AN ANALYSIS OF CREDIBLE THREAT STANDING AND *EX PARTE YOUNG* FOR SECOND AMENDMENT LITIGATION

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INTRODUCTION

District of Columbia v. Heller[1] is on track to become one of the Supreme Court's most famous opinions.[2] Holding that the Second Amendment protects an individual's right to possess a firearm within the home for self-defense, the Court issued a narrow 5-4 ruling that protected a right that the Court had not recognized in over two hundred years.[3] Dick Heller, the eponymous plaintiff in the Supreme Court case, only became the focus of attention, however, when the U.S. Court of Appeals for the D.C. Circuit dismissed the other plaintiffs from the case.[4] Previously known as *Parker v.*

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[1] 128 S. Ct. 2783 (2008).

[2] Jason Harrow at SCOTUSblog wrote that the release of *Heller* "spawned a level of intense online interest in a Supreme Court decision like we at SCOTUSblog have never seen before," and concluded that "[b]ecause of the rise of the Internet and the accompanying ease of distributing the Justices' own words, there seems a good chance that *Heller* is on track to be one of the most widely read Supreme Court opinions by the general public of all-time." Posting of Jason Harrow to SCOTUSblog, http://www.scotusblog.com/wp/gauging-interest-in-the-guns-case (June 27, 2008, 15:04 EST). SCOTUSblog had never received more than 100,000 hits to its website in one day, but received over 370,000 hits with the release of *Heller*, and although SCOTUSblog expected "a few tens of thousands of downloads of the *Heller* decision," its estimates were surpassed when the opinion was downloaded over 93,000 times. *Id.* The Volokh Conspiracy blog, whose contributors were involved in Second Amendment research and analysis, received over four times its normal level of incoming traffic, temporarily disabling the blog's comment function and causing its servers go down for about an hour and a half. *See* Posting of Orin Kerr to The Volokh Conspiracy, http://www.volokh.com/archives/archive_2008_06_22-2008_06_28.shtml#1214493591 (June 26, 2008, 11:19 EST); Posting of Orin Kerr to The Volokh Conspiracy, http://www.volokh.com/archives/archive_2008_06_22-2008_06_28.shtml#1214491591 (June 26, 2008, 10:46 EST) [hereinafter Kerr, *Initial Thoughts*].

[3] *Heller*, 128 S. Ct. at 2821-22.

[4] Clark Neily, District of Columbia v. Heller*: The Second Amendment Is Back, Baby*, 2008 CATO SUP. CT. REV. 127, 140.

District of Columbia,[5] the name of the case changed when Judge Silberman ruled that five of the six plaintiffs lacked standing under Article III of the U.S. Constitution.[6]

More than just the name of the case was at stake. In other famous cases, such as challenges to abortion and contraception restrictions, a lack of constitutional standing would have caused a court to dismiss the case without hearing its actual merits.[7] For example, in 2005, the D.C. Circuit dismissed an almost identical Second Amendment challenge, *Seegars v. Gonzales*,[8] because the court held that all of the plaintiffs lacked constitutional standing.[9] Similar Second Amendment claims are now being litigated throughout the country, and the standing issues that renamed *Parker* and defeated the plaintiffs in *Seegars* are likely to be disputed in upcoming cases.[10]

These challenges are based on the pre-enforcement review of statutes, which allows plaintiffs to test the constitutionality of a challenged statute before violating it and exposing themselves to criminal prosecution.[11] Arti-

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5 (*Parker District*), 311 F. Supp. 2d 103 (D.D.C. 2004), *rev'd*, 478 F.3d 370 (D.C. Cir. 2007), *aff'd sub nom.* District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

6 Parker v. District of Columbia (*Parker Appeal*), 478 F.3d 370, 373-78 (D.C. Cir. 2007), *aff'd sub nom.* District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

7 Georgia's abortion restrictions were struck down in a pre-enforcement challenge in *Doe v. Bolton*, 410 U.S. 179, 194-99 (1973), which was released the same day as its famous companion case, *Roe v. Wade*, 410 U.S. 113 (1973). Connecticut's contraception restrictions were unsuccessfully challenged in *Poe v. Ullman*, 367 U.S. 497, 508-09 (1961), but the Court later struck them down after plaintiffs arranged to get arrested in the landmark privacy case, *Griswold v. Connecticut*, 381 U.S. 479, 481, 485-86 (1965).

8 396 F.3d 1248 (D.C. Cir. 2005).

9 *Id.* at 1255-56. The National Rifle Association ("NRA") initially opposed the filing of *Parker* because of differences in litigation strategy, and *Seegars* was the NRA's attempt to consolidate *Parker* into its own case. *See* John Gibeaut, *A Shot at the Second Amendment*, A.B.A. J., Nov. 2007, *available at* http://www.abajournal.com/magazine/a_shot_at_the_second_amendment.

10 Robert Levy, one of the main lawyers for the plaintiffs in *Heller*, has stated that there is "likely to be quite a flood of litigation to try to flesh out precisely what regulations are to be permitted and which ones are not . . . . The challenges are likely to be in Chicago, New York, Philadelphia and Detroit." Adam Liptak, *Coming Next, Court Skirmishes in Cities*, N.Y. TIMES, June 27, 2008, at A1, *available at* http://www.nytimes.com/2008/06/27/washington/27guns.html; *see, e.g.*, NRA v. Oak Park, Nos. 08 C 3696, 08 C 3697, 2008 WL 5111163 (N.D. Ill. Dec. 4, 2008), *aff'd sub nom.* NRA v. City of Chicago, 567 F.3d 856 (7th Cir. 2009) (declining to incorporate the Second Amendment against the States), *petitions for cert. filed*, 77 U.S.L.W. 3679 (U.S. June 3, 2009) (No. 08-1497), 77 U.S.L.W. 3691 (June 9, 2009) (No. 08-1521), 2008 WL 2840911; Complaint at 5-6, Guy Montag Doe v. San Francisco Hous. Auth., No. 08-3112, 2008 WL 2614876 (N.D. Cal. filed June 27, 2008).

11 Individuals can challenge the constitutionality of a state law by "violat[ing] the statute at issue and [raising the] constitutional claims in the course of state proceedings." *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1135, 1292 (1977). However, individuals create a pre-enforcement challenge to a statute when they refrain from violating the statute at issue and instead sue the government officials and other parties who would have been responsible for enforcing the challenged law. *See, e.g.*, Steffel v. Thompson, 415 U.S. 452, 454-55 (1974).

cle III limits federal courts to hearing only "cases" or "controversies," and if plaintiffs fail to show that a dispute is a "case" or "controversy," the argument is dismissed for a lack of standing.[12] For pre-enforcement review of statutes, the Supreme Court requires plaintiffs to show an injury in fact by proving that the defendants, the potential prosecutors, have made a "credible threat" to enforce the unconstitutional statute at issue.[13]

Heller only addressed the constitutionality of gun regulations within the District of Columbia and did not consider whether the Second Amendment also limits state gun laws.[14] As plaintiffs begin to assert pre-enforcement challenges to state statutes based on *Heller*, they will find that Eleventh Amendment sovereign immunity protects many state officials from prosecution.[15] The Supreme Court allows plaintiffs to bypass such sovereign immunity if they can invoke the 1908 decision, *Ex parte Young*.[16]

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[12] Plaintiffs can be dismissed from a federal court for lacking either constitutional standing or prudential standing. Jonathan R. Siegel, Note, *Chilling Injuries as a Basis for Standing*, 98 YALE L.J. 905, 909-10 (1989). Plaintiffs who lack constitutional standing have "no way to get into federal court" because it would be a violation of Article III. *Id.* at 910. Prudential standing, however, "consists only of rules of self-restraint imposed by courts." *Id.* Therefore, courts can define prudential standing requirements, and Congress can alter these requirements, within the constitutional limits of Article III. *See* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 208-12 (1972); Siegel, *supra*, at 909-10.

[13] Supreme Court precedent provides that the "irreducible constitutional minimum of standing contains three elements." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). The Court in *Lujan* stated:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 560-61 (internal quotation marks and citations omitted). A "credible threat" relates to the first requirement, injury in fact. N.H. Right to Life Political Action Comm. v. Gardner, 99 F.3d 8, 13 (1st Cir. 1996) ("[A] credible threat of present or future prosecution itself works an injury that is sufficient to confer standing . . . ."). Causation and redressability have not been contested in Second Amendment pre-enforcement litigation. *See Seegars*, 396 F.3d at 1251 (citing *Lujan* without mentioning causation or redressability).

[14] *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2813 n.23 (2008) (noting that the incorporation debate is "not presented by this case"). The plaintiffs in *Parker* specifically challenged the D.C. gun ban to avoid a debate on whether the Second Amendment should be incorporated into the Fourteenth Amendment and applied to the states. Brian Doherty, *How the Second Amendment Was Restored*, REASON, Dec. 2008, *available at* http://reason.com/news/show/129991.html ("D.C. was the best place to start litigating the Second Amendment. The district is not a state but a federal enclave under direct control of Congress . . . so lawyers could sidestep the contentious and still-unsolved issue of whether the Second Amendment applied to the states via the Fourteenth Amendment . . . ."). Additionally, the D.C. gun ban was one of the strictest in the country. *See Heller*, 128 S. Ct. at 2818 ("Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban.").

[15] A state that violates its citizens' federal constitutional rights can invoke its sovereign immunity to avoid liability. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1426 (1987). The source of states' sovereign immunity is based on the Eleventh Amendment and states' residual

Ex parte Young, however, may require plaintiffs to show more than just a "credible threat" of enforcement. The original text of *Ex parte Young* only allows plaintiffs to sue state officials who "threaten and are about to commence proceedings," which appears to require plaintiffs to show an actual threat of enforcement.[17] However, the definition of a threat under *Ex parte Young* is imprecise and has changed dramatically over the past one hundred years.[18] The creation of the declaratory judgment in 1934 and the Rehnquist Court's limitations on *Ex parte Young* have left this term ambiguous.[19]

Part I of this Comment presents the doctrine the Supreme Court uses to analyze "credible threat" standing issues. Courts may just cite to cases about standing that allow them to justify their preconceived opinions on an issue, but this Comment shows that the Supreme Court has expressed a coherent, albeit scattered, "credible threat" standing doctrine.[20] Part II then addresses the development of *Ex parte Young* as it evolved from a case about the requirements of an injunction into a judicial "exception" to Eleventh Amendment sovereign immunity based on the Fourteenth Amendment.

Part III presents the recent developments in the Second Amendment litigation in the D.C. Circuit. This Comment then analyzes the D.C. Circuit's creation of its own "credible threat" standing doctrine in Part IV, and concludes that it should be rejected in favor of the Supreme Court's doctrine. Under the Supreme Court's standing analysis, Part IV concludes that the D.C. Circuit erred by denying standing to five of the six plaintiffs in *Parker*, and that other federal courts would be mistaken to adopt the reasoning of *Parker*. Finally, Part V argues that the Supreme Court's "credible threat" analysis should be used to determine whether a threat of enforcement exists for purposes of *Ex parte Young*.

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sovereignty in a federal system. *See* Alden v. Maine, 527 U.S. 706, 712-30 (1999) (summarizing the history of sovereign immunity based on the Eleventh Amendment and inherent state authority); *see also* Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 522-46 (1978) (discussing sources of sovereign immunity other than the Eleventh Amendment).

16 209 U.S. 123 (1908); *see infra* Part II.C.

17 *Young*, 209 U.S. at 156.

18 *See infra* Part II.B-C.

19 *See infra* Part II.D.

20 *See* Michael E. Rosman, *Standing Alone: Standing Under the Fair Housing Act*, 60 MO. L. REV. 547, 550 (1995) ("It is hard to read any significant number of cases or articles about standing without coming to the conclusion that few hold the internal coherence of that doctrine in high regard."). Nonetheless, the Supreme Court has "set forth what it believes are the basic elements of standing." *Id.*

I. "CREDIBLE THREAT" DOCTRINE

Courts determine constitutional standing based on the existence of a "case" or "controversy" as required by Article III, but identifying a definitive description of a "case" or "controversy" is a difficult task. The Constitution provides no definition of "cases" or "controversies," which has led legal scholars such as Cass Sunstein to argue that standing doctrines are unrelated to the actual text of Article III.[21] Instead, Sunstein suggests that Congress, and not the courts, is best structured to determine which situations constitute a "case" or "controversy" under Article III.[22] Similarly, Richard Epstein argues that if the words "cases" and "controversies" were intended to have any effect on the courts, the intent was actually to *expand* the scope of judicial review.[23]

The historical development of the Court's standing doctrine provides no additional support in interpreting the original text of Article III, but instead begins in 1923 in the unanimous decision in *Frothingham v. Mellon*[24] and its companion case, *Massachusetts v. Mellon*.[25] The plaintiffs in the *Mellon* cases challenged a state maternity law on various federalism grounds by arguing that the statute would "increase the burden of future taxation and thereby take [their] property without due process of law."[26] Instead of addressing the merits of the case, however, the Court simply held that the plaintiffs lacked standing.[27] Epstein argues that the standing doctrine was then developed to protect the activities of the expanding federal government during the progressive movement.[28] Sunstein agrees that consti-

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21 Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1474 (1988) ("The connection between standing limitations and [A]rticle III is far from clear. Article III limits federal courts to cases or controversies, but this limitation does not explicitly require that plaintiffs have a particular stake in the outcome. A case or controversy might exist quite apart from whether there is an injury, legal or otherwise, to the complainant.").

22 *Id.* at 1479 ("The best interpretation of [A]rticle III would recognize that Congress has the authority to define legal rights and obligations, and that it may therefore, by statute, create an injury in fact where, as far as the legal system was concerned, there had been no injury before.").

23 Richard A. Epstein, *Standing and Spending—The Role of Legal and Equitable Principles*, 4 CHAP. L. REV. 1, 6 (2001) ("I do not think that [the word 'cases'] imports any arcane meaning that recognizes only certain kinds of legal disputes . . . as cases for the purposes of constitutional law. Indeed the words 'all' and 'extend' carry with them expansive, and not restrictive, meanings."). *But see* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 118 (2d ed. 1986) (arguing that the word "all" has no functional effect on the scope of judicial review). In place of the current standing doctrine that is tenuously related to the text of the Constitution, Epstein would instead derive the definition of "cases" and "controversies" from the "common law" and "equity sides" of private law. Epstein, *supra*, at 7.

24 262 U.S. 447 (1923).

25 *Id.* (consolidated actions); *see also* Epstein, *supra* note 23, at 1.

26 *Mellon*, 262 U.S. at 479-80, 486.

27 *Id.* at 488-89.

28 Epstein, *supra* note 23, at 3, 4 ("[T]he doctrine of standing should be understood for what it purports to do—limit the access to federal courts when a particular plaintiff has come forward to voice a

tutional standing was a creation of the progressive movement, and writes that "courts favorably disposed toward the New Deal reformation developed doctrines of standing, ripeness, and reviewability largely to insulate agency decisions from judicial intervention."[29] Additionally, Sunstein argues that standing was "used enthusiastically by judges associated with the progressive movement and the New Deal, most prominently Justices Brandeis and Frankfurter, who reflected the prevailing belief that traditional conceptions of the rule of law were incompatible with administrative regulation."[30]

Further developing its case law since 1923, the Supreme Court has created a doctrine of constitutional standing that limits plaintiffs' access to federal courts.[31] The first element of judicially-construed constitutional standing requires an injury in fact.[32] Enforcement of an unconstitutional statute is an injury in fact, but plaintiffs who have not yet been prosecuted can instead satisfy this requirement by showing a "credible threat" of the statute's enforcement.[33] The Supreme Court has not developed an explicit formulation to determine how plaintiffs establish "credible threat" standing, but several general trends emerge in the case law.[34] Part I.A examines plaintiffs' initial burden to establish standing, and Part I.B summarizes defendants' possible responses.

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specific grievance against the named government defendant . . . . [S]tanding in American constitutional law was crafted by the progressives who were anxious to insure that their political initiatives, such as the Matrimony Act . . . could be shielded from judicial attack.").

29 Sunstein, *supra* note 21, at 1437.

30 *Id.*

31 F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 289-90 (2008).

32 *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (requiring an injury in fact).

33 *See* Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 297-99 (1979) (allowing plaintiffs to have standing when "there exists a credible threat of prosecution").

34 While resolving a pre-enforcement challenge in the First Circuit, Judge Selya wrote, "Curiously, the doctrine of standing, though vitally important for federal courts, remains a morass of imprecision." N.H. Right to Life Political Action Comm. v. Gardner, 99 F.3d 8, 12 (1st Cir. 1996). "Define 'credible threat' narrowly," one court warned, "and pre-enforcement review becomes empty rhetoric. Define it broadly, and federal courts become college debating forums." Kegler v. U.S. Dep't of Justice, 436 F. Supp. 2d 1204, 1212 (D. Wyo. 2006). The federal circuit courts have varied interpretations of "credible threat" standing. *See generally* David T. Hardy, *Standing to Sue in the Absence of Prosecution: Can a Case Be Too Controversial for Case or Controversy?*, 30 T. JEFFERSON L. REV. 53, 58-67 (2007) (examining the "lack of consistency" in the "credible threat" doctrine in the Sixth, Ninth, and D.C. Circuits).

A. *Plaintiffs' Initial Burden*

Plaintiffs have the initial burden to establish a "credible threat" of enforcement to show an injury in fact for Article III standing.[35] In *Younger v. Harris*,[36] the Supreme Court required three of the four plaintiffs to fulfill this burden by alleging more than just a vague feeling of inhibition that the challenged statute would be enforced against them.[37] While the first plaintiff in *Younger* was already under indictment for violating the state's anti-syndicalism statute, the remaining three plaintiffs attempted to join the suit even though their fear of prosecution was "imaginary or speculative."[38] The Court ruled that the three additional plaintiffs lacked standing because they "[did] not claim that they [had] ever been threatened with prosecution, that a prosecution [was] likely, or even that a prosecution [was] remotely possible."[39] In other cases, the Court has required plaintiffs to show that the injury is "real and immediate," and not "conjectural" or "hypothetical,"[40] and that a plaintiff "has sustained or is immediately in danger of sustaining some direct injury" as a result of the potential enforcement of the challenged statute.[41]

Determining whether plaintiffs can meet these requirements and prove a sufficient threat of enforcement depends on the enactment date of the challenged statute.[42] When a statute is old and possibly obsolete, as in *Poe v. Ullman*,[43] the Supreme Court holds that the mere existence of an old statute does not create a threat sufficient to satisfy plaintiffs' initial burden.[44] The plaintiffs in *Poe* argued that Connecticut's prohibition against the use of contraceptives was unconstitutional under the Fourteenth Amendment.[45] Because the statute had never been enforced since its enactment over eighty

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35 Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 190 (2000).

36 401 U.S. 37 (1971).

37 *Id.* at 41-42.

38 *Id.* at 42.

39 *Id.*

40 City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983). Unlike the plaintiffs in *Younger*, however, the plaintiff in *Lyons* did not attempt to challenge the constitutionality of a statute, but instead sought an injunction to limit police officers' use of illegal chokeholds in any future encounters he may have with the Los Angeles police. *Id.* at 97-98. Despite these factual differences, courts often apply the requirements in *Lyons* to standing doctrines in general. *E.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

41 O'Shea v. Littleton, 414 U.S. 488, 494 (1974) (quoting Massachusetts v. Mellon, 262 U.S. 447, 488 (1923)) (internal quotation marks omitted).

42 *See, e.g.*, Doe v. Bolton, 410 U.S. 179, 188 (1973); Mobil Oil Corp. v. Att'y Gen., 940 F.2d 73, 76 (4th Cir. 1991).

43 367 U.S. 497 (1961).

44 *Id.* at 507. Before *Poe*, the Supreme Court had also dismissed a similar challenge to Connecticut's ban on the use of contraceptives in *Tileston v. Ullman*, 318 U.S. 44, 46 (1943) (per curiam), because the plaintiff, a physician, lacked standing to sue on behalf of his patients.

45 *Poe*, 367 U.S. at 498-500.

years earlier,[46] the Supreme Court held that the lack of immediacy did not create a "realistic fear of prosecution," and the Court therefore held that the plaintiffs lacked standing.[47] To avoid making the same mistake, plaintiffs who challenge antiquated statutes should "clearly . . . allege that [the government] threatens to prosecute them," because they are unlikely to have standing if they claim that the antiquated statute will be enforced against them merely "in the course of [the prosecutor's] duty."[48]

However, when plaintiffs challenge recently enacted, or at least non-archaic, statutes, the "credible threat" standard is "quite forgiving."[49] Abortion doctors in *Doe v. Bolton*[50] sought a declaratory judgment that the state's recently-enacted abortion restrictions were unconstitutional.[51] The state had prosecuted abortion doctors under a previous version of the statute, but had not prosecuted the doctors or threatened them with prosecution under the newer statutes.[52] The Supreme Court held that the abortion doctors had standing because, unlike the contraception ban in *Poe*, the abortion restrictions were "recent and not moribund."[53]

As indicated by the Fourth Circuit's decision in *Mobil Oil Corp. v. Attorney General*,[54] courts now assume that the government's decision to enact a statute indicates its concurrent willingness to enforce that statute.[55]

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46 *Id.* at 501-02. The Court noted, however, that the government had instituted a "test case" about twenty years earlier and had prosecuted two doctors and a nurse to determine the constitutionality of the law. *Id.* The courts upheld the law, but never enforced it. *Id.*

47 *Id.* at 507-09 ("The fact that Connecticut has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication. This Court cannot be umpire to debates concerning harmless, empty shadows."). *But see* Epperson v. Arkansas, 393 U.S. 97, 98, 101-02 (1968) (holding that plaintiffs had standing to challenge the Arkansas anti-evolution statute that had been made famous by *Scopes v. State*, 289 S.W. 363 (Tenn. 1927), even though the law was over forty years old, had never been enforced, and was "more of a curiosity than a vital fact of life"); *see also id.* at 109-10 (Black, J., concurring) (expressing concern that the plaintiff's fear of punishment was unfounded and that the issue should not have been justiciable).

48 *Poe*, 367 U.S. at 501; *see, e.g.*, Doe v. Duling, 782 F.2d 1202, 1204, 1206-07 (4th Cir. 1986) (holding that pre-enforcement plaintiffs lacked standing to challenge a Virginia statute prohibiting fornication and cohabitation because they faced "only the most theoretical threat of prosecution" based upon a law that is a "matter of historical curiosity"). Judge Wilkinson distinguished *Duling* from *Epperson*, 393 U.S. 97 (holding that plaintiffs had standing to challenge a forty-year-old anti-evolution statute), by noting that that *Epperson* was a rare situation that occurs only "when the chilling effect of a statute is so powerful and the rights it inhibits so important that the mere existence of the statute may warrant judicial intervention." *Duling*, 782 F.2d at 1206.

49 N.H. Right to Life Political Action Comm. v. Gardner, 99 F.3d 8, 14 (1st Cir. 1996); *see* Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 297-301 (1979).

50 410 U.S. 179 (1971).

51 *Id.* at 181, 184-85.

52 *Id.* at 188-89.

53 *Id.* at 188.

54 940 F.2d 73 (4th Cir. 1991).

55 *See id.* at 76 ("It would be unreasonable to assume that the General Assembly adopted the 1985 amendment without intending that it be enforced.").

The Fourth Circuit extended this rule to newly-enacted statutes that have not yet even gone into effect.[56] Before the government even had an opportunity to prosecute in *Mobil Oil*, the plaintiff filed for a declaratory judgment to invalidate the challenged petroleum regulations.[57] When the Attorney General of Virginia refused to disclaim any intention of prosecuting the plaintiff, the court held that the plaintiff had standing.[58]

The most recent development in the Supreme Court's case law liberalized the standing requirements for pre-enforcement of challenged statutes that restrict First Amendment expression.[59] The Court allowed the plaintiffs in *Virginia v. American Booksellers Ass'n*[60] to prove a credible threat by showing that the mere existence of the challenged statute caused them to engage in "self-censorship."[61] The plaintiffs in *American Booksellers* challenged a statute that regulated the sale of sexual literature in bookstores, and the Court held that the plaintiffs had standing because they had "self-censored" their behavior to avoid prosecution.[62]

Plaintiffs can easily allege that a challenged statute causes them to "self-censor" their behavior, and this doctrine effectively shifts the burden to the defendant to disavow any prosecution of the plaintiffs.[63] Nonetheless, the Supreme Court does not permit plaintiffs to allege a purely subjective "chill" in their behavior.[64] Instead, the Court requires plaintiffs to show that their reaction to the challenged statute is objectively reasonable.[65] This is

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56 *See id.* at 74. The plaintiffs filed the suit two days before the challenged statute went into effect. *Id.*

57 *Id.*

58 *Id.* at 76-77. Recognizing that the Attorney General was not responsible for passing the new law, the court still inferred the Attorney General's intent to prosecute from the creation of the statute because "a dispute with a state suffices to create a dispute with the state's enforcement officer." *Id.* at 76 n.2.

59 While the First Amendment protects individuals against direct government action, the government may "deter someone from engaging in First Amendment activity without actually prohibiting it." Siegel, *supra* note 12, at 906. These indirect government actions can create a "chilling effect" or "self-censorship," which is "a harm against which the courts may guard." *Id.* at 906, 915-16.

60 484 U.S. 383 (1988).

61 *Id.* at 392-93.

62 *Id.* at 386-88, 392-93. The Court wrote that it was "not troubled by the pre-enforcement nature of this suit" because "the alleged danger of this statute is, in large measure, one of self-censorship." *Id.* at 393. While most "credible threat" standing doctrine is based on determining the imminence of a potential prosecution, "self-censorship" is "a harm that can be realized even without an actual prosecution." *Id.*

63 *See* Siegel, *supra* note 12, at 906-09.

64 *See* Laird v. Tatum, 408 U.S. 1, 13-15 (1972) (ruling that plaintiffs who claimed that government surveillance had a "chill" on the exercise of their First Amendment rights lacked standing because they alleged only a subjective "chill" and not a "specific present objective harm or a threat of specific future harm").

65 *See* Meese v. Keene, 481 U.S. 465, 472-77 (1987) (holding that the plaintiff had standing when showed that he was objectively forced to limit his First Amendment activities because he wanted to protect his reputation, which would have been damaged if the challenged statute were enforced).

rather simple to do, as a plaintiff in the First Circuit prominently demonstrated in *New Hampshire Right to Life Political Action Committee v. Gardner*.[66] Citing a First Amendment right to political speech, the plaintiff in *Right to Life* sought declaratory and injunctive relief to prevent the government from enforcing a New Hampshire statute that limited political campaign expenditures.[67] Because the state failed to provide clear evidence that it would refrain from prosecuting the plaintiff, the plaintiff had standing even though the defendants never specifically threatened the plaintiff.[68] Other federal circuit courts cite the reasoning in *Right to Life* to analyze "credible threat" standing issues that involve First Amendment rights.[69] Nonetheless, with little guidance from the Supreme Court after *American Booksellers*, this First Amendment carve-out may not yet be uniformly recognized.[70]

B. *Defendants' Burden*

After plaintiffs fulfill their initial burden by showing a "credible threat," the burden then shifts to defendants to show that the plaintiffs lack standing.[71] The Supreme Court established in *Babbitt v. United Farm Workers National Union*[72] that if plaintiffs can show a "credible threat," they will have standing unless defendants disclaim future prosecutions under the challenged statute.[73] The plaintiffs in *Babbitt* challenged criminal penalties

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66 99 F.3d 8, 15 (1st Cir. 1996) (noting that in cases like *Right to Life*, "courts will assume a credible threat of prosecution in the absence of compelling contrary evidence").

67 *Id.* at 10, 16.

68 *See id.* at 16-17.

69 *See, e.g.*, St. Paul Area Chamber of Commerce v. Gaertner, 439 F.3d 481, 483, 486-87 & n.4 (8th Cir. 2006) (challenging regulations of corporate contributions to political candidates); Mangual v. Rotger-Sabat, 317 F.3d 45, 51, 56-58 (1st Cir. 2003) (challenging a criminal libel statute); N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 708, 710 (4th Cir. 1999) (challenging portions of an election and campaign finance law); Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n, 149 F.3d 679, 681, 687 (7th Cir. 1998) (challenging a requirement that a trading advisor register before giving financial information); Wilson v. State Bar of Ga., 132 F.3d 1422, 1424, 1428 (11th Cir. 1998) (challenging regulations of the State Bar of Georgia).

70 *See, e.g.*, Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138-42 (9th Cir. 2000) (en banc) (ignoring *American Booksellers* and *Right to Life* and holding that plaintiffs need to show a "reasonable or imminent threat of enforcement" before suing to protect their rights to free speech and free exercise of religion).

71 *See* Winsness v. Yocom, 433 F.3d 727, 736 & n.4 (10th Cir. 2006) ("Because mootness is jurisdictional and non-waivable, we assume that the Supreme Court's discussion of the defendant's 'burden' refers only to the ultimate burden of persuasion and not of coming forward with evidence or argument. Where the defendant has not argued mootness, the court has the obligation to examine the facts as alleged in the complaint and to determine whether there remains a live controversy." (citation omitted)).

72 442 U.S. 289 (1979).

73 *See id.* at 302.

in Arizona's labor regulations, and the defendants responded by observing that the statute had "not yet been applied and may never be applied."[74] However, because the prosecutors did not specifically disavow future prosecutions under the challenged statute, the Supreme Court found that the defendants' statement did not defeat the plaintiffs' showing of a "credible threat."[75]

The Tenth Circuit demonstrated in *Winsness v. Yocom*,[76] however, that defendants can easily meet their burden by disclaiming in an affidavit any intent to prosecute the plaintiffs.[77] The plaintiffs in *Winsness* wanted to prevent prosecutors from enforcing a flag desecration statute.[78] They had written on and burned the U.S. flag, and one of the plaintiffs had even been subjected to criminal proceedings.[79] Nonetheless, the local prosecutors signed affidavits promising not to enforce the statute against the plaintiffs, and the court ruled that "the prosecutors' affidavits have rendered the controversy moot."[80]

Disclaiming an intent to prosecute, however, does not always guarantee that plaintiffs will lack standing.[81] The First Circuit showed in *Right to Life* that plaintiffs may still have standing even if defendants indicate that they currently have no plans of enforcing the challenged statute.[82] The plaintiff in *Right to Life* tried to prevent the state from enforcing a statute that limited its political campaign expenditures, even though the Attorney General had already stated that the plaintiff was not likely violating the challenged statute.[83] However, because the plaintiff could have been prosecuted for a similar action in the future, and the plaintiff would still "self-censor" its actions, the court ruled that the plaintiff had standing.[84]

Overall, plaintiffs meet their initial burden by showing a "credible threat" of enforcement, which is determined by the recency of the enactment date of the challenged statute and whether the statute "chills" First Amendment expression.[85] When plaintiffs fulfill this requirement, the bur-

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74 *Id.* at 293, 302.

75 *Id.* at 302.

76 433 F.3d 727 (10th Cir. 2006).

77 *See id.* at 733, 736.

78 *Id.* at 729.

79 *Id.* at 729-30.

80 *Id.* at 732-33, 736.

81 Although the court in *Winsness* found that the affidavits made the "credible threat" moot, defendants face a difficult standard to show mootness. *Id.* at 736 ("Accordingly, the defendant bears the 'heavy,' 'stringent,' and 'formidable' burden of demonstrating that it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000))).

82 N.H. Right to Life Political Action Comm. v. Gardner, 99 F.3d 8, 16 (1st Cir. 1996).

83 *Id.* at 16-17.

84 *Id.*

85 *See supra* Part I.A; *see also Right to Life*, 99 F.3d at 15.

den then shifts to defendants who might be able to make a "credible threat" moot by disavowing future prosecutions.[86]

II. DEVELOPMENT OF *EX PARTE YOUNG*

In addition to having "credible threat" standing under Article III, plaintiffs who want to prevent state officials from enforcing an unconstitutional law may also need to invoke *Ex parte Young*.[87] Unlike "credible threat" standing, which is a constitutional requirement based on Article III and needs to be present in all pre-enforcement challenges in federal courts,[88] *Ex parte Young* only needs to be asserted when plaintiffs sue state officers who are protected by sovereign immunity.[89] The Supreme Court holds that *Ex parte Young* creates an exception to Eleventh Amendment sovereign immunity that allows plaintiffs to sue otherwise protected defendants from enforcing unconstitutional statutes.[90]

According to the text of the 1908 decision, plaintiffs can invoke *Ex parte Young* only when the state officers responsible for enforcing the challenged statute "threaten and are about to commence proceedings."[91] Requiring a plaintiff to show an actual threat of enforcement appears to create a higher threshold than the "credible threat" standard, which does not always

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86 *See supra* notes 71-84 and accompanying text; *see also Friends of the Earth*, 528 U.S. at 189.

87 *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 994 (5th ed. 2003) (suggesting that "the Court recognized a judicially implied *federal* cause of action [in *Ex parte Young*] for injunctive relief under the Fourteenth Amendment" because the parties in *Ex parte Young* were not diverse).

88 *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

89 *See* Vicki C. Jackson, Seminole Tribe*, the Eleventh Amendment, and the Potential Evisceration of* Ex Parte Young, 72 N.Y.U. L. REV. 495, 511 (1997) ("Under *Ex parte Young*, a suit to secure future compliance with federal law, brought against a state officer, is not regarded as one against the State for purposes of the Eleventh Amendment."). The text of the Eleventh Amendment was passed in response to *Chisholm v. Georgia*, 2 U.S. (1 Dall.) 419 (1793), in order to protect states from lawsuits brought by citizens of another state. *See* Alden v. Maine, 527 U.S. 706, 730 (1999). "The Judicial power of the United States," the Eleventh Amendment states, "shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. Despite the narrow protections of its text, the Eleventh Amendment today represents a broader protection through sovereign immunity that shields states from lawsuits brought by their own citizens. *See* Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 446 (2004); *see also* Hans v. Louisiana, 134 U.S. 1, 10 (1890).

90 *See Ex parte* Young, 209 U.S. 123, 150-56 (1908) (summarizing the history of the Eleventh Amendment and concluding that "officers of the state . . . who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action"). The Supreme Court continues to uphold this "exception" to the Eleventh Amendment through the Fourteenth Amendment. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101-03 (1984); Edelman v. Jordan, 415 U.S. 651, 664 (1974).

91 *Young*, 209 U.S. at 155-56.

require the government to actually threaten the plaintiffs.[92] This difference was not created by any purposeful distinction between Article III standing and *Ex parte Young*, but is instead the result of changes in federal courts over the past century.[93]

Part II.A defines *Ex parte Young* as a case that authorized plaintiffs to use "anti-suit injunctions" in equity in federal courts to assert their defenses before being prosecuted in state courts. Part II.B examines Congress's creation of the declaratory judgment to bypass the requirements of injunctive relief under *Ex parte Young*. Part II.C then traces the reinterpretation of *Ex parte Young* as an "exception" to the Eleventh Amendment that began during the Supreme Court's renewed emphasis on federalism in the 1970s. Finally, Part II.D concludes with a summary of the current confusion that courts face when attempting to apply *Ex parte Young* in conjunction with the Court's "credible threat" standing doctrine.

A. Ex Parte Young *and the "Anti-Suit Injunction"*

Edward Young, the Attorney General of Minnesota, helped his state legislature draft railroad regulations in 1907 that would force railroad companies to reduce their freight and passenger rates.[94] Young attempted to design rate regulations that would be constitutional under the Commerce Clause and the Due Process Clause of the Fourteenth Amendment.[95] Initially, the railroad industry appeared willing to accept the new regulations.[96] Shareholders of the railroad companies, however, sued through a derivative action in a federal circuit court, and in an attempt to prevent the enforcement of the challenged railroad rates, the plaintiffs also named Attorney General Young as a defendant.[97] In response, Young attempted to have the suit dismissed by arguing that he was protected by sovereign immunity, but the court instead ordered a temporary injunction to prevent the enforcement

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92 *See supra* Part I.

93 Note that *Ex parte Young* was decided in 1908, while the first case to consider the Court's modern standing doctrine occurred fifteen years later. *Compare* Massachusetts v. Mellon, 262 U.S. 447, 480-81 (1923), *with Young*, 209 U.S. at 123; *see also* Part II.B-C.

94 *See* RICHARD C. CORTNER, THE IRON HORSE AND THE CONSTITUTION 144-45 (1993).

95 *See id.* at 145-46 (pointing to *Fitts v. McGhee*, 172 U.S. 516, 516-17 (1899), which involved an act that set toll bridge rates, but was challenged on due process and equal protection grounds); *see also* Perkins v. N. Pac. Ry., 155 F. 445, 452 (C.C.D. Minn. 1907) (discussing the Commerce Clause aspect of the railroad rates established by Young).

96 CORTNER, *supra* note 94, at 146.

97 *See Perkins*, 155 F. at 447 (bringing suit against Attorney General Edward Young). The shareholders sued because the new regulations reduced the revenue of the railroad industry, but the railroads were already struggling financially. *Id.* at 451 ("[I]n the years past . . . there was not enough revenue from the business carried on within the state . . . to entirely pay the fixed charges outstanding and afford any adequate dividend or compensation to the owners of the stock itself . . . .").

of the regulations and then denied Young's motion to dismiss.[98] Wanting to avoid the lengthy process necessary for a case to reach the Supreme Court, Young ignored the federal court's temporary injunction, filed an action in a state court to enforce the rate regulations, and was then held in contempt of court.[99] Young was taken into federal custody, where he was allowed to petition directly to the Supreme Court for a writ of habeas corpus.[100]

Writing for a majority of the Court in 1908, Justice Peckham first found that the state's railroad regulations were unconstitutional.[101] Justice Peckham then upheld the plaintiffs' action in federal court, thereby denying Young's writ of habeas corpus.[102] The Court explained that the plaintiffs should be allowed to protect themselves from threatened prosecution in a state court by seeking pre-enforcement review of the challenged statute in a federal court.[103] The Court allowed federal courts to enjoin state officials who have "some connection" to the enforcement of an unconstitutional state law when the state officers "threaten and are about to commence proceedings."[104] Justice Harlan wrote a vigorous dissent, in which he argued that the majority's decision allowed "subordinate federal courts" to control the actions of the state courts, which would destroy federalism and the balance of power between the state and federal governments.[105]

The reasoning in *Ex parte Young* can be interpreted in two ways. The modern interpretation cites *Ex parte Young* to establish an "exception" to the Eleventh Amendment's sovereign immunity.[106] Young had argued that his actions were protected by sovereign immunity, and the Court's decision could be interpreted as reasoning that the Fourteenth Amendment trumped the Eleventh Amendment to create an exception to sovereign immunity, which in turn implicitly created federal question jurisdiction.[107] Some legal

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98 *Young*, 209 U.S. at 132-33.

99 *Id.* at 133-34.

100 *See id.*

101 *Id.* at 145-49.

102 *Id.* at 163-66, 168.

103 *Id.* The Court allowed the plaintiffs to have pre-enforcement review of the constitutionality of the rate regulations in equity, and disagreed with Young's argument that the "proper way to test the constitutionality of the act is to disobey it, at least once, after which the company might obey the act pending subsequent proceedings to test its validity." *Id.* at 163. The Court instead allowed the pre-enforcement review of the challenged statute in equity because it would be difficult to find a party to break the law and also difficult to explain the case to a jury. *Id.* at 163-66.

104 *Young*, 209 U.S. at 155-57.

105 *Id.* at 174-76 (Harlan, J., dissenting).

106 *See* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 269 (1997) ("The [plaintiff's] suit, accordingly, is barred by Idaho's Eleventh Amendment immunity unless it falls within the exception this Court has recognized for certain suits seeking declaratory and injunctive relief against state officers in their individual capacities.").

107 *See Young*, 209 U.S. at 132, 149-50.

scholars adopt this interpretation of *Ex parte Young*.[108] They acknowledge that this view of *Ex parte Young* can only be understood by assuming various "legal fictions" to explain away inconsistent assumptions in the opinion, such as how a suit against state officials in their official capacity is also not an impermissible suit against the state.[109]

The original interpretation of *Ex parte Young*, however, focused on the "anti-suit injunction," a remedy in equity that allowed individuals to preempt an expected prosecution by asserting their defenses first.[110] John Harrison, a legal scholar who argues that the modern usage of *Ex parte Young* is no longer connected to its original interpretation, writes that the distinction between law and equity in the early twentieth century is essential to understanding *Ex parte Young*:

> A core function of equity, and a classic use of the remedy of injunction, especially in systems that separated law and equity, was to interfere with proceedings at law by enjoining parties from bringing legal actions, from raising certain claims or defenses in them, or from executing judgments obtained at law. In one standard configuration a potential defendant at law would sue in equity in order to present a defense that was not recognized at law, or would be inadequately protected by being raised as a defense in a legal proceeding . . . . Equitable relief thus could be granted to equity plaintiffs who would be, or were, defendants at law.[111]

The Supreme Court did not originally interpret the plaintiffs' suit in *Ex parte Young* as a challenge to Eleventh Amendment sovereign immunity because the plaintiffs in the federal circuit court were effectively mounting a preemptive defense, and sovereign immunity does not prevent individuals from defending themselves when sued by the government.[112] The groundbreaking aspect of *Ex parte Young* was the expansion of the review of these preemptive defenses against state officials in federal courts.[113] *Ex parte Young*, therefore, applied only to pre-enforcement actions that sought to enjoin the enforcement of the challenged state law and had not created a general exception to the Eleventh Amendment through the Fourteenth

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108 *See* Andrew B. Coan, *Text as Truce: A Peace Proposal for the Supreme Court's Costly War over the Eleventh Amendment*, 74 FORDHAM L. REV. 2511, 2524-25 (2006); *see also* Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 HASTINGS L.J. 1123, 1123-24 (1989).

109 *See* Coan, *supra* note 108, at 2524-25; *see also* Althouse, *supra* note 108, at 1123-24.

110 John Harrison, Ex Parte Young, 60 STAN. L. REV. 989, 996-1008 (2008).

111 *Id.* at 997-98 (footnote omitted); *see also* Sina Kian, Note, *Pleading Sovereign Immunity: The Doctrinal Underpinnings of* Hans v. Louisiana *and* Ex Parte Young, 61 STAN. L. REV. 1233, 1272-75 (2009).

112 Harrison, *supra* note 110, at 1000 ("Because [the plaintiffs'] position was a defense, not an affirmative claim on the State of Minnesota, a court could grant relief without offending sovereign immunity. . . . Whatever sovereign immunity means exactly, it does not mean that the government necessarily wins when it sues a private person.").

113 *See id.* at 1007 & n.80.

Amendment.[114] The Supreme Court cited *Ex parte Young* for the proposition that "sovereign immunity permitted anti-suit injunctions," but the Court did not yet assume that *Ex parte Young* created a general cause of action that authorized "affirmative equitable relief like specific performance."[115]

Plaintiffs' ability to seek injunctive relief in federal courts from state laws, however, required plaintiffs to show not only a threat of enforcement, but also an "irreparable loss" that would be "both great and immediate," as the Court held in *Fenner v. Boykin*.[116] Cotton dealers in *Fenner* tried to buy and sell cotton in violation of state trade regulations, and after the state threatened them with arrest and prosecution, the dealers tried to enjoin enforcement of the state trade regulations in federal court.[117] Ruling that the plaintiffs did not face a "great and immediate" loss, the Court used *Ex parte Young* to require plaintiffs to first address the issue in state courts, and if that approach failed, the plaintiffs could, in "extraordinary circumstances," receive an injunction against further prosecution if the "danger of irreparable loss is both great and immediate."[118]

B. *Congressional Response: Creation of the Declaratory Judgment*

The "irreparable injury" requirement needed to grant an injunction through *Ex parte Young* and *Fenner* was too difficult for many plaintiffs to show, and Congress responded by enacting the Declaratory Judgment Act in 1934.[119] Under the Act, plaintiffs requesting a declaratory judgment must still show a "case of actual controversy," but they do not need to show any threat of immediate or injurious enforcement of a law as is required for an injunction.[120] Although the Supreme Court initially hesitated to accept a declaratory judgment action as a sufficient "case" or "controversy" under

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114 *Id.* at 1010.

115 *Id.* at 1008; *see also* Ga. R.R. & Banking Co. v. Redwine, 342 U.S. 299, 304 (1952). In contrast, *Ex parte Young* was "not cited for the proposition that affirmative injunctive relief was available against state governments provided only that the relief was prospective." Harrison, *supra* note 110, at 1009.

116 271 U.S. 240, 243-44 (1926).

117 *Id.* at 242-43.

118 *Id.* at 243-44.

119 28 U.S.C. §§ 2201-2202 (2006); *see* Steffel v. Thompson, 415 U.S. 452, 465-67 (1974) (identifying *Ex parte Young* and *Fenner* as the impetuses to the creation of declaratory judgment); Edwin Borchard, *Challenging "Penal" Statutes by Declaratory Action*, 52 YALE L.J. 445, 445-46 (1943) (explaining that declaratory judgment was created to bypass technical, legal standards that only clouded judgments and to allow parties to reach an adjudication of the legal issues).

120 "In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). *See Steffel*, 415 U.S. at 462-63; Md. Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 272 (1941).

Article III, the Supreme Court now holds that "the phrase 'case of actual controversy' in the [Declaratory Judgment] Act refers to the type of 'Cases' and 'Controversies' that are justiciable under Article III."[121]

In *Maryland Casualty Co. v. Pacific Coal & Oil Co.*,[122] the Supreme Court held that both Article III and the Declaratory Judgment Act required a declaratory judgment to address an "actual controversy."[123] The insurance company in *Maryland Casualty* wanted the courts to establish that its policy with an insured policyholder did not cover the contested automobile collision.[124] Because the Supreme Court found that the insurance company had a substantial controversy and was not simply requesting an advisory opinion, the Court granted the insurance company declaratory relief.[125] Limiting its decision, however, the Court specifically noted that a declaratory judgment did not automatically allow the plaintiff to receive an injunction.[126]

Although declaratory judgments only enable courts to "declare" the rights of parties to a suit, and therefore lack the force of injunctions, the effects of the two remedies are often identical.[127] In some situations, such as when a court considers potential remedies to interrupt state proceedings, the Supreme Court holds that a declaratory judgment and an injunction should be treated equally.[128]

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121 MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 126-27 (2007). Initial concerns that the Declaratory Judgment Act may require federal courts to hear issues outside of the Article III requirements were allayed in 1937 when the Supreme Court ruled that the "Declaratory Judgment Act of 1934, in its limitation to 'cases of actual controversy,' manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense." Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239-40 (1937).

122 312 U.S. 270.

123 *Id.* at 272. *Maryland Casualty* established the often-cited standard that a declaratory judgment within the requirements of Article III must "under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 273. With pre-enforcement challenges to a statute, this standard is determined by the Supreme Court's "credible threat" analysis. *See Steffel*, 415 U.S. at 458-60.

124 *Md. Cas.*, 312 U.S. at 271-72.

125 *Id*. at 272-74. *Compare id*., *with* Golden v. Zwickler, 394 U.S. 103, 108-10 (1969) (holding that a former politician's petition regarding the constitutionality of a prohibition against the distribution of anonymous campaign literature did not create an immediate or sufficient controversy because the politician was no longer running for office).

126 *Md. Cas.*, 312 U.S. at 274.

127 *See* 28 U.S.C. §§ 2201-2202 (2006); Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) ("[A] district court can generally protect th[e] interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary."); *see also* FALLON ET AL., *supra* note 87, at 1240-41 (comparing the effects of declaratory judgments and injunctions).

128 *See* Samuels v. Mackell, 401 U.S. 66, 73 (1971) (holding that the denial of an injunction for a state criminal prosecution already in progress also generally requires the denial of declaratory judgment).

The Supreme Court, however, kept the requirements for a declaratory judgment and an injunction separate in *Steffel v. Thompson*,[129] a case involving a pre-enforcement challenge to a law that prohibited the plaintiff from distributing handbills.[130] Because Congress created the Declaratory Judgment Act as a form of relief that allows plaintiffs to avoid the high burden of "irreparable injury" required for an injunction, the Court ruled that declaratory relief should be available to the plaintiff without a showing of "irreparable injury."[131]

Overall, plaintiffs now have a choice of remedies between injunctions, which require plaintiffs to show "irreparable injury" and can be enforced against defendants, and declaratory judgments, which are easier to receive but only "declare" a resolution of the case.[132] Despite their differences, modern American jurisprudence regards declaratory judgments as having virtually the same effect as injunctions.[133]

C. *Reinterpretation of* Ex Parte Young *into a Limited Cause of Action Against State Officers*

Instead of using *Ex parte Young* for pre-enforcement challenges to enjoin the enforcement of state laws, scholars and courts in the late 1950s began to treat *Ex parte Young* as a judicially-implied cause of action that allowed plaintiffs to sue their states through the federal courts.[134] *Ex parte*

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129 415 U.S. 452 (1974).

130 *Id.* at 455-56, 463.

131 *Id.* at 471 ("[E]ngrafting upon the Declaratory Judgment Act a requirement that all of the traditional equitable prerequisites to the issuance of an injunction be satisfied before the issuance of a declaratory judgment is considered would defy Congress' intent to make declaratory relief available in cases where an injunction would be inappropriate.").

132 *Id.* at 458-73.

133 *See* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 3 (1985) ("It is somewhat misleading to describe declaratory remedies as noncoercive. It is more accurate to say that the coercive threat is implicit rather than explicit."). When Edward Borchard designed and advocated for the creation of the declaratory judgment, he argued that the declaratory judgment would resolve issues by operating as res judicata:

> Declaratory judgments operate as *res judicata* and bind the parties and their privies within the same limitations as attach to other final judgments . . . . They cannot, of course, be executed, a feature which constitutes their principal difference from executory judgments. In the case of those judgments which declare a duty, a new action must be founded on them to convert them into judgments on which execution can issue. But this point is more academic than practical, for it rarely proves necessary to resort to this measure . . . . Should the defendant, nevertheless, subsequently bring an action, he would be met by the plea of *res judicata*.

Edwin M. Borchard, *The Declaratory Judgment—A Needed Procedural Reform*, 28 YALE L.J. 105, 149 (1918) (footnote omitted).

134 *See* Seminole Tribe v. Florida, 517 U.S. 44, 73-76 (1996) (treating *Ex parte Young* as a potential federal cause of action). The first analysis of the reinterpreted *Ex parte Young* "fictions" likely "came into circulation mainly due to Kenneth Culp Davis, with some help from Charles Alan Wright" in 1958 and then in 1963 when they argued that "everyone knew that the Court was engaging in fiction

Young was no longer about using the "anti-suit injunction" as a remedy in equity, but instead became an "exception" to state officers' Eleventh Amendment sovereign immunity.[135]

The Rehnquist Court, known for its renewed emphasis on federalism, attempted to limit this modern interpretation of *Ex parte Young*.[136] In 1974, the plaintiffs in *Edelman v. Jordan*[137] requested an injunction and a declaratory judgment by asserting *Ex parte Young* against state officials who had improperly administered a public assistance program for the disabled.[138] Justice Rehnquist, writing for a 5-4 majority, held that *Ex parte Young* was not applicable because a constitutional challenge to a state's statute through the Fourteenth Amendment trumped the state's Eleventh Amendment sovereign immunity only when plaintiffs sought prospective injunctive relief.[139] Because the plaintiffs in *Edelman* had not sued for prospective injunctive relief, but only for the retroactive disbursement of funds from the public assistance program, the Court held that the Eleventh Amendment's sovereign immunity protected the state officials from the plaintiffs' suit.[140]

As plaintiffs continued to use *Ex parte Young* as a cause of action, the Court needed to form new legal theories to understand the text of *Ex parte Young* in light of its modern interpretation.[141] Plaintiffs in federal court no longer limited their requests for relief to pre-enforcement injunctive relief, but began to assert a broader range of claims against state officials.[142] Concerns about the seemingly limitless power that *Ex parte Young* gave to the federal courts were the very concerns that Justice Harlan had raised in his dissenting opinion in *Ex parte Young*.[143] Trying to limit this broad expansion of the federal courts, Chief Justice Rehnquist focused on the tension between the Eleventh and Fourteenth Amendments to create a constitutional "paradox" between the two amendments that allowed the Supreme Court to limit the power of federal courts on a case-by-case basis through

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when it regarded the suit as one against an individual named Young rather than against the state of Minnesota." Harrison, *supra* note 110, at 1011 n.94 (quoting CHARLES ALAN WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 48, at 159 (1963)).

135 Harrison, *supra* note 110, at 1009.

136 *See* Daniel J. Meltzer, *The* Seminole *Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 61-65; *see also* Jackson, *supra* note 89, at 530-46.

137 415 U.S. 651 (1974).

138 *Id.* at 653.

139 *Id.* at 664-65.

140 *Id.*

141 *See, e.g.*, Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 102-06 (1984) (discussing *Ex parte Young* as an "exception" to the Eleventh Amendment and the exception's "fiction" that requires the state official to be in both an official and personal legal position simultaneously).

142 *See, e.g.*, *Edelman*, 415 U.S. at 653, 658-59 (denying relief to plaintiffs who wanted lost benefits from a public assistance program).

143 *See Ex parte* Young, 209 U.S. 123, 174-76 (1908) (Harlan, J., dissenting).

vaguely defined balancing tests.[144] Although the balancing of the Eleventh and Fourteenth Amendments did restrict the grant of power to the federal courts and allowed states to remain protected behind sovereign immunity, the Rehnquist Court's revival of federalism was limited by its failure to overturn *Ex parte Young* completely.[145]

D. *Modern Confusion:* Ex Parte Young *Out of Context*

Since *Ex parte Young* became a cause of action that addressed the newly-created conflict between the Eleventh and Fourteenth Amendments, and not merely cases involving pre-enforcement "anti-suit injunctions," courts have struggled to make sense of the original doctrine that limited plaintiffs to suing state officers who "threaten and are about to commence proceedings."[146] Without any context for this requirement, courts today recite the phrase without understanding its purpose.[147] Some courts directly quote the language from *Ex parte Young* and allow an exception to the Eleventh Amendment's sovereign immunity only when state officials "threaten and are about to commence proceedings."[148] Other courts, however, combine their analysis of the "credible threat" standing requirement and the "threaten and are about to commence proceedings" requirement of *Ex parte Young*.[149]

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144 *See* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 278-80 (1997) (Kennedy, J., principal opinion, and joined by Rehnquist, C.J.) (arguing that *Ex parte Young* creates a case-by-case line drawing exercise on choosing between the *Ex parte Young* exception and the Eleventh Amendment to accommodate federalism concerns and state interests); Seminole Tribe v. Florida, 517 U.S. 44, 73-76 (1996) (Rehnquist, C.J., majority opinion) (refusing to apply the *Ex parte Young* exception because a federal statute already addressed the issue, and thereby upholding a state's Eleventh Amendment sovereign immunity); *Edelman*, 415 U.S. at 660-68 (analyzing *Ex parte Young* as a conflict between the Eleventh and Fourteenth Amendments for the first time); *see also* James Leonard, Ubi Remedium Ibi Jus*, or, Where There's a Remedy, There's a Right: A Skeptic's Critique of* Ex Parte Young, 54 SYRACUSE L. REV. 215, 269 (2004) (explaining that the Kennedy-Rehnquist section of *Seminole* would have allowed *Ex parte Young* cases to be heard in federal court only when state courts were inadequate).

145 *See* Kathleen M. Sullivan, *From States' Rights Blues to Blue States' Rights: Federalism After the Rehnquist Court*, 75 FORDHAM L. REV. 799, 807 (2006).

146 *See Young*, 209 U.S. at 156; Abhay Watwe, Note, Ex Parte Young *Remedy for State Infringement of Intellectual Property*, 12 LEWIS & CLARK L. REV. 793, 812-817 (2008) (summarizing the various *Ex parte Young* doctrines throughout the federal courts).

147 *See, e.g.*, Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Nixon, 428 F.3d 1139, 1145 (8th Cir. 2005); Nat'l Audubon Soc'y, Inc. v. Davis, 307 F.3d 835, 846-48 (9th Cir. 2002).

148 *See* Children's Healthcare Is a Legal Duty, Inc. v. Deters, 92 F.3d 1412, 1414 (6th Cir. 1996) (quoting *Young*, 209 U.S. at 155-56); *see also* Summit Med. Assocs. v. Pryor, 180 F.3d 1326, 1338 (11th Cir. 1999) (citing *Ex parte Young* to require that enforcement is "threatened," but rejecting any Article III requirement that the enforcement must also be "imminent").

149 *See* 1st Westco Corp. v. Sch. Dist. of Phila., 6 F.3d 108, 112-16 (3d Cir. 1993) (interspersing Article III analysis with *Ex parte Young* analysis); *see also* Long v. Van de Kamp, 961 F.2d 151, 152

The Supreme Court recently hinted at a logical resolution of these developments in *Morales v. Trans World Airlines, Inc.*,[150] in which the plaintiffs invoked *Ex parte Young* to prevent the state Attorney General from enforcing anti-deception advertisement laws in the airline industry.[151] The Court granted both a declaratory judgment and an injunction to the plaintiffs.[152] The Court granted the injunction after finding that the plaintiffs would otherwise suffer "irreparable injury," which was determined by the "imminent" harm posed by state officers who "threaten and are about to commence proceedings."[153] However, the Court only enjoined the defendant from enforcing portions of the law that he had actually threatened to enforce.[154] The Court also granted declaratory relief in the last paragraph of the decision, but provided no explanation for this ruling.[155] Unlike the injunctive relief, however, the Court did not place any limits on the extent of the declaratory relief.[156]

Morales offered little explicit guidance on how to apply the threat requirement of *Ex parte Young*, but it suggests that injunctions through *Ex parte Young* require an actual threat, while declaratory judgments do not.[157] The Declaratory Judgment Act requires only an "actual controversy,"[158] and perhaps this explains why *Morales* did not require a heightened burden from the plaintiff in order to receive a declaratory judgment.[159] For injunctions, however, plaintiffs are still seemingly required to show an "irreparable injury" from a state prosecutor's threatened enforcement.[160]

In common practice, however, modern courts often determine "irreparable injury" based on a functional analysis of the case, and not on a technical checklist of requirements that must include a harmful threat of enforce-

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(9th Cir. 1992) (per curiam) (holding that the absence of a threat of enforcement indicated a lack of standing under both Article III and the *Ex parte Young* exception).

150 504 U.S. 374 (1992).

151 *Id.* at 380-81.

152 *Id.* at 391.

153 *Id.* at 381 (quoting *Young*, 209 U.S. at 155-56).

154 *Id.* at 382-83.

155 *See id.* at 391.

156 *See Morales*, 504 U.S. at 391.

157 *See id.* at 382-83, 391.

158 28 U.S.C. §§ 2201-2202 (2006) (allowing federal courts to address the merits of a case in "a case of actual controversy").

159 *Morales*, 504 U.S. at 382-83, 391; s*ee also* Nat'l Audubon Soc'y, Inc. v. Davis, 307 F.3d 835, 847 (9th Cir. 2002) (explicitly limiting any "imminence" analysis for a declaratory judgment to the general requirements of Article III).

160 *See Morales*, 504 U.S. at 380-83; Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Nixon, 428 F.3d 1139, 1145 (8th Cir. 2005) (holding that the *Ex parte Young* exception did not allow the plaintiff to receive an injunction because the plaintiff did not show that the Attorney General had actually threatened to enforce the law).

ment.[161] Therefore, despite the limited injunction in *Morales*, courts are usually deferential in defining "irreparable injury," and grant injunctions routinely.[162]

III. "CREDIBLE THREAT" STANDING IN *DISTRICT OF COLUMBIA V. HELLER*[163]

The D.C. Circuit had already addressed standing issues in previous Second Amendment cases when it decided *Parker*.[164] Part III.A examines these precedents, and Part III.B analyzes Judge Silberman's use of this case law in *Parker*.

A. *"Credible Threat" Precedents in the D.C. Circuit*

In 1997, the D.C. Circuit in *Navegar, Inc. v. United States*[165] determined whether plaintiffs had Article III standing by examining whether the challenged law specifically targeted the plaintiffs.[166] Congress passed a law that made it illegal to "manufacture, transfer, or possess" various types of firearms.[167] As soon as the law went into effect, inspection agents visited the plaintiffs, who were two gun manufacturers, informed them of the new restrictions, and conducted inventories of their production facilities.[168] The plaintiffs stopped their production and shipment of the outlawed firearms, but sought a declaratory judgment by arguing that the law was unconstitutional.[169]

The D.C. Circuit found that the plaintiffs had standing because the law singled out and targeted products made only by the plaintiffs.[170] In these circumstances, the court ruled that "the imminent threat of such prosecutions can be deemed speculative only if it is likely that the government may

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161 The "irreparable injury" requirement has evolved into a highly flexible standard, and is often viewed today as a mere technicality before a court awards an injunction. *See* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 5 (1991) ("[T]he irreparable injury rule is dead. It does not describe what the cases do, and it cannot account for the results. Equally abandoned are such corollary expressions as 'injunctions are an extraordinary remedy.'" (footnotes omitted)).

162 *Id.* ("Injunctions are routine, and damages are never adequate unless the court wants them to be.").

163 128 S. Ct. 2783 (2008).

164 Parker v. District of Columbia (*Parker Appeal*), 478 F.3d 370, 374-78 (D.C. Cir. 2007), *aff'd sub nom.* District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

165 103 F.3d 994 (D.C. Cir. 1997).

166 *Id.* at 997, 1000.

167 *Id.* at 996-97 (quoting 18 U.S.C. § 922(v)(1) (1994)).

168 *Id.* at 997.

169 *Id.* at 996-97.

170 *Id.* at 999-1000.

simply decline to enforce these provisions at all."[171] Because government officials had visited the plaintiffs, informed them of the law, and took inventory of their products, the court held that it would be "chimerical" to pretend that the government was unlikely to enforce the law.[172] However, the statute also contained a general ban that identified firearms based on non-specific characteristics, and the court ruled that the "general nature of the language in these portions of the Act makes it impossible to foretell precisely how these provisions may be applied."[173] The court therefore held that the plaintiffs lacked standing to challenge the general ban.[174]

Eight years later, gun owners, instead of gun manufacturers as in *Navegar*, challenged the constitutionality of a firearm ban under the Second Amendment in *Seegars v. Gonzales*.[175] In the same statutes challenged by *Heller*, the District of Columbia's criminal code prohibited the possession of unregistered firearms, and also prohibited the registration and transportation of the specified firearms.[176] Even if an individual possessed a firearm that had been registered before the inception of the 1976 firearm registration ban, the D.C. Code required that the gun be kept disassembled or locked.[177] The plaintiffs in *Seegars* argued that they lived in high-crime neighborhoods inside the District of Columbia and therefore wanted to protect themselves by bringing their firearms into the District and removing the guns' trigger locks.[178] None of the plaintiffs had violated the statute, been arrested, or been prosecuted, and they therefore sought a declaratory judgment through a pre-enforcement challenge.[179]

Avoiding the merits of the case, the majority opinion by Judge Williams held that the plaintiffs lacked standing because they failed to demonstrate a "threat of prosecution sufficiently imminent under circuit law."[180] After citing prominent Supreme Court precedents to establish the basics of Article III standing, Judge Williams instead relied upon the court's analysis in *Navegar*, which found standing only when the challenged statute specifically targeted the plaintiffs.[181] Extending this test in *Seegars*, the court held

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171 *Navegar*, 103 F.3d at 1000.

172 *Id.* at 1000-01.

173 *Id.* at 1001.

174 *Id.* at 1001-02.

175 396 F.3d 1248, 1250-51 (D.C. Cir. 2005).

176 *Id.* at 1250; *see* D.C. CODE §§ 7-2502.02(a)(4), 7-2507.02, 22-4504(a) (2001).

177 *Seegars*, 396 F.3d at 1250; *see also* D.C. CODE § 7-2507.02.

178 *Seegars*, 396 F.3d at 1250-51.

179 *Id.* at 1251.

180 *Id.* at 1256.

181 *Id.* at 1253-56. Among other cases, the D.C. Circuit mentioned the Supreme Court's case law in *Babbitt v. United Farm Workers National Union*, 442 U.S. 289 (1979), *Younger v. Harris*, 401 U.S. 37 (1971), and *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988), and also the First Circuit's case law in *N.H. Right to Life Political Action Committee v. Gardner*, 99 F.3d 8 (1st Cir. 1996). *Seegars*, 396 F.3d at 1251-54. Despite recognizing a "tension" between *Navegar* and other pre-enforcement

that the plaintiffs would have to show that they had been "personally threatened with prosecution" to have standing.[182] Even a "well-founded fear of prosecution" was insufficient to meet the threshold requirements of the *Navegar* test, and because the government had not personally threatened any of the plaintiffs, the court ruled that they all lacked standing and dismissed the case.[183]

Judge Sentelle dissented with a succinct, but thorough, opinion.[184] Judge Sentelle argued that the majority had inappropriately used the standing analysis in *Navegar* to ignore the very Supreme Court precedents the majority had just cited.[185] Instead of *Navegar*, Judge Sentelle would have held that the plaintiffs faced a "realistic fear of prosecution" that was sufficient to satisfy the standard in *Babbitt*,[186] and that under the even looser standard of *American Booksellers*, the plaintiffs had already demonstrated a "self-censorship" in their actions sufficient to establish standing.[187] Although *American Booksellers* addressed a First Amendment issue and the plaintiffs in *Seegars* presented a Second Amendment issue, Judge Sentelle argued that he was aware of "no hierarchy of Bill of Rights protections that dictates different standing analysis."[188] Applying *American Booksellers* instead of *Navegar*, Judge Sentelle would have found standing for the plaintiffs.[189]

The D.C. Circuit refused plaintiffs' petition for an en banc hearing.[190] Chief Judge Ginsburg concurred in the denial for rehearing en banc and tried to vindicate the panel decision,[191] while Judge Sentelle dissented from

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cases, the D.C. Circuit decided to apply its decision in *Navegar*. *Id.* at 1254. The court attempted to justify this decision by noting that *Seegars* was "the only [D.C. Circuit] case dealing with a non-First Amendment preenforcement challenge to a criminal statute that has not reached the court through agency proceedings." *Id.* Even if this statement is accurate, such a statement does not explain the D.C. Circuit's willingness to ignore the Supreme Court's case law on general pre-enforcement standing.

182 *Seegars*, 396 F.3d at 1253-56. The D.C. Circuit explicitly clarified that its standing analysis was based on general pre-enforcement standing principles, and that it was not trying to create a special standing doctrine for Second Amendment issues. *Id.* at 1254 ("Despite these apparent tensions [between pre-enforcement case law on the First Amendment and *Navegar*], we faithfully apply the analysis articulated by *Navegar*. We do so *not* because it represents our 'law of firearms.'").

183 *Id.* at 1256.

184 *Id.* at 1256-58 (Sentelle, J., dissenting).

185 *Id.* at 1256 ("I would find standing based on the authority of cases cited by the majority.").

186 *Id.* at 1257.

187 *Id.* at 1256-57.

188 *Seegars*, 396 F.3d at 1257. Indeed, the reasoning of *American Booksellers* has already been applied to pre-enforcement challenges that do not address constitutional rights. *See, e.g.*, Mobil Oil Corp. v. Att'y Gen., 940 F.2d 73, 76 (4th Cir. 1991) (quoting Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 393 (1988)).

189 *Seegars*, 396 F.3d at 1257-58 (Sentelle, J., dissenting) ("I would therefore find the line of cases represented by *American Booksellers*, rather than *Navegar*, controlling.").

190 Seegars v. Gonzales, 413 F.3d 1, 1 (D.C. Cir. 2005) (per curiam) (denying a rehearing).

191 *Id.* at 1-2 (Ginsburg, C.J., concurring).

the refusal for rehearing based on his dissent from the panel decision.[192] Interestingly, Judge Williams wrote a statement to explain his decision to call for the rehearing of his panel decision and to emphasize that the decision was "constrained by recent circuit authority," as well as to express his general disapproval with these constraints.[193] If Judge Williams had hoped for the Supreme Court to address this issue, his arguments were ignored when the Court denied certiorari.[194]

B. Parker *Becomes* Heller

A year before the D.C. Circuit released the *Seegars* opinion, the United States District Court for the District of Columbia issued its opinion in a similar challenge to the D.C. firearm ban in *Parker v. District of Columbia*.[195] A total of six plaintiffs challenged the District of Columbia's firearm ban: five of them were unable to apply for a permit to possess a gun in their home, while the sixth plaintiff, Dick Heller, had been rejected when he applied for his permit.[196] Citing *Navegar*, the District of Columbia argued that the plaintiffs lacked standing because they had not been specifically threatened with prosecution and because the probability of needing a firearm for self-defense and then getting caught by law enforcement was

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192 *Id.* at 2 (Sentelle, J., dissenting).

193 *Id.* at 2-3 (Williams, J., statement) ("I do not think our law of standing requires that citizens who want to obey the law, but also to follow their judgment as to self-preservation, be told that they cannot get a reading on the validity of the law except by pursuing concededly useless administrative avenues or by engaging in forbidden behavior that is sure to be exposed if the risk they fear arises.").

194 Seegars v. Gonzales, 546 U.S. 1157, 1157 (2006) (mem.).

195 Parker v. District of Columbia (*Parker District*), 311 F. Supp. 2d 103 (D.D.C. 2004), *rev'd*, 478 F.3d 370 (D.C. Cir. 2007), *aff'd sub nom.* District of Columbia v. Heller, 128 S. Ct. 2783 (2008). While both *Seegars* and *Parker* challenged the D.C. gun ban on Second Amendment grounds, the plaintiffs in *Seegars* sued then Attorney General of the United States, John Ashcroft, while the plaintiffs in *Parker* sued the District of Columbia. Neily, *supra* note 4, at 137. Even though a decision against only the District of Columbia might not be binding against the Department of Justice, counsel for the plaintiffs in *Parker* wanted to avoid a suit against the Attorney General. The plaintiffs' counsel chose this strategy because the Department of Justice, which could defend itself with "greater resources and generally more sophisticated legal acumen" than the District of Columbia, would have been involved. *Id.* The Department of Justice provided a stronger defense of the D.C. gun ban than did the District of Columbia: the lawyers for District of Columbia in *Parker* were not prepared to argue standing, and the standing issue was only raised by the Department of Justice. *Id.* at 137-39.

196 *Parker District*, 311 F. Supp. 2d at 103. Dick Heller was a security guard within the District of Columbia, and because he was a "special police officer," Heller was allowed to carry a pistol while working but could not take it home at night. Neily, *supra* note 4, at 136. Although Heller was allowed to carry a firearm for work, the District of Columbia rejected his attempt to register his revolver in July 2002 because of the D.C. gun ban. *Id.*; *see* D.C. CODE §§ 7-2502.02(a)(4), 7-2507.02, 22-4504(a) (2001).

merely speculative.[197] The plaintiffs responded that the defendants' reliance on *Navegar* was misplaced because the court in *Navegar* had indeed found standing for most of the claims.[198] Additionally, not only were the plaintiffs likely to use firearms in self-defense because they lived in high-crime neighborhoods, but the plaintiffs pointed out that standing analysis is not based on the "likelihood of getting caught," but on whether the challenged statute is actively enforced and not obsolete.[199] The District Court, however, ignored the standing issues in its decision by deciding that the defendants prevailed on the merits.[200]

By the time *Parker* reached the D.C. Circuit on appeal, the D.C. Circuit had already dismissed the plaintiffs in *Seegars* for a lack of standing.[201] Writing the majority opinion in *Parker*, Senior Judge Silberman acknowledged that *Navegar* "was in tension with" the Supreme Court's analysis of Article III standing, but nonetheless decided to apply *Navegar* and *Seegars* and examine whether any of the plaintiffs had been "singled out or uniquely targeted by the D.C. government for prosecution."[202] Additionally, Judge Silberman added his support to Judge Sentelle's dissent in *Seegars* and argued that "the injury-in-fact requirement should be applied uniformly over the First and Second Amendments (and presumably all other constitutionally-protected rights)."[203]

Just as with the plaintiffs in *Seegars*, the court found that five of the plaintiffs in *Parker* did not have standing. [204] However, the sixth plaintiff, Dick Heller, presented a different set of facts. The counsel for the plaintiffs had "hammered home" the point that, unlike any of the other plaintiffs in *Seegars*, Heller had applied for a registration certificate to own a handgun, but his application had been denied.[205] Judge Silberman wrote that the denial of a license or a permit allowed the court to consider the standing issue outside of the framework of *Navegar* and *Seegars* because the court had "consistently treated a license or permit denial pursuant to a state or federal

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197 Defendants' Supplemental Motion to Dismiss on the Grounds that Plaintiffs Lack Standing at 2-4, *Parker District*, 311 F. Supp. 2d 103 (No. CIV.A.03-0213 EGS), 2003 WL 25743954.

198 Memorandum of Points and Authorities in Reply to Defendants' Standing Arguments at 3, *Parker District*, 311 F. Supp. 2d 103 (No. CIV.A.03-0213 EGS), 2003 WL 24057556.

199 *See id.* at 2-3. Emphasizing their standing argument, the plaintiffs asked by analogy, "If defendants enforced a ban on reading books at home, would plaintiffs lack standing to challenge such a law on First Amendment grounds because the likelihood of [the police] catching them is low?" *Id.* at 2.

200 *Parker District*, 311 F. Supp. 2d at 109-10.

201 The D.C. Circuit put *Parker* on hold for two years at the behest of the District of Columbia, and the D.C. Circuit didn't take up the case again until after it resolved *Seegars* and the Supreme Court denied certiorari. Neily, *supra* note 4, at 139.

202 Parker v. District of Columbia (*Parker Appeal*), 478 F.3d 370, 374-75 (D.C. Cir. 2007), *aff'd sub nom*. District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

203 *Id.* at 375 n.1.

204 *Id.* at 375, 378.

205 *Id.* at 375-76; *see* Neily, *supra* note 4, at 140.

administrative scheme as an Article III injury."[206] Under this "administrative scheme" analysis, the court examined the standing issue "independent of the District's prospective enforcement of its gun laws."[207] Instead of looking for a "credible threat," the court determined that "the formal process of application and denial, however routine, makes the injury to Heller's alleged constitutional interest concrete and particular."[208] Because the District of Columbia had denied Dick Heller's firearm registration, Heller had standing.[209] The court then addressed the merits of the case, and ruled in favor of the only remaining plaintiff.[210]

The Supreme Court granted certiorari,[211] and on June 26, 2008, the Court affirmed the D.C. Circuit's decision.[212] The Court, however, did not address the standing issue, but only addressed the merits of the case.[213] The Supreme Court held that the "District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense."[214] Despite the enormous attention *Heller* has received, the scope of its decision is rather narrow.[215] The Court invalidated the firearm

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206 *Parker Appeal*, 478 F.3d at 376.

207 *Id.*

208 *Id.*

209 *Id.* at 376, 378.

210 *Id.* at 378-401.

211 The Court granted certiorari for Dick Heller, *District of Columbia v. Heller*, 128 S. Ct. 645, 645 (2007) (mem.), but denied certiorari on the cross-petition from Shelly Parker and the other plaintiffs who lacked standing, *Parker v. District of Columbia*, 128 S. Ct. 2994, 2994 (2008) (mem.).

212 District of Columbia v. Heller, 128 S. Ct. 2783, 2822 (2008).

213 *See id.* at 2788, 2821-22. By concluding that the Second Amendment protects an individual right instead of a collective right, the Court implicitly rejected any standing analysis resulting in the conclusion that plaintiffs lacked standing because the Second Amendment only protected a collective right. The Ninth Circuit previously held that "the Second Amendment does not provide an individual right to own or possess guns or other firearms," and used this conclusion to assert that the plaintiffs therefore lacked standing. Silveira v. Lockyer, 312 F.3d 1052, 1066-67 & n.18 (9th Cir. 2002). The D.C. Circuit responded to this analysis in *Parker*:

> We note that the Ninth Circuit has recently dealt with a Second Amendment claim by first extensively analyzing that provision, determining that it does not provide an individual right, and then, and only then, concluding that the plaintiff lacked standing to challenge a California statute restricting the possession, use, and transfer of assault weapons. We think such an approach is doctrinally quite unsound. The Supreme Court has made clear that when considering whether a plaintiff has Article III standing, a federal court must assume *arguendo* the merits of his or her legal claim.

Parker Appeal, 478 F.3d at 376-77 (citation omitted). After *Heller*, the Ninth Circuit changed its standing analysis of the Second Amendment to reflect the protection of an individual right. Nordyke v. King, 563 F.3d 439, 445 (9th Cir. 2009) ("To reach this argument on the merits, we must first decide whether *Heller* abrogated [the Ninth Circuit's previous standing doctrine]. It did. [The previous standing doctrine] rested on our conclusion that the Second Amendment protects only a collective right; *Heller* squarely overruled such conclusion.").

214 *Heller*, 128 S. Ct. at 2821-22.

215 *See* Comment, District of Columbia v. Heller*: The Individual Right to Bear Arms*, 122 HARV. L. REV. 139, 143-44 (2008). Despite the hype, *Heller* was representative of the minimalism

ban in the D.C. criminal code, but this ruling only affected the District of Columbia, which is ultimately controlled by the federal government.[216] *Heller* made no explicit ruling on whether the Second Amendment should be incorporated into the Fourteenth Amendment, and the Court instead expressly reserved the issue of whether the Second Amendment should limit state and local laws too.[217] Only a few days after the Supreme Court released *Heller*, public interest groups were already attempting to apply *Heller* to state and local gun bans.[218]

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of the October 2007 Term that left "most battles for another day." Posting of Orin Kerr to The Volokh Conspiracy, http://www.volokh.com/posts/1214512710.shtml (June 26, 2008, 16:38 EST) [hereinafter Kerr, *Minimalist Court*]; *see also* Kerr, *Initial Thoughts*, *supra* note 2 ("Justice Scalia's majority opinion . . . is relatively narrow . . . . It recognizes the individual right . . . , but does not resolve the degrees of scrutiny, does not address incorporation, and indicates (without establishing) that traditional gun restriction laws are valid.").

Additionally, Cass Sunstein has stated that the minimalism of *Heller* is similar to *Griswold v. Connecticut*, 381 U.S. 479 (1965). Cass R. Sunstein, *Second Amendment Minimalism:* Heller *as* Griswold, 122 HARV. L. REV. 246, 273-74 (2008) ("Both [*Heller* and *Griswold*] were made possible by a national consensus, which they simultaneously reflected. Both struck down a law that amounted to a national outlier. Despite their sweeping rhetoric, both had important minimalist features, ensuring that the content of the relevant right will be specified over time . . . . We have entered a period of Second Amendment minimalism.").

Finally, Clark Neily, co-counsel for the plaintiffs in *Heller*, wrote that the implications of *Heller* "will be fairly modest in terms of their impact on existing gun laws, but hopefully more significant from a symbolic standpoint." Neily, *supra* note 4, at 158.

216 *See* Doherty, *supra* note 14.

217 *Heller*, 128 S. Ct. at 2813 n.23. *Compare Nordyke*, 563 F.3d at 447-57 (holding that the Due Process Clause applied the Second Amendment to state and local governments), *with* Maloney v. Cuomo, 554 F.3d 56, 58-59 (2d Cir. 2009) (per curiam) (stating that it is "settled law" that the Second Amendment "applies only to . . . the federal government"). The incorporation issue has yet to be further analyzed by the Supreme Court. *Compare* Nelson Lund, *Anticipating Second Amendment Incorporation: The Role of the Inferior Courts*, 59 SYRACUSE L. REV. 185, 187 (2008) (concluding that, after *Heller*, federal courts should use the Supreme Court's modern incorporation doctrine to "conclude that the right to keep and bear arms is protected against infringement by the state governments"), *with* Lawrence Rosenthal, *Second Amendment Plumbing After* Heller*: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1, 6 (2009) (concluding that *Heller* suggests a standard of review that allows courts to apply the Second Amendment only to the federal government, and not to the states, because the "demands of ordered liberty argue for leaving gun control policy at the state and local level").

218 Soon after the release of *Heller*, the NRA sued several Chicago suburbs, some of which have already decided to bring their handgun bans in line with *Heller*. *See* Complaint for Declaratory Judgment and Injunctive Relief at 5-6, NRA v. City of Evanston, No. 08 C 3693, 2009 WL 1139130 (N.D. Ill. Apr. 27, 2009), 2008 WL 2840834; Posting of David Kopel to The Volokh Conspiracy, http://www.volokh.com/posts/1214788657.shtml (June 29, 2008, 21:17 EST) [hereinafter Kopel, *Dominos Fall*].

IV. ANALYZING "CREDIBLE THREAT" STANDING IN SECOND AMENDMENT LITIGATION

Upcoming Second Amendment litigation is likely to raise the same "credible threat" standing issues as *Parker*, and federal courts will have to decide which standing precedents to apply. Part IV.A below argues that courts should reject the standing doctrine that the D.C. Circuit developed. While Part IV.B suggests that the Supreme Court's generic "credible threat" standing doctrine provides an acceptable framework of analysis, Part IV.C ultimately concludes that courts should preferably apply *American Booksellers*. Part IV.D examines the policy arguments in favor of granting standing to plaintiffs in pre-enforcement challenges.

A. *The Standing Analysis in the D.C. Circuit Should Be Shot Down*

While *Parker* and *Heller* will undoubtedly be heavily cited for their analysis of the Second Amendment, other courts should not adopt the "credible threat" analysis in those cases as persuasive authority.[219] The D.C. Circuit's "credible threat" analysis should not be used to resolve Second Amendment litigation because the D.C. Circuit relied exclusively on *Navegar* and ignored the Supreme Court's "credible threat" precedents.[220] Although *Navegar* may seem particularly persuasive because, like *Parker* and *Seegars*, it involved a challenge to firearm regulations, the D.C. Circuit insisted that *Navegar* was representative of its generic "credible threat" doctrine.[221] The D.C. Circuit distinguished other "credible threat" cases by arguing that those precedents were limited to administrative functions and First Amendment issues.[222]

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219 Ideally, the D.C. Circuit should also reject its "credible threat" analysis in *Seegars v. Gonzales*, 396 F.3d 1248 (D.C. Cir. 2005), but the court has indicated that it will only do so through an en banc decision. *Parker Appeal*, 478 F.3d at 375 ("[U]nless and until this court en banc overrules [*Navegar, Inc. v. United States*, 103 F.3d 994 (D.C. Cir. 1997) and *Seegars*], we must be faithful to *Seegars* just as the majority in *Seegars* was faithful to *Navegar*.").

220 *Seegars*, 396 F.3d at 1253-54 ("We cannot help noting that *Navegar*'s analysis is in *sharp tension* with standard rules governing preenforcement challenges to agency regulations . . . . There is also *tension* between *Navegar* and our cases upholding preenforcement review of First Amendment challenges to criminal statutes. . . . Despite *these apparent tensions*, we faithfully apply the analysis articulated by *Navegar*." (emphasis added)).

221 *Id.* at 1254 (insisting that the court was not creating a "law of firearms").

222 *Id.* ("We [apply *Navegar*] because it represents the only circuit case dealing with a non-First Amendment preenforcement challenge to a criminal statute that has not reached the court through agency proceedings."). The D.C. Circuit, for example, distinguished *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988), by arguing that the case only created standing for parties attempting to protect the First Amendment rights of others, but did not create standing for parties attempting to protect their own First Amendment rights. *Id.* While the Court in *American Booksellers* could not explicitly

Ignoring the Supreme Court's "credible threat" doctrine in favor of *Navegar*, the D.C. Circuit required plaintiffs to meet a higher burden than the Supreme Court's "credible threat" doctrine requires.[223] *Navegar* and *Seegars* require courts to examine individual plaintiffs' fact patterns to determine whether a statute or law enforcement specifically targeted or singled out the plaintiffs.[224] The Supreme Court's general "credible threat" doctrine, however, does not require plaintiffs to meet such a narrow definition of "credible threat."[225] The D.C. Circuit's additional burden on the plaintiffs determined the outcome of *Seegars*, and motivated Judge Sentelle, who would have found "the line of cases represented by *American Booksellers*, rather than *Navegar*, controlling," to dissent and argue that the plaintiffs should have had standing.[226]

With the exception of Dick Heller, the D.C. Circuit applied the reasoning and result of *Seegars* to determine the standing of the plaintiffs in *Parker*.[227] The plaintiffs attempted to distinguish themselves from the plaintiffs in *Seegars* by "pointing to 'actual' and 'specific' threats" made by the District of Columbia during litigation of *Parker* in the district court, but the D.C. Circuit nonetheless decided that the plaintiffs in *Seegars* and *Parker* were indistinguishable.[228] This decision was not based on a broad constitu-

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address the plaintiffs' standing based on their own First Amendment rights because "that claim was not passed on below," the D.C. Circuit ignored the Supreme Court's argument in *American Booksellers* that a statute that restricts First Amendment rights grants plaintiffs standing if the statute could cause the plaintiffs to "self-censor" their behavior. *See Am. Booksellers*, 484 U.S. at 393 & n.6. Additionally, even before *American Booksellers*, the Supreme Court had allowed plaintiffs to assert pre-enforcement standing for violations of their own First Amendment rights. *See* Meese v. Keene, 481 U.S. 465, 472-77 (1987).

223 *Parker Appeal*, 478 F.3d at 375 ("In both [*Babbitt*] and *American Booksellers*, the Supreme Court took a far more relaxed stance on pre-enforcement challenges than *Navegar* and *Seegars* permit.").

224 *Navegar*, 103 F.3d at 1001 (examining whether "any *special priority* [was] placed upon preventing [the plaintiffs] from engaging in specified conduct" (emphasis added)). In *Seegars*, the Court held that plaintiffs lacked standing because they were unable to show that they had been personally threatened with the enforcement of the D.C. gun ban. *Seegars*, 396 F.3d at 1255 ("[P]laintiffs allege no prior threats against them or any characteristics indicating an especially high probability of enforcement against them . . . . As is true of the other pistol plaintiffs, there is nothing in the record to indicate that [one of the plaintiffs] has been personally threatened with prosecution or that his prosecution has 'any special priority' for the government.").

225 *See supra* Part I.A.

226 *Seegars*, 396 F.3d at 1258 (Sentelle, J., dissenting).

227 *Parker Appeal*, 478 F.3d at 375 ("Applying *Navegar-Seegars* to the standing question in this case, we are obliged to look for an allegation that appellants here have been singled out or uniquely targeted by the D.C. government for prosecution. No such allegation has been made; with one exception [Dick Heller], appellants stand in a position almost identical to the *Seegars* plaintiffs.").

228 *Id.* ("None of the statements cited by appellants expresses a 'special priority' for preventing *these* appellants from violating the gun laws, or a particular interest in punishing *them* for having done so. Rather, the District appears to be expressing a sentiment ubiquitous among stable governments the world over, to wit, scofflaws will be punished.").

tional analysis of Supreme Court precedents, but was instead based on the application of precedents within the D.C. Circuit.[229] Other courts outside of the D.C. Circuit are therefore not bound by *Seegars*.[230]

Additionally, other courts should not use the standing analysis of *Seegars* as persuasive authority on Second Amendment litigation.[231] Although *Navegar*, *Seegars*, and *Parker* all addressed firearm regulations, the D.C. Circuit clearly stated that it was not creating a special "law of firearms" doctrine that might be helpful in resolving upcoming Second Amendment litigation, but instead stated that its analysis represented the circuit's general "credible threat" doctrine.[232] However, as the D.C. Circuit admitted in both *Seegars* and *Parker*, the court's "credible threat" analysis in *Navegar* and *Seegars* is "in sharp tension" with the Supreme Court's "credible threat" analysis.[233] The burdensome standing requirements the D.C. Circuit imposes on plaintiffs are not only inconsistent with the Supreme Court's "credible threat" doctrine, but they also diverge from the Court's recent trend to be less stringent about standing requirements.[234]

B. *The Supreme Court's Generic "Credible Threat" Analysis is an Acceptable, but Not Ideal, Doctrine*

Courts would err by adopting the D.C. Circuit's "credible threat" analysis in *Navegar* and *Seegars*, and they should therefore follow the Supreme Court's precedents that require plaintiffs to show that enforcement of

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229 *See id.* at 374-78. These selected precedents were also contrary to the subtext of other cases in the D.C. Circuit on standing. *See, e.g.*, Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus, 317 F.3d 334, 336-39 (D.C. Cir. 2003) (holding that seeing an elephant in the circus provided the plaintiff with an "aesthetic injury" to have standing to challenge the circus's animal treatment policies); Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 429-38 (D.C. Cir. 1998) (holding that the plaintiff had an "aesthetic injury" sufficient for standing when he saw an isolated and lonely chimpanzee at the zoo).

230 *See* RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING 152-54 (5th ed. 2005) (comparing binding precedents to persuasive precedents).

231 Notably, the Sixth Circuit should rely on its own decision in *Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522, 526-27 (6th Cir. 1998), which held that an organization bringing a pre-enforcement challenge to gun regulations has standing to represent its members.

232 Seegars v. Gonzales, 396 F.3d 1248, 1254 (D.C. Cir. 2005).

233 *See id.* at 1253, 1254; *see also Parker Appeal*, 478 F.3d at 374-75.

234 *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988), which liberalized the "credible threat" standing requirements for First Amendment issues by focusing on plaintiffs' incentives to "self-censor" their behavior, is the Supreme Court's most recent case to address pre-enforcement standing. *See id.* at 392-93. More recently, the Court has been willing to interpret the standing requirements articulated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), rather loosely. *See, e.g.*, Sprint Commc'ns Co. v. APCC Servs., Inc., 128 S. Ct. 2531, 2542-44 (2008) (holding that an assignee of a legal claim has standing even though the assignee has no injury in fact); Massachusetts v. EPA, 549 U.S. 497, 517-21 (2007) (relaxing standing requirements for a public litigant to receive procedural rights standing).

the challenged statute is imminent, and not "imaginary or speculative."[235] The Supreme Court, however, eases these requirements on plaintiffs when the challenged statute is newly-enacted, but it can make the burden almost insurmountable when the challenged statute is old and obsolete.[236]

This "credible threat" standing doctrine requires a fact-specific analysis of Second Amendment pre-enforcement challenges, but some generalities can be identified.[237] Plaintiffs would fulfill their initial burden by showing that the challenged gun regulations create an imminent, specific threat to their Second Amendment rights. If the challenged gun regulations were recently modified in an attempt to comply with *Heller*, plaintiffs could easily shift their burden to the defendant under the assumption that a state's willingness to revise its gun ban also indicates a concurrent willingness to enforce it.

If the D.C. Circuit had used the Supreme Court's "credible threat" standing doctrine in *Parker*, all six plaintiffs would likely have had standing. When *Parker* reached the D.C. Circuit, the plaintiffs attempted to distinguish their case from *Seegars*,[238] and to support this distinction, they wrote:

> One can hardly imagine a more specific threat of prosecution than the threat conveyed in a front page [*Washington Times*] article quoting Defendant Mayor's spokesperson and the Deputy Mayor . . . in response to the District Court's specific query, that Plaintiffs could expect "no" immunity from prosecution, and it is a "fact that if, in fact, they break the law . . . we would enforce the law that they're breaking."[239]

It remains surprising that this statement specifically mentioned that the plaintiffs in *Parker* would be prosecuted, yet it still failed to qualify as a "credible threat" to the D.C. Circuit. Under the Supreme Court's "credible threat" doctrine, however, such a statement would likely grant standing to the plaintiffs. The District of Columbia indicated that the plaintiffs in *Parker* would indeed be prosecuted if they violated the law, and this front-page statement in the *Washington Times* was hardly an "imaginary" or "speculative" threat.[240]

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235 *See supra* notes 35-41 and accompanying text.

236 *See supra* notes 42-58 and accompanying text.

237 The smallest of details, however, can affect a party's standing. Dick Heller, for example, only had standing because of his attempt to register his gun, which occurred five years before the D.C. Circuit decided *Parker*. Neily, *supra* note 4, at 136. Counsel for the plaintiffs had not planned this attempt to register a gun as part of their litigation strategy, and Heller only attempted to register the gun based on the advice of a friend's previous experience with a pre-enforcement standing issue. Doherty, *supra* note 14.

238 Appellants' Brief at 17-21, *Parker Appeal*, 478 F.3d 370 (No. 04-7041), 2006 WL 1662401.

239 *Id.* at 21.

240 *See supra* notes 35-41 and accompanying text.

Additionally, the D.C. firearm ban was regularly enforced since it had been enacted about thirty years before *Seegars* and *Parker*,[241] a fact that even the defendants acknowledged.[242] The statute was therefore not obsolete or moribund, like the eighty-year-old statute in *Poe*,[243] but at the same time, unlike *Mobil Oil*, the statute was not newly-enacted.[244] Instead, the plaintiffs in *Parker* were more like the doctors in *Doe*, who easily received standing because they were challenging a statute that had been enforced under previous versions of the law.[245] Overall, if upcoming Second Amendment litigation resembles *Seegars* or *Parker*, plaintiffs will likely acquire standing under the Supreme Court's generic "credible threat" standing doctrine.

C. American Booksellers *Presents the Best Doctrine for "Credible Threat" Analysis of Second Amendment Litigation*

While the Supreme Court's basic "credible threat" doctrine is an acceptable analysis for upcoming Second Amendment litigation, courts should preferably adopt the analysis of Judge Sentelle in his *Seegars* dissent and apply *American Booksellers* to pre-enforcement challenges that assert constitutionally-protected rights. Judge Sentelle argued that the "self-censorship" used in *American Booksellers* should not be limited to First Amendment analysis because there is "no hierarchy of Bill of Rights protections that dictates different standing analysis."[246] In the *Parker* majority, Judge Silberman echoed Judge Sentelle's desire to apply *American Booksellers* to Second Amendment litigation, and Judge Silberman added that the majority in *Seegars* had even "tacitly agreed" with Judge Sentelle's dissent on this issue, but nonetheless felt bound to apply *Navegar*.[247] Apply-

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241 Appellants' Brief, *supra* note 238, at 19; *see* Kopel, *Dominos Fall*, *supra* note 217.

242 Appellants' Brief, *supra* note 238, at 19 ("On summary judgment, Defendants admitted that the laws are zealously enforced. And during oral argument, they candidly confirmed that Plaintiffs would be prosecuted if they violated the challenged laws.").

243 *See supra* notes 42-48 and accompanying text.

244 *See supra* notes 54-58 and accompanying text.

245 *See* Doe v. Bolton, 410 U.S. 179, 188-89 (1973); *see also supra* notes 49-53 and accompanying text.

246 Seegars v. Gonzales, 396 F.3d 1248, 1257-58 (D.C. Cir. 2005) (Sentelle, J., dissenting) ("The only difference between that harm and the harm alleged in this case is that [in *American Booksellers*] it was to First Amendment interests, here to Second. I know of no hierarchy of Bill of Rights protections that dictates different standing analysis . . . . I would therefore find the line of cases represented by *American Booksellers*, rather than *Navegar*, controlling."); *see also* Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 393 (1988) ("We are not troubled by the pre-enforcement nature of this suit. . . . [T]he alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution.").

247 Parker v. District of Columbia (*Parker Appeal*), 478 F.3d 370, 375 n.1 (D.C. Cir. 2007) ("The *Seegars* majority, although it felt constrained by *Navegar* to reach a different result, tacitly agreed with Judge Sentelle's assessment that the injury-in-fact requirement should be applied uniformly over the

ing *American Booksellers* would allow plaintiffs who assert their constitutionally-protected rights in a pre-enforcement challenge and can show objective "self-censorship" to shift their initial burden to the defendant.[248]

Heller established that the Second Amendment protects an individual, and not a collective, right to keep and bear arms.[249] This ruling now provides a constitutionally-protected right that plaintiffs can assert in their standing analysis under *American Booksellers*. Plaintiffs can invoke Judge Sentelle's argument that there is no "hierarchy" among constitutionally-protected rights for standing purposes.[250] If plaintiffs can show that the challenged statute causes them to "self-censor" their ability to use a handgun for self-defense within their homes, plaintiffs would shift the initial burden to the defendant.[251]

Applying *American Booksellers* in cases similar to *Seegars* and *Parker* should then allow plaintiffs to have standing. Plaintiffs like Dick Heller, who acquired standing when his application to register his gun was denied, would still have standing under *American Booksellers* anyway.[252] Additionally, the other five plaintiffs in *Parker* would also have standing under *American Booksellers* by showing that they wanted to possess handguns in their homes for self-defense but chose not to do so because they feared fines, arrest, and criminal prosecution.[253] Plaintiffs like those in *Seegars*, who gave up "what they believe[d] would be the additional security of possessing pistols or possessing a shotgun ready for immediate use," would also be able to show that they had "self-censored" their behavior.[254]

First and Second Amendments (and presumably all other constitutionally protected rights)."), *aff'd sub nom.* District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

248 *See supra* notes 59-70 and accompanying text. In another liberalization of standing rules for First Amendment issues, the Supreme Court created an exception to the typical prudential standing doctrine that prevents plaintiffs from asserting the claims of third parties. *See* Sec'y of State v. Joseph H. Munson Co., 467 U.S. 947, 956-57 (1984). Because the plaintiffs of *American Booksellers* based their case on a First Amendment challenge, they were also allowed to assert the rights of others to justify their standing by alleging "an infringement of the First Amendment rights of bookbuyers [who were not parties to the suit]." *Am. Booksellers*, 484 U.S. at 392-93 ("However, in the First Amendment context, '[l]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'" (quoting *Munson*, 467 U.S. at 956-57)).

249 *Heller*, 128 S. Ct. at 2799 ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment's right to free speech was not . . . .").

250 *Seegars*, 396 F.3d at 1257 (Sentelle, J., dissenting).

251 *See supra* notes 59-70 and accompanying text.

252 *See Parker Appeal*, 478 F.3d at 375-76.

253 This was the argument made by the remaining five plaintiffs in *Parker*. *See* Parker v. District of Columbia (*Parker District*), 311 F. Supp. 2d 103, 103 (D.D.C. 2004), *rev'd*, 478 F.3d 370 (D.C. Cir. 2007), *aff'd sub nom.* District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

254 *Seegars*, 396 F.3d at 1250-51.

The burden would then shift to defendants to prove that they had no intention of prosecuting the plaintiffs.[255] However, even if prosecutors disclaim in an affidavit any intention of prosecuting the plaintiffs, the plaintiffs may still have standing. If a court believes that the plaintiffs could be prosecuted for the same crime in the future, or if an objective concern of prosecution would still cause the plaintiffs to "self-censor" their behavior, the plaintiffs may still have standing despite a defendant's disavowal to prosecute.[256] In cases like *Seegars* or *Parker*, for example, the plaintiffs presumably would need to transport their firearms to the local registration office in order to license their guns.[257] If defendants were to disavow the prosecution of plaintiffs' possession of guns, but did not comment on whether they would prosecute the plaintiffs' transportation of guns to the local firearm registration office, a court could still find standing without a more complete disavowal from the defendant.[258]

D. *Policy Implications*

Courts agree that constitutional standing prohibits mere "advisory opinions,"[259] but the remaining vagueness about Article III standing suggests that "credible threat" standing analysis may ultimately result in a pru-

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255 *See supra* Part I.B.

256 *See, e.g.*, N.H. Right to Life Political Action Comm. v. Gardner, 99 F.3d 8, 16 (1st Cir. 1996) ("It is, therefore, highly probable that N-PAC will at some point find itself either in violation of a statute that takes direct aim at its customary conduct or be forced to self-censor . . . for fear of the consequences.").

257 Recall that the challenged firearm ban in *Seegars* and *Parker* (1) prohibited possession of a non-registered firearm; (2) prevented any firearm registrations; (3) prohibited the transportation of the firearm; and (4) required the firearm to be "unloaded and disassembled, or bound by a trigger lock." *Seegars*, 396 F.3d at 1250.

258 *See* Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 302 (1979) (holding that defendant's statement that plaintiffs were not likely to be prosecuted was not a complete disavowal of prosecution, and plaintiffs therefore had standing).

259 Prohibiting advisory opinions in federal courts is not controversial. Epstein, *supra* note 23, at 6 ("[The word 'cases'] operates as a word of limitation only insofar as it excludes the use of advisory opinions, which everyone regards as outside the scope of the federal judicial power."). The Supreme Court has a long-standing ban on issuing advisory opinions that began when the Court refused President Washington's request to issue an opinion on the Proclamation of Neutrality in 1793 because it would violate the separation of powers. *See* Letter from the Justices of the Supreme Court to President George Washington (Aug. 8, 1793), *in* STEWART JAY, MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES app. at 179-80 (1997); *see also* Muskrat v. United States, 219 U.S. 346, 354-63 (1911) (holding that the Court does not issue advisory opinions). The term "advisory opinions," however, is a loosely-used phrase that courts may sometimes use to describe cases that resemble, but are not in fact, advisory opinions. *See* Sam Kamin, *An Article III Defense of Merits-First Decisionmaking in Civil Rights Litigation: The Continued Viability of* Saucier v. Katz, 16 GEO. MASON L. REV. 53, 79-88 (2008).

dential analysis.[260] The D.C. Circuit mentioned four underlying policy justifications for standing requirements in *Navegar*, and these considerations favor granting standing to plaintiffs with pre-enforcement challenges based on the Second Amendment as well.[261]

First, constitutional standing limits judicial review.[262] The judicial branch has the power to review the constitutionality of state and federal laws under the U.S. Constitution, but concerns for the judicial branch's countermajoritarian decisions may prompt courts to avoid addressing issues that should be resolved through the democratic process.[263] Before *Heller*, the Supreme Court did not review firearm regulations developed by the other branches of the federal government or by the states.[264] *Heller*, however, pulled the Second Amendment out of historical disuse and asserted the role of the judicial branch in the development of the regulation of firearms.[265] How courts will apply *Heller* remains to be seen, but for better or

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260 For example, while standing originally allowed courts to protect programs of the federal government, standing limitations today also allow courts to engage in a Coasean analysis of their responsibilities to enable courts to allocate their limited resources efficiently. *See* Eugene Kontorovich, *What Standing Is Good For*, 93 VA. L. REV. 1663, 1675-93 (2007); *see also* Eric R. Claeys, Note, *The Article III, Section 2 Games: A Game-Theoretic Account of Standing and Other Justiciability Doctrines*, 67 S. CAL. L. REV. 1321, 1325-42 (1994).

261 Navegar, Inc. v. United States, 103 F.3d 994, 997-99 (D.C. Cir. 1997).

262 *Id.* at 997-98 ("This principle of justiciability derived from Article III serves several important functions, not the least of which [is] maintaining the limits on judicial power appropriate in a democratic society . . . ."). Additionally, courts may reject standing for plaintiffs on prudential grounds if the case presents "abstract questions of wide public significance that would more appropriately be addressed by the representative branches of government." *Id.* at 998. Richard Epstein has argued that standing is a direct limitation on *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Epstein, *supra* note 23, at 2-3 ("[T]he expansion of Federal power was aided by importing a standing requirement into the Constitution that often operates at cross purposes with the function of judicial review that the Court assumed in *Marbury v. Madison*. Quite simply, the harder it is for individuals to make their way into federal court, the more difficult it is for them to challenge actions as falling beyond the scope of Congress." (footnote omitted)).

263 In his book, *The Least Dangerous Branch*, Alexander Bickel identified standing as one of the "passive virtues" that can affect the scope of judicial review. BICKEL, *supra* note 23, at 111-27. "For the Court to entertain such a suit as *Frothingham*," Bickel wrote, "and to adjudicate the constitutional issue tendered would, in my judgment, materially alter the function of judicial review and seriously undermine any acceptable justification for it." *Id.* at 122. Bickel also supported pre-enforcement challenges, and wrote that "[t]here is and there ought to be no rule of constitutional standing that, in order to construct a judiciable case, a plaintiff must submit to the very burden whose validity he wishes to contest." *Id.* at 135.

264 *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2822-47 (2008) (Stevens, J., dissenting).

265 *Compare id.* at 2846 ("Until [*Heller*], it has been understood that legislatures may regulate the civilian use and misuse of firearms so long as they do not interfere with the preservation of a well-regulated militia. The Court's announcement of a new constitutional right to own and use firearms for private purposes upsets that settled understanding . . . ."), *and* J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254 (arguing that *Heller*, like *Roe v. Wade*, 410 U.S. 113 (1973), was a "transfer of power to judges from the political branches of government—and thus, ultimately, from the people themselves"), *with Heller*, 128 S. Ct. at 2822 (majority opinion)

worse, courts will be sorting out the remaining questions of *Heller* for years to come.[266] Allowing courts to find standing for pre-enforcement challenges encourages courts to resolve the implications of *Heller* and define the scope of judicial review for Second Amendment issues.

Second, requiring plaintiffs to have standing guarantees that parties to a suit have the proper incentives to represent their positions adequately.[267] If federal courts were to decide issues in cases in which parties lacked standing, such as advisory opinions, the parties would have decreased incentives to research and advocate their positions without personal, emotional, or financial interests in the outcome.[268] With pre-enforcement challenges to the Second Amendment, parties do not present mere advisory opinions, but instead have strong incentives to present the best arguments for their positions. For example, the plaintiffs in *Parker* lived in dangerous neighborhoods and wanted to possess firearms for self-defense.[269] At the same time, the principal defendant in *Parker* was the District of Columbia, which was willing to enforce its gun ban regardless of whether the plaintiffs were first subjected to criminal liability.[270]

(holding that it is the role of the Court to take "certain policy choices off the table" when they conflict with "the enshrinement of constitutional rights"), *and* Nelson Lund & David B. Kopel, *Unraveling Judicial Restraint: Guns, Abortion, and the Faux Conservatism of J. Harvie Wilkinson, III*, 25 J.L. & POL. (forthcoming 2009) (critiquing Judge Wilkinson's article by arguing Wilkinson relied too much on the "principle of judicial restraint" instead of an analysis of the Constitution).

266 *See* District of Columbia v. Heller*: The Individual Right to Bear Arms*, *supra* note 215, at 143; Kerr, *Minimalist Court*, *supra* note 215.

267 *Navegar*, 103 F.3d at 997-98 (noting that Article III standing ensures "that the federal courts act only when the disputes brought before them involve sharply-defined issues pressed by truly adversary parties with a genuine stake in the outcome").

268 *See* Baker v. Carr, 369 U.S. 186, 204 (1962) ("Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing."); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 579-81 (1992) (Kennedy, J., concurring). The requirement that the plaintiffs have an interest in the outcome of the case is not without its exceptions, as the Court demonstrated when it held that the plaintiffs had standing even though they had agreed to remit all proceeds of the suit to another party. Sprint Commc'ns Co. v. APCC Servs., Inc., 128 S. Ct. 2531, 2543 (2008) (holding that the assignee still had "concrete adverseness" sufficient for standing (quoting *Baker*, 369 U.S. at 204)); *see also* Massachusetts v. EPA, 549 U.S. 497, 517-18 (2007).

269 Parker v. District of Columbia (*Parker Appeal*), 478 F.3d 370, 373-74 (D.C. Cir. 2007), *aff'd sub nom.* District of Columbia v. Heller, 128 S. Ct. 2783 (2008). Shelly Parker, who lived in a neighborhood "rife with tenacious drug gangs," had "made a nuisance of herself to local drug dealers, walking the streets as a one-woman citizen patrol, calling cops when she saw illegal activity, and installing a security camera for her yard." Doherty, *supra* note 14. Within a few months, "Parker's car window had been broken, her security camera had been stolen, and a gang lookout rammed a car into her back fence." *Id.* Parker decided that she needed a gun after one of the drug dealers, who was over seven feet tall, "allegedly shook her gate one night, shouting, 'Bitch, I'll kill you! I live on this block, too.'" *Id.*

270 Appellants' Brief, *supra* note 238, at 19, 21.

Third, requiring a "credible threat" for a pre-enforcement challenge also requires cases to be ripe,[271] which ensures that the facts of a case have been sufficiently developed for judicial resolution.[272] Like ripeness analysis, "credible threat" standing also examines whether a case is brought too early, and courts can conflate a case's ripeness analysis with its "credible threat" standing analysis.[273] Although judging whether the facts of a case are sufficiently developed is a highly fact-intensive inquiry, the facts of *Seegars* and *Parker*, for example, suggest that the cases were already ripe. In both cases, the plaintiffs wanted to possess a gun for self-defense because they lived in dangerous neighborhoods.[274] Additionally, the District of Columbia's gun ban was a law that had been predictably enforced for over thirty years.[275] The facts could only develop further if one of the plaintiffs was arrested for possessing a gun, which would not affect the underlying merits of the case anyway, and at which point the case would be over-ripe and would no longer be a pre-enforcement challenge. If the court waits for the facts to develop further, the delay will only impose a hardship upon the plaintiffs as they live without the protection of handguns for their self-defense. If the facts of upcoming Second Amendment litigation resemble *Seegars* or *Parker*, the facts of the case are already ripe and a court would

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271 *Navegar*, 103 F.3d at 998 ("By refusing to hear disputes which are not yet ripe, federal courts avoid becoming entangled in 'abstract disagreements,' enhance judicial economy, and ensure that a record adequate to support an informed decision exists when the case is heard." (citation omitted)); *see also* Warth v. Seldin, 422 U.S. 490, 498-500 & n.10 (1975).

272 *See* 22A AM. JUR. 2D *Declaratory Judgments* § 32 (2003). Ripeness is based on both constitutional limitations of Article III and courts' prudential limitations. *See* Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57 n.18 (1993). Although the requirements of ripeness are rather flexible, a controversy is usually ripe when a refusal to consider the case will not result in further factual developments, but will only cause the parties to suffer hardship while waiting for the case to ripen. *See* Nat'l Park Hospitality Ass'n v. Dep't of the Interior, 538 U.S. 803, 807-12 (2003); Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733 (1998); Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967), *overruled in part on other grounds by* Califano v. Sanders, 430 U.S. 99, 105 (1977).

273 Although ripeness and "credible threat" standing have different requirements, the two doctrines can overlap. *See* 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.12 (2008) ("The blending of standing and ripeness theories is so important that courts should become more assiduous to recognize its advantages. Standing opinions have tended to be more doctrinaire than ripeness opinions, particularly in relying on Article III concepts of injury, causation, and remedial benefit." (footnote omitted)). Although courts do not require standing and ripeness to be addressed in the same analysis, courts appear willing to conflate the two analyses when the determinative issues, such as the "imminence" requirement for standing and the "hardship" requirement for ripeness, overlap. *See* Brooklyn Legal Servs. Corp. v. Legal Servs. Corp., 462 F.3d 219, 225-26 (2d Cir. 2006); *see also* MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128 n.8 (2007) (allowing the respondent to analyze the injury in terms of either the "injury in fact" requirement of standing or the "hardship" requirement of ripeness); Thomas v. Union Carbide Agric. Prods., 473 U.S. 568, 579-82 (1985).

274 *Parker Appeal*, 478 F.3d at 373-74; *see also* Seegars v. Gonzales, 396 F.3d 1248, 1250-51 (D.C. Cir. 2005).

275 Appellants' Brief, *supra* note 238, at 19; *see* Kopel, *Dominos Fall*, *supra* note 218.

only impose hardship on the parties by delaying resolution of the case on standing grounds.

Finally, "credible threat" standing allows plaintiffs to pursue relief from a statute that infringes on their constitutional rights without engaging in illegal behavior.[276] The Declaratory Judgment Act was specifically enacted to allow plaintiffs to contest the constitutionality of a statute without risking arrest, criminal prosecution, and possibly a fine or imprisonment.[277] Plaintiffs should not be forced to choose between being without self-defense in their homes and being prosecuted for a violation of the D.C. gun ban if there is a chance that the challenged law is unconstitutional. Instead, plaintiffs deserve to have a court determine the extent of their Second Amendment rights without first subjecting themselves to criminal prosecution.[278]

V. STATE GUN BANS, SOVEREIGN IMMUNITY, AND *EX PARTE YOUNG*

As plaintiffs assert their Second Amendment rights against state firearm laws, they will consider invoking *Ex parte Young*. The modern application of *Ex parte Young* allows plaintiffs to bypass a state's sovereign immunity to sue its governor and attorney general in their official capacities for prospective relief against violations of the Second Amendment.[279] The

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276 *Navegar*, 103 F.3d at 998-99; *see also* Mobil Oil Corp. v. Att'y Gen., 940 F.2d 73, 75 (4th Cir. 1991) ("Public policy should encourage a person aggrieved by laws he considers unconstitutional to seek a declaratory judgment against the arm of the state entrusted with the state's enforcement power, all the while complying with the challenged law, rather than to deliberately break the law and take his chances in the ensuing suit or prosecution.").

277 *See* Steffel v. Thompson, 415 U.S. 452, 479-80 (1974) (Rehnquist, J., concurring) ("[T]he legislative history of the Declaratory Judgment Act and the Court's opinion in this case both recognize that the declaratory judgment procedure is an alternative to pursuit of the arguably illegal activity."); *see also MedImmune*, 549 U.S. at 129. Imposing burdensome standing requirements "renders the [Declaratory Judgment] Act virtually meaningless," and therefore, "deference to congressional intent requires a broader standing requirement." Mark Peter Henriques, Note, *Desuetude and Declaratory Judgment: A New Challenge to Obsolete Laws*, 76 VA. L. REV. 1057, 1088-89 (1990).

278 Even if individuals are confident that a statute is unconstitutional, Justice Brennan argued that pre-enforcement review should still be available because the criminal system can be lengthy and take unexpected turns. *See* Perez v. Ledesma, 401 U.S. 82, 119 (1971) (Brennan, J., concurring in part and dissenting in part). "Even persons confident that their contemplated conduct would be held to be constitutionally protected and that accordingly any state conviction would be overturned," Brennan wrote, "may be deterred from engaging in such conduct by the prospect of becoming enmeshed in protracted criminal litigation . . . ." *Id.* Because courts exist to "vindicate the constitutional rights of all persons—those who want to obey state laws as well as those prepared to defy them," Brennan concluded that "federal anticipatory relief" should be available. *Id.*

279 *See, e.g.*, Young v. Hawaii, 548 F. Supp. 2d 1151, 1161-62 (D. Haw. 2008). To invoke *Ex parte Young*, plaintiffs must name a defendant who has "some connection" to the enforcement of the firearm laws. *Ex parte* Young, 209 U.S. 123, 157 (1908). The Hawaiian plaintiff in *Young v. Hawaii* failed to meet this requirement, and the court refused to waive the sovereign immunity of the governor and attor-

passage of the Declaratory Judgment Act and the modern reinterpretation of *Ex parte Young*, however, left general confusion over what plaintiffs need to show to establish a threat of enforcement sufficient to invoke *Ex parte Young*.[280] Part V.A states that "credible threat" analysis should form the basis of the threat requirement for *Ex parte Young*, and Part V.B applies this doctrine to Second Amendment litigation.

A. Ex Parte Young *Should Incorporate the Court's "Credible Threat" Doctrine*

The current analysis of *Ex parte Young* confuses multiple issues that were not present when the case was originally decided.[281] Though *Ex parte Young* was decided in 1908,[282] the first case to discuss modern standing doctrine was written fifteen years later in 1923,[283] and Congress did not create the declaratory judgment until 1934.[284] With these historical developments over the past century, and with the reinterpretation of *Ex parte Young* itself,[285] courts should not limit plaintiffs to suing only state officials who "threaten and are about to commence proceedings" simply because that phrase appears in the original text of *Ex parte Young*.[286]

Sovereign immunity analysis should therefore tease apart the threat needed to assert a pre-enforcement challenge against defendants under *Ex parte Young* (now, a "credible threat"),[287] and the threat needed to show "irreparable injury" for injunctive relief (an actual threat that will result in a "great and immediate" loss).[288] "Irreparable injury" was required to receive injunctive relief and should not be treated as an independent requirement needed to invoke *Ex parte Young*.[289] Federal courts, therefore, should con-

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ney general when the plaintiff failed to show a "nexus between the violation of federal law and the individual accused of violating that law." *Young*, 548 F. Supp. 2d at 1163 (quoting Pennington Seed, Inc. v. Produce Exch. No. 299, 457 F.3d 1334, 1342 (Fed. Cir. 2006)).

280 *See supra* Part II.B-D.

281 *Id*.

282 *See supra* Part II.A.

283 Massachusetts v. Mellon, 262 U.S. 447, 480-82 (1923).

284 *See supra* Part II.B.

285 *See supra* Part II.C-D.

286 *Ex parte* Young, 209 U.S. 123, 156 (1908).

287 In 1907, Attorney General Young threatened to enforce the new rate regulations, and this "threat of enforcement" allowed the railroad shareholders to assert a pre-enforcement challenge to the unconstitutional regulations. *See supra* notes 94-105 and accompanying text.

288 Also in *Ex parte Young*, the Court held that the threat caused plaintiffs enough harm that it left them no adequate remedy at law, and they were therefore entitled to receive an injunction in equity. *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 381 (1992) (quoting *Young*, 209 U.S. at 145-47, 156).

289 *See* Watson v. Buck, 313 U.S. 387, 400 (1941) ("Federal injunctions against state criminal statutes . . . are not to be granted as a matter of course, even if such statutes are unconstitutional . . . .

sider whether state officials made an actual threat only when plaintiffs need to show "irreparable injury" to receive an injunction.[290]

Although Congress eliminated the "irreparable injury" requirement for declaratory judgments,[291] the Supreme Court is unclear on whether plaintiffs need to show that the defendant made an actual threat to receive a declaratory judgment through *Ex parte Young*.[292] A declaratory judgment, however, does not require plaintiffs to show an "actual threat," but only a "credible threat" sufficient to have Article III standing.[293]

Federal courts should therefore use the "credible threat" doctrine to determine whether plaintiffs have alleged a threat of enforcement sufficient to invoke *Ex parte Young* in pre-enforcement challenges against state officers.[294] The "credible threat" doctrine has already been developed and used by the judicial system[295] and, as required by Article III, all pre-enforcement challenges in federal courts—including those that invoke *Ex parte Young*—must establish "credible threat" standing anyway.[296] By adopting the "credible threat" standard into *Ex parte Young*, courts could then determine whether plaintiffs can invoke *Ex parte Young* and have Article III standing in a single analysis. If plaintiffs can establish a "credible threat" sufficient for Article III standing, those plaintiffs would also automatically demonstrate a threat of enforcement sufficient for *Ex parte Young*.

Any additional burden faced by plaintiffs in a pre-enforcement challenge depends on the plaintiffs' choice of remedy.[297] If plaintiffs seek only a declaratory judgment, then "credible threat" standing is sufficient, and plaintiffs would have also fulfilled the threat of enforcement requirement in *Ex parte Young*.[298] However, if plaintiffs use *Ex parte Young* to request an

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The imminence and immediacy of proposed enforcement, the nature of the threats actually made, and the exceptional and irreparable injury which complainants would sustain if those threats [of enforcement] were carried out are among the vital allegations which must be shown to exist before restraint of criminal proceedings is justified.").

290 The terminology in this section can be confusing. "Credible threat" standing does not always require the defendant to actually threaten the plaintiffs—especially when the challenged statute is newly-enacted or restricts First Amendment expression. *See supra* Part I.A. The text of *Ex parte Young*, however, imposes a narrower requirement: an actual threat in all cases. *Young*, 209 U.S. at 156 (limiting *Ex parte Young* to defendants who "threaten and are about to commence proceedings").

291 *See* Steffel v. Thompson, 415 U.S. 452, 466-73 (1974).

292 *See supra* Part II.D.

293 28 U.S.C. §§ 2201-2202 (2006); *see also supra* Part II.B.

294 *See*, *e.g.*, 1st Westco Corp. v. Sch. Dist. of Phila., 6 F.3d 108, 112-16 (3d Cir. 1993); Long v. Van de Kamp, 961 F.2d 151, 152 (9th Cir. 1992) (per curiam).

295 *See supra* Part I.

296 *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

297 *See supra* Part II.B.

298 As defined by the Declaratory Judgment Act, a court can give declaratory judgments "in a case of actual controversy." 28 U.S.C. § 2201(a). Additionally, Congress created the declaratory judgment to decrease a plaintiff's burden in court and to encourage cases to be decided on their merits. *See* Steffel v. Thompson, 415 U.S. 452, 466-68 (1974); *see also supra* Part II.B.

injunction to prohibit prospective enforcement of a statute, plaintiffs must also show "irreparable injury."[299] Showing "irreparable injury," however, should not be much of a burden today, because courts typically examine all factors of a case and grant injunctions routinely.[300]

B. *Sovereign Immunity and the Second Amendment*

If courts were limited to the text of *Ex parte Young*, plaintiffs could only invoke *Ex parte Young* against state officers who "threaten and are about to commence proceedings."[301] This standard is similar to the restrictive standing analysis used in *Navegar* and *Seegars*, which required the plaintiffs to show a specific, targeted threat of enforcement.[302] However, courts should use the Supreme Court's generic "credible threat" standing doctrine in their sovereign immunity analysis, and for pre-enforcement challenges based on constitutional rights, such as Second Amendment litigation, courts should preferably incorporate the "credible threat" analysis defined by *American Booksellers*.[303]

Consider, for example, a situation similar to *Seegars* or *Parker* in which plaintiffs challenged state firearm regulations but named a defendant protected by sovereign immunity. If the plaintiffs can show that they have "credible threat" standing to challenge a gun ban, they would have also automatically established the requisite threat of enforcement needed to invoke *Ex parte Young* for a declaratory judgment.[304] A declaratory judgment allows a court to examine the merits of the case,[305] but if plaintiffs seek an injunction against prospective enforcement of a gun ban, they must also show "irreparable injury."[306] While a court's determination of "irreparable injury" is a fact-intensive examination, the plaintiffs in *Parker* argued that they lived in dangerous neighborhoods and wanted to own handguns for self-defense.[307] Not only is an individual's safety a strong factor in granting an injunction, but after *Heller* recognized an individual right to possess firearms for self-defense, plaintiffs are even more likely to receive an in-

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299 *See* Dombrowski v. Pfister, 380 U.S. 479, 490 (1965). Additionally, the Burger Court held that *Ex parte Young* is "necessarily limited to prospective injunctive relief" and "may not include a retroactive award." Edelman v. Jordan, 415 U.S. 651, 677 (1974).

300 *See supra* notes 161-62 and accompanying text.

301 *Ex parte* Young, 209 U.S. 123, 156 (1908); *see also supra* Part II.A.

302 *See supra* notes 165-94 and accompanying text.

303 *See supra* Part IV.B-C (arguing that the *American Booksellers* doctrine should be the preferred analysis for Second Amendment litigation).

304 *See supra* notes 281-90 and accompanying text.

305 *See* 28 U.S.C. §§ 2201-2202 (2006); *see also supra* Part II.B.

306 *See supra* Part II.A-B.

307 Parker v. District of Columbia (*Parker Appeal*), 478 F.3d 370, 373-74 (D.C. Cir. 2007), *aff'd sub nom.* District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

junction because courts are especially willing to protect constitutional rights.[308]

CONCLUSION

Despite the initial excitement over *Heller*, courts have only begun to define the scope of individuals' Second Amendment rights.[309] Before considering the merits of these rights, however, courts must first decide whether plaintiffs have standing to appear in federal court,[310] and in cases that invoke *Ex parte Young*, whether the plaintiffs can sue defendants protected by sovereign immunity.[311] Although *Heller* originated from the D.C. Circuit, other courts should not adopt the standing analysis used in *Navegar*, *Seegars*, or *Parker* because these cases improperly narrowed the Supreme Court's "credible threat" standing doctrine.[312]

Instead, plaintiffs asserting their Second Amendment rights in a pre-enforcement challenge for a declaratory judgment should be able to fulfill their initial burden and acquire generic "credible threat" standing.[313] This burden is especially easy to meet when the challenged statute is newly-enacted or infringes upon First Amendment expression.[314] Although the Supreme Court's generic doctrine is acceptable, courts should preferably apply *American Booksellers* to upcoming Second Amendment litigation, which would allow plaintiffs to assert their pre-enforcement challenges in court if the contested statute forces them to "self-censor" their actions.[315] If plaintiffs also seek an injunction to prevent future enforcement of a statute through *Ex parte Young*, then they should also be required to show "irreparable injury," which may include the sufficiency of a state officer's threat, but should not be a difficult standard to meet because courts are flexible in granting injunctions.[316]

Over a hundred years have passed since Attorney General Edward Young set the gold standard for legal advocacy: not all lawyers, after all,

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308 Courts routinely grant injunctions with a flexible definition of "irreparable injury." *See supra* notes 161-62 and accompanying text. Additionally, courts are even more likely to grant injunctions when constitutional rights are violated. *See* 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2944 (2008) ("[I]f a constitutional violation is established, usually no further showing of irreparable injury is necessary.").

309 *See* District of Columbia v. Heller*: The Individual Right to Bear Arms*, *supra* note 215, at 143-44; Kerr, *Minimalist Court*, *supra* note 215.

310 *See supra* Part I.

311 *See supra* Part II.

312 *See supra* Part III-IV.A.

313 *See supra* Part I.A.

314 *See supra* notes 42-70 and accompanying text.

315 *See supra* Part IV.C.

316 *See supra* notes 161-62, 299-300 and accompanying text.

are willing to throw themselves into federal custody so they can petition the Supreme Court to uphold railroad rate regulations.[317] Nor should they be. Procedural technicalities should not force individuals to risk criminal prosecution to protect their constitutional rights. As plaintiffs file pre-enforcement challenges to states' firearm regulations, courts should avoid the mistakes of the D.C. Circuit, and should instead use the "credible threat" doctrine in *American Booksellers* to analyze Article III standing and sovereign immunity. Federal courts have the authority to review unconstitutional laws,[318] and with an unprecedented number of Americans watching and wondering, courts should be able to address the merits of upcoming Second Amendment cases.

317 *See Ex parte* Young, 209 U.S. 123, 132-33 (1908).

318 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803).