging unpopular Supreme Court decisions. Few today would find fault in a state legislature challenging Japanese-

³⁵ See Jordan E. Pratt, *Disregard of Unconstitutional Laws in the Plural State Executive*, 86 MISS. L.J. 881, 902 (2017) (citing GA. CONST. art. I, § 2, p. 5; IOWA CONST. art. XII, § 1; KY. CONST. Bill of Rights § 26; R.I. CONST. art. VI, § 1).

³⁶ *Id.* at 912 (quoting GA. CONST. art. I, § 2, p. 5).

³⁷ *Martin*, 14 U.S. (1 Wheat.) at 345.

³⁸ See, e.g., *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 326 n.1 (1989) (“This Court long has recognized that th[e] affirmative [constitutional] grant of authority to Congress [to regulate commerce] also encompasses an implicit or ‘dormant’ limitation on the authority of the States to enact legislation affecting interstate commerce.” (internal citations omitted)).

³⁹ See *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

American internment⁴⁰ or the separate but equal doctrine.⁴¹ But these examples are exceptional and viewed through the lens of hindsight. In most cases, the desirability of legislative contravention is based on the beholder's politics, which presents several concerns.

A. *Brown v. Board: The Danger of Legislative Defiance*

An extreme example of state legislatures challenging the Supreme Court is the southern states' response to *Brown v. Board*. Legislatures asserted that

Brown was an unconstitutional federal usurpation of state sovereign prerogatives and power [and passed resolutions] declaring the *Brown* decision "null, void and of no effect" (Alabama) and resolving to "take all appropriate measures . . . to resist this illegal encroachment upon our sovereign powers" (Virginia). Mississippi's resolution labeled *Brown* "unconstitutional, invalid and of no lawful effect . . ." ⁴²

In Arkansas, attempts to integrate Little Rock schools were met not only with legislative resistance, but also with physical confrontation.⁴³ Nine African American students attempting to attend a local high school were "turned back by the National Guard [of Arkansas] and a large and angry mob."⁴⁴ The students ultimately had to enter the school "under the protection of the local police department (necessary because a large and violent mob remained gathered in front of the school)" and were sent home hours later "for safety reasons."⁴⁵ President Eisenhower ordered federal troops to assist, and the students required federal protection for the entire school year.⁴⁶ Even so, they "were subjected to physical and verbal abuse and threats, both from fellow students and from adults."⁴⁷

⁴⁰ See *Korematsu v. United States*, 323 U.S. 214 (1944), *abrogated by* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

⁴¹ See *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483 (1954).

⁴² Ryan Card, Note, *Can States "Just Say No" to Federal Health Care Reform? The Constitutional and Political Implications of State Attempts to Nullify Federal Law*, 2010 BYU L. REV. 1795, 1807 (2010) (internal citations omitted).

⁴³ See Ashutosh Bhagwat, *Cooper v. Aaron and the Faces of Federalism*, 52 ST. LOUIS U. L.J. 1087, 1088-90 (2008).

⁴⁴ *Id.* at 1089.

⁴⁵ *Id.* at 1090.

⁴⁶ See *id.*

⁴⁷ *Id.*

Eventually the Supreme Court intervened, reaffirming the Supremacy Clause as binding on state legislatures.⁴⁸ Recognizing that “[n]o state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it,”⁴⁹ the Court held that the State’s interest in public schooling “must be exercised consistently with [the] federal constitutional requirements” decreed in *Brown v. Board*.⁵⁰

To understand state hostility to *Brown* as confined to bills, briefs, and oral arguments would be to minimize a violent, traumatic, and costly clash. State legislative resistance to *Brown* was not merely symbolic; it helped catalyze a dangerous and shameful period in American history.

B. Second-Order Elections and Democracy

In addition to the risk of physical violence, state legislative defiance of judicial precedent can have profound effects on elections. Multiple scholars have discussed the phenomenon of second-order elections, or “election[s] at one level of government that [reflect] voter preferences developed in relation to another level of government.”⁵¹ In other words, citizens may make election decisions based on political issues being debated and ultimately addressed by an entirely different government unit than that for which they are voting. This often manifests in state legislative elections, where national party labels decide how voters cast their state election ballots.⁵² For instance, the strongest predictor of 2018 state election outcomes was “how voters fe[lt] about President Trump.”⁵³ As state voters become hyper-focused on legislators’ stance on national issues,⁵⁴ they signal that the way to score political points is by focusing state legislative efforts on such topics. For this reason, we

⁴⁸ See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 772 (2017) [hereinafter *Federalism and State Democracy*] (citing Karlheinz Reif & Hermann Schmitt, *Nine Second-Order National Elections — A Conceptual Framework for the Analysis of European Election Results*, 8 EUR. J. POL. RES. 3, 8-9 (1980)).

⁵² David N. Schleicher, *Federalism is in a Bad State*, HARV. L. REV. BLOG (Oct. 12, 2018), <https://blog.harvardlawreview.org/federalism-is-in-a-bad-state/> [hereinafter *Federalism is in a Bad State*].

⁵³ *Id.*

⁵⁴ See Schleicher, *Federalism and State Democracy*, *supra* note 51, at 784.

see state legislatures passing laws that target hot-topic national issues like abortion⁵⁵ and federal immigration policy.⁵⁶

Second-order elections may have positive effects. As Professor Jessica Bulman-Pozen argues, state elections' absorption of national politics can provide a "check [on] the federal government by channeling partisan conflict" and create a haven for the national minority-parties' views.⁵⁷ Practical examples include state challenges to the Defense of Marriage Act and Affordable Care Act.⁵⁸ But lawsuits questioning the constitutionality of federal action are situated within the bounds of state power and are thus meaningfully different from legislating in defiance of binding precedent.

Even assuming the benefits of second-order elections, scholars acknowledge that they pose significant risks to our democratic system. First, voters who base election decisions solely on federal priorities may not identify and vote for those who represent their interests on the state level.⁵⁹ Second, preoccupation by state legislatures with federal issues results in inadequate attention to important state issues,⁶⁰ which voters — motivated by party politics — may not consider at the ballot box.⁶¹ As a result, state legislatures fail to prioritize key state government responsibilities, fail to represent the true interests of constituents, and fail to be held accountable for these actions.

C. Undermining Judicial Values

The costs to democracy do not end here. State legislatures who disregard precedent also undermine fundamental features of our federalist system. Most obvious is that passing unconstitutional laws casts doubt on the supremacy of the Constitution and Supreme Court. While these establishments are sufficiently deep-rooted to withstand

⁵⁵ See *infra* text accompanying notes 77–99.

⁵⁶ See, e.g., S.B. 54, 2017-2018 Leg., Reg. Sess. (Cal. 2017) (enacted) (restricting state and local law enforcement agencies from cooperating with federal immigration authorities).

⁵⁷ Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1081, 1100-05 (2014).

⁵⁸ See *id.* at 1098-99.

⁵⁹ See Schleicher, *Federalism and State Democracy*, *supra* note 51, at 776-80.

⁶⁰ See *id.* at 780; see Schleicher, *Federalism is in a Bad State*, *supra* note 52.

⁶¹ See Schleicher, *Federalism is in a Bad State*, *supra* note 52 ("What state legislatures actually do has little effect on whether they are reelected in general elections. How well they fund infrastructure, pensions, or education doesn't matter much. How they shape tort, contract, and property law doesn't really matter. The way they shape labor, occupational licensing, land use, and environmental regulation doesn't matter.").

such confrontations in the short term, albeit at a cost,⁶² the gradual chipping away of federal institutions can eventually show signs of wear.

Additionally, unconstitutional state laws impede judicial values of efficiency, predictability, finality, and uniformity.⁶³ The importance placed on these principles is evident in various judicial practices: the final judgment rule prevents costly disruptions and judicial burdens from immediate appeal of non-dispositive issues;⁶⁴ *Erie*'s choice of law doctrine seeks consistency between state and federal courts;⁶⁵ the Supreme Court's habit of granting certiorari on issues with circuit splits promotes uniformity amongst federal jurisdictions; Federal Rule of Civil Procedure 26's proportionality standard injects cost consciousness into discovery;⁶⁶ and Rule 23's allowance for class actions focuses on efficiency in adjudications.⁶⁷

Enacting unconstitutional laws eliminates the predictability and uniformity intrinsic to settled law. Suddenly, nationwide standards no longer apply in certain states, and a legislature may encroach on established fundamental rights whenever it sees fit. While in most cases federal courts will be quick to enjoin an unconstitutional law, there is no guarantee that an individual judge will do so, or do so before the statute takes effect. For example, though the Supreme Court has held that proscribing the primary abortion method beginning at approximately fifteen weeks gestational age constitutes an undue burden,⁶⁸ and thus almost every court to have passed on a similar law

⁶² See *supra* text accompanying notes 42–50; *infra* text accompanying notes 103–111.

⁶³ See Jed I. Bergman, *Putting Precedent in Its Place: Stare Decisis and Federal Predictions of State Law*, 96 COLUM. L. REV. 969, 982–84 (1996) (citing HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 568–70 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994)).

⁶⁴ See 28 U.S.C. § 1291 (2019); *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 380 (1987).

⁶⁵ See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74–75 (1938).

⁶⁶ See FED. R. CIV. P. 26(b)(1).

⁶⁷ See FED. R. CIV. P. 23(b)(3).

⁶⁸ See *Stenberg v. Carhart*, 530 U.S. 914, 924–25, 929–30 (2000) (holding a statute proscribing multiple abortion methods unconstitutional where the statute included a prohibition on dilation and evacuation (“D&E”) procedures); *Gonzales v. Carhart*, 550 U.S. 124, 154, 167–68 (2007) (upholding a similar enactment where the statute explicitly excepted D&E procedures from its scope).

has issued an injunction,⁶⁹ a single Oklahoma County District Judge recently upheld such a ban in a ruling from the bench.⁷⁰

Indeed, the resurgence of state pre-viability abortion bans illustrates how passing unconstitutional laws hinders the aforementioned values. In *Roe v. Wade*, the Court deemed viability the point at which a state's interest could outweigh a woman's constitutional right to an abortion under the Fourteenth Amendment.⁷¹ The court adopted a trimester framework for determining the extent to which a state may regulate abortion: during the first trimester, a state may not regulate abortion access; during the second trimester, "the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health"; and "[f]or the stage subsequent to viability, the State, in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."⁷²

In 1992, a Supreme Court plurality returned to the issue and replaced *Roe's* trimester framework with an undue burden standard for evaluating the constitutionality of pre-viability abortion restrictions.⁷³ Nevertheless,

⁶⁹ See, e.g., *Bernard v. Individual Members of Ind. Med. Licensing Bd.*, No. 1:19-cv-01660-SEB-DML, 2019 WL 2717620 (S.D. Ind. June 28, 2019) (preliminarily enjoining D&E ban); *EMW Women's Surgical Ctr., P.S.C. v. Meier*, 373 F. Supp. 3d 807 (W.D. Ky. 2019) (permanently enjoining D&E ban), *appeal filed*, No. 19-5516 (6th Cir. May 15, 2019); *W. Ala. Women's Ctr. v. Miller*, 299 F. Supp. 3d 1244 (M.D. Ala. 2017), *aff'd*, *W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310 (11th Cir. 2018) (permanently enjoining D&E ban); *Hopkins v. Jegley*, 267 F. Supp. 3d 1024 (E.D. Ark. 2017) (preliminarily enjoining D&E ban), *appeal filed*, No. 17-2879 (8th Cir. Aug. 28, 2017); *Whole Woman's Health v. Paxton*, 280 F. Supp. 3d 938 (W.D. Tex. 2017) (permanently enjoining D&E ban), *appeal filed*, No. 17-51060 (5th Cir. Dec. 1, 2017); *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461 (Kan. 2019) (affirming district court's preliminary injunction of D&E ban); see also *Planned Parenthood Sw. Ohio Region v. Yost*, 375 F. Supp. 3d 848, 852 (S.D. Ohio 2019) (preliminarily enjoining most applications of D&E ban).

⁷⁰ See Gavrielle Jacobovitz, *Oklahoma Judge First to Uphold Ban on a Common Abortion Procedure*, HUFFPOST (Dec. 12, 2019, 6:33 PM), https://www.huffpost.com/entry/oklahoma-abortion-ban-upheld-dilation-evacuation_n_5d28ea1de4b0060b11ec3993.

⁷¹ 410 U.S. 113, 163 (1973).

⁷² *Id.* at 164-65.

⁷³ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 873-78 (1992). An abortion regulation is unconstitutional under the undue burden test "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.* at 878.

[the Court] stated at the outset and with clarity that [it affirmed] *Roe*'s essential holding, . . . a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure.⁷⁴

This language has been reiterated by the Supreme Court over the last three decades.⁷⁵

Despite the Court's clear articulation and the general understanding that viability occurs around twenty-four weeks of pregnancy,⁷⁶ numerous states have sought to criminalize pre-viability abortion with only narrow exceptions for maternal health complications.⁷⁷ When litigated, these statutes have been enjoined by courts based on the Supreme Court's binding precedent. Just months after *Casey*, the Fifth Circuit struck down as "clearly unconstitutional under *Casey*"⁷⁸ a Louisiana law criminalizing abortion performance with limited exceptions.⁷⁹ Four years later, the Utah legislature attempted to ban nearly all abortions at a gestational age of twenty weeks.⁸⁰ In finding the pre-viability ban unconstitutional, the Tenth Circuit chastised the State's arguments as "disingenuous and unpersuasive because they are grounded on its continued refusal to accept governing Supreme Court authority . . . and that until viability is actually present the State may not prevent a woman from choosing to abort."⁸¹

⁷⁴ *Id.* at 846.

⁷⁵ See, e.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2320 (2016) ("[I]n *Casey* we discarded the trimester framework, and we now use 'viability' as the relevant point at which a State may begin limiting women's access to abortion for reasons unrelated to maternal health." (citing *Casey*, 505 U.S. at 878)); *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007) (stating that the *Casey* Court reaffirmed *Roe*'s "essential holding," including that "a woman has the right to choose to have an abortion before fetal viability and to obtain it without undue interference from the State." (quoting *Casey*, 505 U.S. at 846)); *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) ("[B]efore 'viability . . . the woman has a right to choose to terminate her pregnancy.'" (quoting *Casey*, 505 U.S. at 870)).

⁷⁶ See, e.g., *When Is It Safe to Deliver Your Baby?*, UNIV. OF UTAH HEALTH, <https://healthcare.utah.edu/womenshealth/pregnancy-birth/preterm-birth/when-is-it-safe-to-deliver.php> (last visited Oct. 16, 2019) ("In general, infants that are born very early are not considered to be 'viable' until after 24 weeks gestation.").

⁷⁷ See *infra* text accompanying notes 78–99.

⁷⁸ *Sojourner T v. Edwards*, 974 F.2d 27, 28 (5th Cir. 1992).

⁷⁹ See *id.* at 29.

⁸⁰ See *Jane L. v. Bangerter*, 102 F.3d 1112, 1113–14 (10th Cir. 1996).

⁸¹ *Id.* at 1118.

Moving into the twenty-first century, the trend continues. In 2013, the Ninth Circuit treated a twenty-week Arizona abortion ban as “unconstitutional under an unbroken stream of Supreme Court authority, beginning with *Roe* and ending with *Gonzales*. Arizona simply cannot proscribe a woman from choosing to obtain an abortion before the fetus is viable.”⁸² It reached the same conclusion just two years later passing on a twenty-week Idaho abortion ban.⁸³

By 2015, states began supplementing their later-term bans with so-called “fetal heartbeat” bills or bans on abortion where “cells that form the basis for development of the [fetal] heart later in gestation produce activity that can be detected with ultrasound” in an embryo.⁸⁴ This electrical activity is typically detectable beginning at approximately six weeks gestation.⁸⁵ Though critical of the Supreme Court’s abortion jurisprudence, the Eighth Circuit struck down an Arkansas law proscribing abortion beginning at twelve weeks gestational age if a “fetal heartbeat” is detected: “As an intermediate court of appeals, this court is *bound* by the Supreme Court’s decisions in *Casey* and the ‘assum[ption]’ of *Casey*’s ‘principles’ in *Gonzales*.”⁸⁶ Barely two months later, the Eighth Circuit again invalidated a North Dakota “fetal heartbeat” ban that proscribed abortion beginning around six weeks gestational age.⁸⁷

The Southern District of Mississippi criticized the State for criminalizing abortion at fifteen weeks gestational age in 2018:

[T]he real reason we are here is simple. The State chose to pass a law it knew was unconstitutional to endorse a decades-long campaign, fueled by national interest groups, to ask the Supreme Court to overturn *Roe v. Wade*. This Court follows the commands of the Supreme Court and the dictates of the United States Constitution, rather than the disingenuous calculations of the Mississippi Legislature.⁸⁸

⁸² *Isaacson v. Horne*, 716 F.3d 1213, 1231 (9th Cir. 2013).

⁸³ *See McCormack v. Herzog*, 788 F.3d 1017, 1029 (9th Cir. 2015).

⁸⁴ *Preterm-Cleveland v. Yost*, No. 1:19-cv-00360, 2019 WL 2869640, at *2 (S.D. Ohio July 3, 2019).

⁸⁵ *See id.*

⁸⁶ *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015) (alteration in original).

⁸⁷ *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 770-71 (8th Cir. 2015). *See also id.* at 772 (“[T]he [Supreme] Court has yet to overrule the *Roe* and *Casey* line of cases. Thus we, as an intermediate court, are bound by those decisions.”).

⁸⁸ *Jackson Women’s Health Org. v. Currier*, 349 F. Supp. 3d 536, 542-43 (S.D. Miss. 2018), *appeal filed*, No. 18-60868 (5th Cir. Dec. 17, 2018).

After “[t]he [Mississippi] Court ruled that the law was unconstitutional and permanently enjoined its enforcement[, t]he State responded by passing an even more restrictive bill,” this time proscribing most abortions beginning at roughly six weeks gestational age.⁸⁹ The Southern District of Mississippi’s decision in issuing a preliminary injunction was clear:

This Court previously found the 15-week ban to be an unconstitutional violation of substantive due process because the Supreme Court has repeatedly held that women have the right to choose an abortion prior to viability, and a fetus is not viable at 15 weeks lmp.⁹⁰ If a fetus is not viable at 15 weeks lmp, it is not viable at 6 weeks lmp.⁹¹

Also this year, North Carolina’s twenty-week ban was invalidated⁹² and Iowa’s “fetal heartbeat” bill was deemed unconstitutional.⁹³ A district court in Ohio temporarily enjoined an Ohio “fetal heartbeat” bill restricting abortion at approximately six weeks gestational age.⁹⁴ Noting that even the State conceded that “Casey dictates a finding in Plaintiffs’ favor,”⁹⁵ the court held that “under *Casey*, Plaintiffs are certain to succeed on the merits of their claim. To the extent that the State of Ohio ‘is making a deliberate effort to overturn *Roe* [v. *Wade*] and established constitutional precedent,’ those arguments must be made to a higher court.”⁹⁶ Earlier this month, Georgia’s “fetal heartbeat” ban was preliminarily enjoined, with the District Court for the Northern District of Georgia declaring itself bound by “clear Supreme Court precedent” and chronicling the long list of “lower and intermediate federal courts [that] have uniformly and repeatedly struck down similar

⁸⁹ *Jackson Women’s Health Org. v. Dobbs*, 379 F. Supp. 3d 549, 551 (S.D. Miss. 2019), *appeal filed*, No. 19-60455 (5th Cir. June 24, 2019).

⁹⁰ Lmp measures the gestational age of a pregnancy based on the woman’s last menstrual period. *See id.* at 551 n.1.

⁹¹ *Id.* at 552.

⁹² *See Bryant v. Woodall*, 363 F. Supp. 3d 611, 630-31 (M.D.N.C. 2019), *appeal filed*, No. 19-1685 (4th Cir. June 26, 2019).

⁹³ *Planned Parenthood of the Heartland, Inc. v. Reynolds*, No. EQCE83074, 2019 WL 312072, at *3, *5 (Dist. Iowa Jan. 22, 2019). The court based its decision on the state constitution but acknowledged the relevance of *Casey* and *Gonzales*. *Id.*

⁹⁴ *See Preterm-Cleveland v. Yost*, No. 1:19-cv-00360, 2019 WL 2869640 (S.D. Ohio July 3, 2019).

⁹⁵ *Id.* at *3.

⁹⁶ *Id.* (quoting *Jackson Women’s Health v. Currier*, 349 F. Supp. 3d 536, 544 (S.D. Miss. 2018)).

attempts to ban abortions prior to viability.”⁹⁷ At the time of publication, a challenge to an abortion ban in Alabama remained pending⁹⁸ and multiple other legislatures were considering anti-abortion bills.⁹⁹

These cases demonstrate that despite repeated decisions, *Roe v. Wade* is not settled law and that state legislatures are willing to disregard judicial supremacy. By forcing courts and plaintiffs to relitigate adjudicated issues, legislatures waste precious judicial time that courts could otherwise spend addressing their overloaded dockets,¹⁰⁰ plaintiffs must shoulder the expense of litigating (and relitigating) their claims, and doctors must take time away from patients to testify in hearings.¹⁰¹ Meanwhile, clinics are left to contend with the possibility that they may have to shutter their doors to patients if courts do not respond quickly, while thousands of women live with uncertainty about whether and where they may access their constitutional right to abortion.¹⁰²

⁹⁷ *SisterSong Women of Color Reprod. Justice Collective v. Kemp*, No. 1:19-cv-02973-SCJ, 2019 WL 4849448, at *12 (N.D. Ga. Oct. 1, 2019).

⁹⁸ See generally Verified Complaint for Declaratory and Injunctive Relief, *Robinson v. Marshall*, No. 2:19-cv-00365 (M.D. Ala. May 24, 2019). While acknowledging the importance of the rule of law and that the law was unconstitutional, in signing the bill Alabama Governor Kay Ivey commended the challenge to *Roe v. Wade*. See *Governor Ivey Issues Statement After Signing the Alabama Human Life Protection Act*, OFFICE OF GOV. ALA. (May 15, 2019), <https://governor.alabama.gov/statements/governor-ivey-issues-statement-after-signing-the-alabama-human-life-protection-act/>.

⁹⁹ See Madeline Holcombe, *Georgia’s ‘Heartbeat’ Abortion Bill Is One of Several Across the Nation. Where Do Those Bills Stand Now?*, CNN (Mar. 30, 2019, 8:44 AM), <https://edition.cnn.com/2019/03/30/us/heartbeat-laws-national/index.html> (noting similar bills and legislative efforts in states including Tennessee, Arkansas, Florida, Minnesota, Missouri, and Kentucky).

¹⁰⁰ See, e.g., Sudhin Thanawala, *Wheels of Justice Slow at Overloaded Federal Courts*, AP NEWS (Sept. 27, 2015), <https://www.apnews.com/54175de3d735409ab99a2f10e872d58e> (discussing how court backlogs cause delays in case resolution).

¹⁰¹ See, e.g., Chuck Lindell, *Texas Abortion Law Adds Risk for Patients, Doctors Testify*, STATESMAN (Nov. 2, 2017, 12:01 AM), <https://www.statesman.com/news/20171102/texas-abortion-law-adds-risk-for-patients-doctors-testify>.

¹⁰² See, e.g., Plaintiff’s Motion and Memorandum of Law in Support of Their Motion for Temporary Restraining Order and/or Preliminary Injunction at 3, *Preterm-Cleveland v. Yost*, No. 1:19-cv-00360 (S.D. Ohio May 15, 2019); Kim Chandler & Sudhin Thanawala, *At Abortion Clinics, New Laws Sow Confusion, Uncertainty*, AP NEWS (May 21, 2019), <https://www.apnews.com/aad4cc8b68b7400aac27e5c1abc7b1be> (discussing the uncertainty and confusion around abortion access for patients in states with restrictive abortion bans that have yet to take effect).

D. The Taxpayers' Bill

Unfortunately, taxpayers must foot the bill for their overzealous legislators. Like the aforementioned intangible costs, utilizing state taxpayer dollars to fund the subversion of established constitutional law threatens norms of judicial and federal supremacy. More markedly, unconstitutional state laws waste hard-earned money. Taxpayers shoulder the cost of salaries for legislators passing unconstitutional laws, attorneys general and district attorneys who enforce the laws, and government lawyers who defend them in litigation; discovery and expert witness fees; and attorney's fees awards to opposing counsel when ultimately successful.¹⁰³

As the Southern District of Mississippi stated in passing on the State's fifteen-week abortion ban, "the State is aware that this type of litigation costs the taxpayers a tremendous amount of money."¹⁰⁴ Indeed, anti-abortion advocate and former Ohio Governor John Kasich vetoed two earlier versions of Ohio's "fetal heartbeat" ban because "[a]s the losing party, the state of Ohio w[ould] be forced to pay hundreds of thousands of taxpayer dollars to cover the legal fees for the pro-choice activists' lawyers."¹⁰⁵ North Dakota faced this reality when its legal battle over an abortion ban cost the state \$570,948,¹⁰⁶ \$245,000 of which went to the Center for Reproductive Rights as attorney's fees.¹⁰⁷ Though Alabama received press for "pa[ying] \$3.72 million to the American Civil Liberties Union after losing or settling lawsuits related to state laws on abortion, same-sex marriage and immigration,"¹⁰⁸ it is now set to spend up to \$75,000 on single expert in defending its most

¹⁰³ See 42 U.S.C. § 1988(b) (2019) (providing for discretionary grants of attorney's fees in certain successful suits against the government or its officers).

¹⁰⁴ Jackson Women's Health Org. v. Currier, 349 F. Supp. 3d 536, 542 (S.D. Miss. 2018), *appeal filed*, No. 18-60868 (5th Cir. Dec. 17, 2018).

¹⁰⁵ Jeremy Pelzer, *Gov. John Kasich OKs Tighter Abortion Restrictions, Vetoes "Heartbeat" Bill and Pay Raises*, CLEVELAND.COM (Dec. 21, 2018), <https://www.cleveland.com/politics/2018/12/gov-john-kasich-vetoes-anti-abortion-heartbeat-bill-legislative-pay-raises.html>.

¹⁰⁶ See Amanda Michelle Gomez, *Unconstitutional 'Heartbeat' Abortion Bans Cost States Thousands in Legal Fees*, THINKPROGRESS (July 3, 2019, 9:30 AM), <https://thinkprogress.org/arkansas-north-dakota-heartbeat-bans-spent-thousands-abortion-cases-losing-court-3ae67b9696ca/>.

¹⁰⁷ See *Abortion Law Costs State \$245,000 in Legal Fees*, BISMARCK TRIBUNE (Apr. 14, 2016), https://bismarcktribune.com/news/state-and-regional/abortion-law-costs-state-in-legal-fees/article_83c6292e-d705-5c73-b58b-c6f7e56f5912.html.

¹⁰⁸ See Anna Claire Vollers, *Alabama Paid \$1.7 Million to ACLU on Last Abortion Test Case*, AL.COM (May 14, 2019), <https://www.al.com/politics/2019/05/as-alabama-considers-abortion-test-case-a-look-at-the-17-million-paid-for-previous-failed-abortion-law.html>.

recent anti-abortion law.¹⁰⁹ The Mississippi Attorney General's Office estimated that it dedicated \$225,940 in attorney time defending anti-abortion legislation between 2012 and 2018, translating to 3,476 government hours¹¹⁰ spent defending unconstitutional laws instead of pursuing other priorities. As one Ohio representative who voted against a later-enjoined abortion restriction said, "it's sad that dollars are now going to be dedicated to defending litigation when we could be taking those dollars and putting them toward everything from pre-K education to any kind of special services."¹¹¹

III. THE RECOURSE PROBLEM

Unfortunately, this Essay does not have a happy ending, as there are limited vehicles by which to hold civil servants pursuing unconstitutional aims accountable. While it may be tempting to sue state legislators for intentionally passing unconstitutional laws, such as for negligence, fraud, or dereliction of duty, these suits would be barred by constitutional immunity principles governing both personal and official capacity suits regardless of their ultimate merits.¹¹² It is also unrealistic to expect legislators to self-police support of unconstitutional legislation through impeachment procedures. Taxpayers may find some success in state court challenges to appropriations for the defense of unconstitutional laws, but the viability of these claims is uncertain and state specific. As a result, broadly addressing this issue requires reliance on the most fundamental right of all: voting.

¹⁰⁹ Brian Lyman, *AG's Office Could Pay Professor \$200 an Hour Over Abortion Suit*, MONTGOMERY ADVERTISER (July 10, 2019, 12:45 PM), <https://www.montgomeryadvertiser.com/story/news/2019/07/10/ags-office-could-pay-professor-200-hour-over-abortion-suit/1693844001/>.

¹¹⁰ See Erica Hensley, *'A Tremendous Amount': Cost of Defending State in Abortion Lawsuits Could Soar Past \$1 Million*, MISS. TODAY (Dec. 20, 2018), <https://mississippitoday.org/2018/12/20/a-tremendous-amount-cost-of-defending-state-in-abortion-lawsuits-could-soar-past-1-million/>.

¹¹¹ Jo Ingles, *The Debate Over the Costs of Legally Defending Ohio's New Abortion Laws*, STATEHOUSE NEWS BUREAU (Mar. 18, 2018), <https://www.stateneews.org/post/debate-over-costs-legally-defending-ohios-new-abortion-laws>.

¹¹² A direct or personal capacity suit is a lawsuit filed against the official directly, typically for money damages paid for by the defendant. An official capacity suit sues the defendant for action taken as part of their official government duties with relief accruing against the state, typically in the form of injunctive or declaratory relief. See John F. Duffy, Comment, *Sovereign Immunity, the Officer Suit Fiction, and Entitlement Benefits*, 56 U. CHI. L. REV. 295, 295 n.4 (1989).

A. *Personal Capacity Suits: Immunity Under the Speech or Debate Clause*

The Founding Fathers believed that legislative independence was crucial to ensuring a republican form of government.¹¹³ Built into such independence was the idea that “the legislature must be free to speak and act without fear of criminal and civil liability.”¹¹⁴ They therefore drafted the U.S. Constitution’s Speech or Debate Clause with the “fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator.”¹¹⁵ Article I section six states: “for any Speech or Debate in either House, [congresspersons] shall not be questioned in any other Place.”¹¹⁶

Beginning in the late 1800s and continuing through the twenty-first century, the Supreme Court sought to define the parameters of the Clause’s broad protection.¹¹⁷ Immunity attaches “where legislators traditionally have power to act.”¹¹⁸ To find that a legislature “exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive.”¹¹⁹ The Clause protects all matters that are “an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.”¹²⁰ The Court has also refused to entertain

¹¹³ See Steven N. Sherr, *Freedom and Federalism: The First Amendment’s Protection of Legislative Voting*, 101 YALE L.J. 233, 235 (1991).

¹¹⁴ *United States v. Craig*, 528 F.2d 773, 777 (7th Cir. 1976) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951)).

¹¹⁵ *Gravel v. United States*, 408 U.S. 606, 618 (1972).

¹¹⁶ U.S. CONST. art. I, § 6.

¹¹⁷ See, e.g., *Gravel*, 408 U.S. at 625 (“The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.”); *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880) (finding the Clause protects “things generally done in a session of the House by one of its members in relation to the business before it”); see also *United States v. Brewster*, 408 U.S. 501 (1972); *United States v. Johnson*, 383 U.S. 169 (1966); *Tenney v. Brandhove*, 341 U.S. 367 (1951).

¹¹⁸ *Bogan v. Scott-Harris*, 523 U.S. 44, 56 (1998) (quoting *Tenney*, 341 U.S. at 379).

¹¹⁹ *Tenney*, 341 U.S. at 378.

¹²⁰ *Gravel*, 408 U.S. at 625.

claims against otherwise proper legislative action taken with an “unworthy purpose,” reasoning that “[t]he privilege would be of little value if [legislatures] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury’s speculation as to motives.”¹²¹

While the Clause as written applies to the federal legislature, state legislatures are also protected by immunity. In *Tenney v. Brandhov*, the Court held that members of a California Senate Committee could not be held civilly liable based on a federal cause of action for allegedly violating a citizen’s civil liberties.¹²² The majority “determined that federal common law legislative immunity limited Congress’ authority to make state legislators answerable in causes of action based on federal statutes.”¹²³ Thus, state legislatures were deemed shielded to the same extent as federal congresspersons when “acting in the sphere of legitimate legislative activity.”¹²⁴

The Supreme Court’s Speech or Debate Clause jurisprudence only bans suits on federal grounds against state legislatures, but state lawsuits are also limited. Forty-eight state constitutions contain some form of legislative immunity,¹²⁵ with thirty-nine specifically protecting legislative speech and/or debate.¹²⁶ These states tend to interpret their state clauses akin to the federal Speech or Debate Clause.¹²⁷ Only two states — Florida and North Carolina — entirely lack explicit legislative immunities in their state constitutions,¹²⁸ both of which have adopted a legislative immunity doctrine.¹²⁹

¹²¹ *Tenney*, 341 U.S. at 377.

¹²² *See id.* at 370, 378.

¹²³ Sherr, *supra* note 113, at 237.

¹²⁴ *See Tenney*, 341 U.S. at 376, 379.

¹²⁵ *See Sherr*, *supra* note 113, at 236.

¹²⁶ *Id.* at 236 n.18.

¹²⁷ *See, e.g., Romer v. Colorado Gen. Assembly*, 810 P.2d 215, 221 (Colo. 1991) (en banc) (“We can find no reason to analyze Colorado’s protection for speech or debate any differently than the federal clause has been examined by the federal judiciary.” (citations omitted)); *In re Arnold*, 991 So. 2d 531, 541, 543 (interpreting a state constitutional provision stating in part: “no member shall be questioned elsewhere for any speech in either house” to indicate that “the legislature [has] sole jurisdiction to investigate, ‘question,’ or punish legislators for any actions by them within the ‘legitimate legislative sphere’” (emphasis omitted)).

¹²⁸ *See Sherr*, *supra* note 113, at 236.

¹²⁹ *See, e.g., N.C. GEN. STAT. § 120-9* (2001) (creating a statutory legislative privilege); *Florida House of Representatives v. Expedia, Inc.*, 85 So. 3d 517, 519 (Fla. Dist. Ct. App. 2012) (finding “a legislative privilege existed under the common law”).

Given that legislative immunity would be implicated in virtually any jurisdiction, the question next becomes whether such immunity extends to a state legislator who knowingly passes an unconstitutional law. The weight of authority suggests that the answer is yes. While there is an argument that passing unconstitutional laws constitutes a “usurpation of functions exclusively vested in the Judiciary,”¹³⁰ because legislating falls within the traditional ambit of legislative power it is likely protected. The Supreme Court has held that “resolutions offered” and “the act of voting” are subject to legislative immunity.¹³¹ As the en banc Colorado Supreme Court likewise determined:

Although the constitutionality of [legislation] may be reviewed by a court of competent jurisdiction, the legislators who passed those acts cannot be questioned or held liable in the process. Because the act of passing legislation falls squarely within the ambit of legitimate legislative activity, legislators and the General Assembly must be dismissed as defendants¹³²

Additionally, to the extent that lawsuits implicate questions of legislative intent to disobey precedent, such an inquiry would be barred by the Court’s refusal to investigate legislators’ motives.¹³³ For instance, in applying the Rhode Island Speech or Debate Clause while relying on jurisprudence related to the federal Clause, the Supreme Court of Rhode Island held that “[i]nquiry by the court into the actions or motivations of the legislators in proposing, passing, or voting upon a particular piece of legislation . . . falls clearly within the most basic elements of legislative privilege.”¹³⁴ Thus, it is hard to imagine a situation where a legislator could be held personally accountable for supporting an unconstitutional law.

B. *Official Capacity Suits: Sovereign Immunity and the Eleventh Amendment*

The Eleventh Amendment provides that “[t]he judicial power of the United States shall not be construed to extend to any suit in law or

¹³⁰ See *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951).

¹³¹ See *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880). Protection of legislative voting has been repeatedly affirmed. See *Sherr*, *supra* note 113, at 237 n.26 (citing *Doe v. McMillan*, 412 U.S. 306, 311-12 (1973); *Gravel v. United States*, 408 U.S. 606, 617 (1972); *Powell v. McCormack*, 395 U.S. 486, 502 (1969)).

¹³² *Romer*, 810 P.2d at 223.

¹³³ *Tenney*, 341 U.S. at 377.

¹³⁴ *Holmes v. Farmer*, 475 A.2d 976, 984 (R.I. 1984).

equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”¹³⁵ The Amendment was passed in response to *Chisholm v. Georgia*,¹³⁶ a 1793 Supreme Court decision holding that a state could be sued by a citizen of another state for money damages.¹³⁷ The Amendment has been interpreted to preclude, among other claims, federal court jurisdiction over suits against state-defendants brought by citizens of that state.¹³⁸ Moreover, “[s]tates’ immunity from private suit in their own courts is beyond congressional power to abrogate by Article I legislation.”¹³⁹ Limited exceptions exist, including when a state consents to jurisdiction,¹⁴⁰ in bankruptcy proceedings,¹⁴¹ where Congress acts to enforce the Fourteenth Amendment,¹⁴² and in suits seeking prospective relief for a civil rights violation taken “under the color of state law.”¹⁴³

In addition to preventing states from suit, the Eleventh Amendment applies to state officials sued in their official capacity. As the Supreme Court articulated, a suit against a government employee in her official capacity is the functional equivalent of a suit against the state.¹⁴⁴ This is because in either case, judgment “might be satisfied out of any property of the state . . . or made a basis for charges upon the treasury of the state.”¹⁴⁵ Thus, so long as the state has not voluntarily abrogated its immunity, suing a state legislature in her official capacity for supporting an unconstitutional law would be barred.

¹³⁵ U.S. CONST. amend. XI.

¹³⁶ 2 U.S. 419 (1793).

¹³⁷ See generally *id.*; *Alden v. Maine*, 527 U.S. 706, 708 (1999).

¹³⁸ See *Hans v. Louisiana*, 134 U.S. 1 (1890).

¹³⁹ *Alden*, 527 U.S. at 707.

¹⁴⁰ See *Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 283-84 (1906).

¹⁴¹ See *Central Va. Cmty. College v. Katz*, 546 U.S. 356 (2006).

¹⁴² Congress may waive state sovereign immunity pursuant to its enforcement powers under § 5 of the Fourteenth Amendment. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

¹⁴³ See 42 U.S.C. § 1983 (2019); *Edelman v. Jordan*, 415 U.S. 651, 677 (1974) (“Though a [§] 1983 action may be instituted . . . a federal court’s remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief and may not include a retroactive award which requires the payment of funds from the state treasury.” (internal citations omitted)); see also *Ex parte Young*, 209 U.S. 123 (1908) (enabling claims for injunctive relief against state officials acting in violation of constitutional rights). Section 1983 typically provides the cause of action for those seeking to enjoin unconstitutional laws.

¹⁴⁴ See *In re State of New York*, 256 U.S. 490, 502 (1921).

¹⁴⁵ *Id.* at 501.

C. Impeachment

In theory, impeachment proceedings initiated pursuant to a state's constitution are one area where recourse is feasible. While states vary in their specific procedures, like in the federal system,¹⁴⁶ impeachment generally entails a state assembly voting for impeachment and a state senate conducting a trial.¹⁴⁷ A violation of the oath of office by failing to uphold the Constitution may satisfy states' constitutional definitions of conduct that qualifies for impeachment. In practice, however, it is improbable that a state legislator would be willing to support impeachment. Introducing and supporting unconstitutional bills are not uncommon practices. Legislators may fail to see them as problematic, favor them to the extent they align with their political views, and/or wish not to establish precedent that could potentially allow for impeachment of themselves or those in their party. Pursing impeachment against another legislator may also appear overly political and jeopardize reelection. It thus seems unlikely for impeachment to be initiated, let alone succeed.

D. State Taxpayer Suits

Given that taxpayers bear the cost of defending unconstitutional laws, an alternative route would be to seek recourse based on inappropriate government spending. While these suits are virtually non-justiciable in federal courts, with some luck they may find traction in state courts.

The Supreme Court has established that taxpayers generally do not have standing in federal court to challenge a federal or state exercise of taxing and spending based solely on the plaintiff's status as a taxpayer.¹⁴⁸ “[T]he interests of a taxpayer in the moneys of the . . . treasury are too indeterminable, remote, uncertain and indirect to furnish a basis for an appeal to the preventive powers of the Court over

¹⁴⁶ See U.S. CONST. art. I, §§ 2-3.

¹⁴⁷ See, e.g., MASS. CONST. chap. I, § II, art. VIII (“The senate shall be a court with full authority to hear and determine all impeachments made by the house of representatives, against any officer or officers of the commonwealth, for misconduct and mal-administration in their offices.”); N.Y. CONST. art. VI, § 24 (amended 2001) (delegating the power of impeachment to the assembly and requiring that “[t]he court for the trial of impeachments shall be composed of the president of the senate, the senators, or the major part of them, and the judges of the court of appeals, or the major part of them”).

¹⁴⁸ James R. Parks, Note, *A New Theory of Taxpayer Standing*, 6 COL. J. TAX L. 118, 120 (2014).

their manner of expenditure.”¹⁴⁹ The Court appeared to retreat from its bright-line approach in *Flast v. Cohen*, finding justiciable a First Amendment challenge to an appropriation financing instruction materials in religious schools.¹⁵⁰ The *Flast* Court determined that taxpayer standing exists where the claimant has a sufficiently “personal stake” in the outcome, or a “logical link between [the taxpayer’s] status and the type of legislative enactment attacked” and “a nexus between that status and the precise nature of the constitutional infringement alleged.”¹⁵¹ However, *Flast*’s progeny has held taxpayer standing to be the rare exception rather than the rule, ultimately leading to what Justice Kagan described as “the effective demise of taxpayer standing” in federal court.¹⁵²

With federal courts virtually foreclosed, some taxpayers have had success challenging state appropriations in state courts. While a minority of states have adopted the Supreme Court’s bar to standing, many take a more liberal approach.¹⁵³ “Some states recognize taxpayer standing in cases deemed by the courts to be particularly important. Other states grant taxpayer standing more broadly, without first assessing the significance *vel non* of any particular case.”¹⁵⁴ For example, “in Alabama, a person ‘suing in his capacity as a citizen and taxpayer, has standing to attack the constitutionality’ of state expenditures,”¹⁵⁵ as do taxpayers in at least nine other states.¹⁵⁶ Other states utilize more exacting standing criteria, though still less prohibitive than the Supreme

¹⁴⁹ *Doremus v. Bd. of Ed. of Borough of Hawthorne*, 342 U.S. 429, 433 (1952) (citations omitted); *see also* *Massachusetts v. Mellon*, 262 U.S. 447, 487 (1923) (taxpayers’ “interest in the moneys of the treasury — partly realized from taxation and partly from other sources — is shared with millions of others, is comparatively minute and indeterminable, and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.”).

¹⁵⁰ *See Flast v. Cohen*, 392 U.S. 83, 85-86, 103-04 (1968).

¹⁵¹ *Id.* at 101-03.

¹⁵² *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 148 (2011) (Kagan, J., dissenting) (majority denying standing in taxpayers’ Establishment Clause challenge to Arizona’s tuition tax credit for contributions to student tuition used to fund religious schools); *see also* *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 338, 354 (2006) (denying standing in Commerce Clause challenge to local tax abatements and credits granted to induce manufacturer to remain in city).

¹⁵³ *See* Edward A. Zelinsky, *Putting State Courts in the Constitutional Driver’s Seat: State Taxpayer Standing After Cuno and Winn*, 40 HASTINGS CONST. L.Q. 1, 36 (2012).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 40 (citing *Zeigler v. Baker*, 344 So. 2d 761, 764 (Ala. 1977)).

¹⁵⁶ *See id.* at 40-42 (internal citations omitted).

Court's standards.¹⁵⁷ Finally, some state legislatures have established statutory causes of action that specifically allow for taxpayer standing, including in California and New York.¹⁵⁸

Even with more relaxed state standards, these suits remain an uphill battle. A claimant would need to convince a court that not only is the statute at issue flagrantly unconstitutional, but also that funding its defense would be unlawful — an attenuated argument. The idea that the government is acting unconstitutionally by using tax dollars to advance a law that it knows violates clearly established constitutional rights may appease a sympathetic judge, but given dispute over whether an executive actually has an affirmative duty to defend unconstitutional laws,¹⁵⁹ it is far from a slam dunk. In states that recognize challenges to spending for reasons broader than just unconstitutionality, plaintiffs may have stronger arguments. In California, for instance, taxpayers may seek to enjoin “wasteful spending.”¹⁶⁰ While still a high bar¹⁶¹ — it requires a showing that no reasonable person could find possible public benefit in the expenditure¹⁶² — California courts will not “close [their] eyes to wasteful, improvident and completely unnecessary public spending, merely because it is done in the exercise of a lawful power.”¹⁶³ Where a legislature passes a law in direct and obvious contravention of Supreme Court precedent and then seeks to fund its hopeless defense with taxpayer dollars, this standard may arguably be satisfied.

In many cases, it may also be difficult for the taxpayer to point to a specific appropriation for the defense of unconstitutional laws. General

¹⁵⁷ See *id.* at 42 (discussing Tennessee's caselaw on taxpayer standing).

¹⁵⁸ *Id.* at 42-43 (citing CAL. CIV. PROC. CODE § 526a (2012); N.Y. STATE FIN. LAW §123-b(1) (2012)).

¹⁵⁹ See, e.g., Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 509, 514-20 (2012) (arguing that there “is no duty to defend federal statutes the President believes are unconstitutional” and demonstrating that several presidents have historically declined to defend laws they believed to be unconstitutional); Aziz Z. Huq, *Enforcing (But Not Defending) ‘Unconstitutional’ Laws*, 98 VA. L. REV. 1001 (2012) (discussing the “enforcement-litigation gap” that occurs when executives enforce constitutionally suspect laws but choose not to defend the laws in court); Gregory F. Zoeller, *Duty to Defend and the Rule of Law*, 90 IND. L.J. 513, 515 (2015) (arguing that attorneys general have “a duty to defend [their] statutes against constitutional attack except when controlling precedent so overwhelmingly shows that the statute is unconstitutional that no good-faith argument can be made in its defense”).

¹⁶⁰ Anne Abramowitz, Comment, *A Remedy for Every Right: What Federal Courts Can Learn from California's Taxpayer Standing*, 98 CALIF. L. REV. 1595, 1616 n.201, 1617 (2010) (citing CAL. CIV. PROC. CODE § 526a (2010)).

¹⁶¹ See *id.* at 1616 n.201.

¹⁶² See *id.* (citing *Sundance v. Mun. Court*, 29 P.2d 80, 103 (1986)).

¹⁶³ *Sundance*, 29 P.2d at 104.

appropriations to fund the attorney general's office and its activities — even if ultimately used to defend unconstitutional laws — are not facially problematic. Indeed, the Supreme Court has denied federal standing where plaintiffs sought to challenge a general executive branch appropriation because it was the Executive's choice rather than Congress's decision to ultimately allocate the money to fund faith-based initiatives.¹⁶⁴ How state courts would respond to this issue is largely jurisdiction dependent. For example, New York law creates a taxpayer cause of action “for equitable or declaratory relief, or both, against an officer or employee of the state who in the course of his or her duties has caused, is now causing, or is about to cause a wrongful expenditure, misappropriation, misapplication or any other illegal or unconstitutional disbursement of state funds or state property.”¹⁶⁵ This broad language suggests that even if the state legislature granted only a general appropriation, injunctive relief could be sought against the official who ultimately decided to allot the money to defending the unconstitutional law. Other taxpayers may find footing in state requirements that the legislature approve certain expenses, including in Alabama where the Legislature's Contract Review Committee has approval power over expert witness contracts entered into by the attorney general's office.¹⁶⁶

While the feasibility of challenging funding for the defense of unconstitutional laws is skeptical, state court suits do provide one creative avenue of potential recourse against an otherwise insulated activity. These suits would not hold legislatures accountable for actually passing the unconstitutional law but could at least mitigate the costs and disincentivize passage of future unconstitutional legislation.

E. *The Ballot Box*

Even when the courthouse may be unwelcoming, citizens wield the trump card. They can hold their legislators accountable in the traditional way: at the voting booth. Focusing on state issues in election decisions and refusing to vote for those who waste government time and money litigating meritless cases sends a message to legislators that they must recalibrate their priorities. While topics like infrastructure improvement may not make for the most engaging debates and campaign platforms, prioritizing state-level interests can increase

¹⁶⁴ See *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 609-11 (2007).

¹⁶⁵ Zelinsky, *supra* note 153, at 43 (quoting N.Y. STATE FIN. LAW §123-b(1) (2012)).

¹⁶⁶ See Lyman, *supra* note 109.

efficiency in government spending and result in better outcomes for citizens on a day-to-day basis.

CONCLUSION

This Essay does not intend to suggest that questioning the accuracy of Supreme Court precedent is objectionable when done through proper channels. History has shown that sometimes the Court gets its wrong and further litigation is desperately needed. We should encourage citizen engagement with Supreme Court rulemaking and support suits by individuals, non-profit organizations, and private lawyers to implore courts to reconsider precedent that has proven clearly incorrect or unsustainable. But addressing potential constitutional errors does not justify another constitutional wrong; legislators cannot flout their own constitutional duty under the guise of promoting the Constitution itself.