RESPONSE

RESPONSE TO WASSERMAN AND RHODES: THE TEXAS S.B. 8 LITIGATION AND "OUR FORMALISM"

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*In S*olving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Limits and Opportunities of Offensive Litigation, *Professors Howard Wasserman and Rocky Rhodes explain why the U.S. Supreme Court correctly rejected the pre-enforcement legal challenge brought by abortion providers challenging Texas's draconian abortion law, S.B. 8, which was specifically designed to evade such challenges. Wasserman and Rhodes also provide grounds for hope on the part of future similarly situated challengers to S.B. 8 copycat laws, outlining a route by which the clinics could have engaged in offensive federal-court litigation against "any person" plaintiffs who seek to bring lawsuits under S.B. 8.*

Wasserman and Rhodes's argument is persuasive and elegant. It works within a formalist maze of procedural complexities, charting the narrowest of pathways through that maze. But in doing so, it may underestimate the extent to which S.B. 8 succeeds in chilling any attempts to provoke the sort of "any person" lawsuit that is a necessary predicate to bringing the sort of offensive litigation that the authors advocate. This Response, therefore, argues instead for a return to the true spirit of Ex parte Young *and to the policies underlying the availability of pre-enforcement injunctive relief in constitutional cases.*

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INTRODUCTION

In their extraordinarily careful and masterfully argued Article,[1] Professors Howard Wasserman and Rocky Rhodes demonstrate that, unfortunately for the plaintiffs, under current doctrine, the U.S. Supreme Court got it right in *Whole Woman's Health v. Jackson*.[2] *Whole Woman's Health*, of course, was the unsuccessful legal challenge brought by abortion providers challenging Texas's draconian abortion law, S.B. 8, before it went into effect. However, Wasserman and Rhodes also provide grounds for hope on the part of future similarly-situated challengers, outlining a route by which the clinics could have engaged in offensive federal-court litigation against "any person" plaintiffs who seek to bring lawsuits under S.B. 8.[3] Although they acknowledge that this approach does not afford plaintiffs the opportunity for pre-enforcement review of the law, they nonetheless show that S.B. 8, and laws like it, need not necessarily escape federal constitutional review in a federal forum.[4]

Wasserman and Rhodes's proposal is clever and nuanced: plaintiffs, such as the abortion providers in the S.B. 8 litigation, may bring federal lawsuits to enjoin anyone who threatens to sue or actually initiates a lawsuit against them under the statute in state court.[5] The providers may raise their federal constitutional claims in this federal injunction suit.[6] While this route to federal court requires the providers to wait until they are sued in order to bring their own suit, it still permits them to choose a federal forum for their federal constitutional claims and to seek immediate injunctive relief pending final adjudication of their claims.[7] Thus, as a path to vindicating their constitutional rights,

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1. Howard M. Wasserman & Charles W. "Rocky" Rhodes, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Limits and Opportunities of Offensive Litigation*, 71 AM. U. L. REV. 1029 (2022).
2. 142 S. Ct. 522 (2021).
3. TEX. HEALTH & SAFETY CODE ANN. § 171.208(a).
4. *See* Wasserman & Rhodes, *supra* note 1, at 1036–37, 1084–85.
5. *Id.* at 1077.
6. *Id.* at 1036.
7. *Id.*

Wasserman and Rhodes's proposal is superior to the path chosen by the actual litigants in *Whole Woman's Health*, which was doomed to failure under existing law.[8]

To demonstrate why their proposal is more likely to succeed, the authors argue that once an "any person" plaintiff threatens or initiates a lawsuit under S.B. 8, the threatened party can bring a federal case against them under 42 U.S.C. § 1983, which requires the defendant to be a state actor or someone acting "under color of" state law.[9] This solution thus hinges on the argument that the "any person" plaintiffs who would bring suit under S.B. 8 are standing in the shoes of the state by enforcing a public policy rather than vindicating their own rights—an argument that the authors convincingly make.[10] In addition, they argue that the abstention doctrine of *Younger v. Harris*,[11] which generally dictates that federal courts do not intervene to enjoin a pending state-court proceeding, should be no bar here.[12] This is because *Younger* may not even apply to civil suits like these. And even if it does, S.B. 8 is so extreme that it falls under one of the exceptions to *Younger*—such as the exception allowing federal court intervention where there was no opportunity to raise the constitutional claim below, the bad-faith exception, or the exception for laws that are "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph."[13]

Wasserman and Rhodes's argument is both persuasive and important. Texas's S.B. 8 represents a new strategy for state legislatures seeking to undermine federal constitutional rights of which they disapprove. Of course, the Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization*[14] overturned *Roe v. Wade*[15] and thereby eliminated the federal constitutional protections upon which the providers relied in the S.B. 8 litigation, thereby essentially mooting their claims.[16] However, as Wasserman and Rhodes have noted, the

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8. *See id.*
9. *See id.* at 1077.
10. *See id.* at 1079–84.
11. 401 U.S. 37 (1971).
12. *Id.* at 53.
13. *See* Wasserman & Rhodes, *supra* note 1, at 1088–90 (quoting Younger v. Harris, 401 U.S. 37, 53–54 (1971)).
14. 142 S. Ct. 2228 (2022).
15. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
16. *Dobbs*, 142 S. Ct. 2228.

basic structure of S.B. 8 could be replicated, in red states and in blue states, to undermine an entire panoply of constitutional rights—from free speech to the right to bear arms to the right to marry.[17]

It's not easy to find holes in Wasserman and Rhodes's meticulous legal reasoning. So I won't try. Instead, this Response begins by expanding upon the ways in which Texas S.B. 8 and similar statutes may lead to the large-scale decimation of federally protected rights by hostile state legislatures.[18] Wasserman and Rhodes's Article works within a formalist maze of procedural complexities, charting the narrowest of pathways to challenging such laws; but in doing so, it may underestimate the extent to which S.B. 8 succeeds in chilling any attempts to provoke the sort of "any person" lawsuit that is a necessary predicate to bringing the sort of offensive litigation that the authors advocate. This Response, therefore, argues instead for a return to the true spirit of *Ex parte Young*,[19] and to the policies underlying the availability of pre-enforcement injunctive relief in constitutional cases.[20]

I. THE DOUBLE BIND OF S.B. 8

As soon as S.B. 8 took effect, it had a devastating effect on abortion access in Texas.[21] With exactly one known exception, providers universally chose to comply with the law's draconian and flagrantly unconstitutional six-week limit on providing abortions rather than risk

17. *See* Wasserman & Rhodes, *supra* note 1, at 1036–37 (citing Compl. for Decl. J. and Inj. Relief—Class Action at 7–8, Whole Woman's Health v. Jackson, No. 21-CV-616, 2021 WL 3821062 (W.D. Tex. July 13, 2021), *aff'd in part*, Whole Woman's Health v. Jackson, 142 S. Ct. 522, 549–50 (2021)).

18. *See infra* notes 24–32 and accompanying text (discussing the ways this law erodes federally protected rights).

19. 209 U.S. 123 (1908).

20. *See infra* notes 50–54 and accompanying text.

21. Samuel Dickman & Kari White, *How Some Texans Are Getting Abortions Despite a Devastating Law*, N.Y. TIMES (March 24, 2022), https://www.nytimes.com/2022/ 03/24 /opinion/texas-abortion-funds-sb8.html (last visited Oct. 22, 2022) (stating that abortions fell by approximately half in Texas and that thousands of Texans were denied abortions after S.B. 8 went into effect). As the authors explain, the decrease in abortions was less than the eighty-five percent originally predicted; however, this smaller-than-expected decrease was due in part to a massive influx of donations to support patients and clinics that cannot be expected to continue indefinitely. *Id.*

liability under the law.[22] Most likely, this was due to the law's double-barreled attack on reproductive freedom: S.B. 8 was designed both to evade offensive constitutional litigation in the form of federal pre-enforcement lawsuits and to discourage defensive litigation, which would involve provoking a lawsuit under the law and then raising the law's unconstitutionality as a defense to liability.[23]

As Wasserman and Rhodes explain, S.B. 8 sets down procedural hurdles that make it difficult for claimants to follow the usual method of challenging abortion restrictions in federal court.[24] Primarily because S.B. 8 disclaims enforcement by *any* public official and instead delegates enforcement to "any" private party, whether injured by the violation or not, there is no executive officer that can be named as a defendant in such a suit.[25] Any affirmative litigation would face standing, sovereign immunity, and similar procedural problems.[26]

As for defensive litigation, as Wasserman and Rhodes also acknowledge, the law erects barriers to provoking "test" cases in order

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22. Alan Braid, *Why I Violated Texas's Extreme Abortion Ban*, WASH. POST (Sept. 18, 2021), https://www.washingtonpost.com/opinions/2021/09/18/texas-abortion-provider-alan-braid [https://perma.cc/YQR2-8JST] ("[O]n the morning of Sept. 6, I provided an abortion to a woman who, though still in her first trimester, was beyond the state's new limit."); Eleanor Klibanoff, *A Texas Abortion Clinic Survived Decades of Restrictions. The Supreme Court May Finally Put It out of Business.*, TEX. TRIB. (June 17, 2022), https://www.texastribune.org/2022/06/17/dobbs-supreme-court-abortion-texas [https://perma.cc/FD5D-Q599] (noting that Dr. Alan "Braid was the only provider in Texas to openly violate" S.B. 8). Under the prevailing law at the time of the *Whole Woman's Health* litigation, states could not ban abortion prior to viability, and six weeks of pregnancy is well before the point of viability. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 545 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part).

23. *See* Wasserman & Rhodes, *supra* note 1, at 1040, 1059.

24. *See id.* at 1034.

25. TEX. HEALTH & SAFETY CODE ANN. § 171.208(a); *see also* Wasserman & Rhodes, *supra* note 1, at 1055–56, 1059 (explaining that since no executive officer can enforce S.B. 8, no proximate constitutional injury can be established to enjoin enforcement of the law).

26. *See* Wasserman & Rhodes, *supra* note 1, at 1065–68. The Supreme Court's decision in *Whole Woman's Health* left open the possibility that the offensive litigation could proceed against the state medical licensing officials who were named as defendants. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 534 (2021). After remand, however, the Fifth Circuit Court of Appeals agreed to certify to the Texas Supreme Court the question whether those Texas officials had any enforcement authority under S.B. 8. Whole Woman's Health v. Jackson, 642 S.W.3d 569, 574 (Tex. 2022). The Texas Supreme Court answered the question in the negative. *Id.*

to achieve a declaration of S.B. 8's unconstitutionality.[27] They explain that the law changes both the procedural rules and the substantive defenses available to those sued under S.B. 8, making the law "uniquely punitive for those sued."[28] For example, unlike in most civil cases, providers and those who help people obtain post-heartbeat abortions can be sued in any one of Texas's 254 counties where a plaintiff happens to live, and venue cannot be changed without the plaintiff's consent.[29] Of course, Texas is an enormous state geographically, so litigating in a county far from one's home or work could be significantly more than a minor inconvenience for many defendants.

Wasserman and Rhodes also note that the defenses of non-mutual issue and claim preclusion do not apply to S.B. 8 lawsuits, so that "[i]f X sues Planned Parenthood over one abortion and loses because the heartbeat ban is constitutionally invalid, Whole Woman's Health cannot gain the preclusive effect of that judgment to defeat X's subsequent lawsuit against it for a different abortion."[30] Because of this provision, not only non-plaintiff clinics but also other individuals—those who aid and abet abortion under the sweeping terms of S.B. 8—will remain vulnerable until there is a binding injunction or declaration of unconstitutionality at the appellate level. And no matter how frivolous or baseless the lawsuit brought against them, people who provide or assist with obtaining an abortion cannot get their attorney's fees reimbursed, even though defendants in other sorts of lawsuits can seek reimbursement under those circumstances.[31] As Wasserman and Rhodes further explain, the law severely limits several defenses they could otherwise assert, including mistake of law, mistake of fact, and that the law violates the constitutional rights of certain third parties not before the court.[32]

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27. *See* Wasserman & Rhodes, *supra* note 1, at 1040–41. The authors discuss the challenges and possibilities of defensive-posture litigation at greater length in a companion article, Howard M. Wasserman & Charles W. "Rocky" Rhodes, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Potential for Defensive Litigation*, 75 SMU L. REV. 187 (2022).

28. *See* Wasserman & Rhodes, *supra* note 1, at 1040 (quoting Whole Woman's Health v. Jackson, 142 S. Ct. 522, 546 (2021) (Sotomayor, J., concurring in part and dissenting in part)).

29. *Id.* at 1040 (citing § 171.210(b)).

30. *Id.*

31. *Id.* at 1040; TEX. HEALTH & SAFETY CODE ANN. § 171.208(i).

32. *See* Wasserman & Rhodes, *supra* note 1, at 1040–41; TEX. HEALTH & SAFETY CODE ANN. § 171.208(e)–(f). As for mistake of fact, S.B. 8 provides a narrow affirmative

However, the inequities baked into the law go beyond what the authors have described. S.B. 8 repeatedly states that the Texas Rules of Civil Procedure, which apply to all other litigants in civil cases, do not protect abortion providers.[33] In terms of substantive disabilities placed on defendants, the law not only criminalizes performing, aiding, or abetting an abortion but also even "intend[ing] to engage in" such conduct.[34] Thus, a plaintiff need not prove that a post-heartbeat abortion actually occurred in order to garner a $10,000 (or greater) bounty, plus costs and attorney fees; rather, a plaintiff could presumably seek to prove intent based on a mere phone call to a clinic that indicated the clinic's willingness to provide a post-heartbeat abortion.[35] In addition, the law provides that if the Supreme Court overturns *Roe v. Wade*, plaintiffs can sue even for abortions that were constitutionally protected at the time they were performed.[36] This provision must be read in light of S.B. 8's four-year statute of limitations, which means that any provider who was considering violating the law and creating a test case would have to calculate the likelihood that *Roe v. Wade*—which was good law at the time S.B. 8 was enacted—would be overturned in the coming years.[37] Finally, S.B. 8 appears to green-light an unlimited number of lawsuits against the same provider for the same abortion until the provider actually pays out a judgment for that one particular violation.[38] Thus, even if an abortion provider achieves dismissal of a lawsuit—either because it is found that the abortion was legally performed or because S.B. 8 is found unconstitutional—a new plaintiff can still take another bite at

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defense for those who, "reasonably believed, after conducting a reasonable investigation," that the abortion complied or would comply with the law. § 171.208(f). In general, and under Texas law, a mistake of fact need only be reasonable; here, S.B. 8 adds an "investigation" requirement. *Compare* TEX. PENAL CODE ANN. § 8.02(a) *with* TEX. HEALTH & SAFETY CODE ANN. § 171.208(f).

33. TEX. HEALTH & SAFETY CODE ANN. §§ 171.208(d), (i); 171.210(a); 171.211(a)(2).

34. *Id.* § 171.208(a)(2)–(3).

35. *Id.* § 171.208(b). Note that all three forms of relief offered by S.B. 8—injunctive relief, damages of "not less than $10,000," and attorney fees and costs—are mandatory. *Id.* (stating that "the court *shall* award" those forms of relief) (emphasis added).

36. *Id.* § 171.208(e)(3).

37. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2278 (2022).

38. S.B. 8 provides that "a court may not award relief . . . if the defendant demonstrates that the defendant previously paid the full amount of statutory damages . . . in a previous action for that particular abortion." TEX. HEALTH & SAFETY CODE ANN. § 171.208(c).

the apple, since there is no issue preclusion (even under pre-S.B. 8 law) in this circumstance.[39] And, as noted above, the new plaintiff need not fear that the court will award attorney fees for filing a frivolous lawsuit.

In addition, the original plaintiff could try suing different defendants (such as anyone who could be considered to have aided or abetted the abortion) for that same abortion, and those new defendants cannot avail themselves of the prior court's finding due to S.B. 8's bar on non-mutual issue preclusion.[40] This universe of potential defendants includes anyone who helped the patient to obtain the abortion: Uber drivers, friends and relatives, insurers, and nonprofit organizations that provided information or practical support.[41] Given the breadth of potential aiding-and-abetting liability, donations that would otherwise support clinics and patients may well dry up, leaving the clinics in an even more vulnerable and financially precarious position.[42]

Indeed, the Texas law violates every rule-of-law norm, enabling a form of asymmetrical warfare that systematically disadvantages only one side—the defendant—in every lawsuit. S.B. 8 intentionally, explicitly, and shamelessly states that the usual rules do not apply when abortion is involved, and that one class of litigants does not receive the

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39. Under established preclusion principles, a non-party to a suit cannot be bound by matters decided in a prior suit. 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE & PROCEDURE § 4449 (3d ed. 2017) ("The basic premise of preclusion is that parties to a prior action are bound and nonparties are not bound."). So additional plaintiffs injured by a defendant's conduct would not normally be bound by a prior judgment even in cases not involving S.B. 8. However, the potentially infinite number of "any person" plaintiffs created by S.B. 8, combined with the lack of preclusive effect, creates particular difficulties for S.B. 8 defendants.

40. TEX. HEALTH & SAFETY CODE ANN. § 171.208(e)(5).

41. Katrina Morris, Whole Woman's Health v. Jackson*: One Texas Law's Procedural Peculiarities and Its Monolithic Threat to Abortion Access*, 48 AM. J.L. & MED. 158, 162 (2022) ("This unique provision ultimately extends liability to any and all parties involved in the process of obtaining an abortion: a partner who drives someone to an abortion appointment (indeed, an Uber driver who transports an individual to their abortion appointment), an employee at an insurance agency who approves coverage for an abortion, a friend who lent an encouraging ear to a pregnant person before they chose to seek an abortion, etc.").

42. *See, e.g.*, Peter Holley & Dan Solomon, *Your Questions About Texas's New Abortion Law, Answered*, TEX. MONTHLY (Oct 7, 2021), https://www.texasmonthly.com/news-politics/texas-abortion-law-explained [https://perma.cc/P66D-YEDQ].

protections that the law provides to everyone else.[43] Thus, to the extent that Wasserman and Rhodes's ingenious proposal depends on a provider or other potential defendant choosing to provoke a suit that will then allow a subsequent suit to be filed in federal court, there is reason to worry that this route is unrealistic in most situations. The threat of substantial civil liability and an endless flood of lawsuits was intended to chill potential defendants from engaging in constitutionally protected conduct.[44] In that sense, S.B. 8 is different from other laws under which individuals have been willing to provoke test cases in order to seek federal judicial review.[45]

All of these problems are written into the statute itself. Indeed, this Response has not even addressed the potentially hostile state court environment—or for that matter, the hostile U.S. Supreme Court majority—that any brave S.B. 8 defendants would have had to contend with.[46] Even taking at face value the oft-repeated assumption of comity

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43. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (dispensing with a concrete injury requirement for plaintiff); *id.* § 171.208(i) (prohibiting defendants from collecting attorney fees or costs under Texas law); *supra* notes 38–39 and accompanying text (discussing the statute's suspension of non-mutual issue preclusion for defendants).

44. *See Hearing on S.B. 8 Before the Sen. Comm. on State Affs.*, 2021 Leg., 87th Sess. (Tex. 2021) (statement of Sen. Bryan Hughes, Chairman, S. Comm. on State Affs.), https://tlcsenate.granicus.com/MediaPlayer.php?view_id=49&clip_id=16122 [https://perma.cc/4SHM-5ZUC]; *see also* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 544 (2021) (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("[B]y design, the mere threat of even unsuccessful suits brought under S. B. 8 chills constitutionally protected conduct, given the peculiar rules that the State has imposed.").

45. In their article on defensive litigation against S.B. 8, Wasserman and Rhodes cite *Griswold v. Connecticut*, 381 U.S. 479 (1965), as one such test case, *id.* at 480. But the Connecticut law challenged in *Griswold* did not expose the defendant to the risk of infinite civil lawsuits, to be litigated on an uneven playing field. Wasserman & Rhodes, *supra* note 1, at 209–10. Another relevant distinction between a potential S.B. 8 test case and the test case provoked in *Griswold* is that, at the time *Griswold* was decided, there was mandatory U.S. Supreme Court appellate jurisdiction over decisions from state high courts upholding state laws against a federal constitutional challenge, thus guaranteeing such litigants a federal forum for their federal claims. 28 U.S.C. § 1257, *amended by* 28 U.S.C. § 1257 (1988). That mandatory jurisdiction was repealed in 1988 and replaced with discretionary (certiorari) jurisdiction. Supreme Court Case Selections Act of 1988, Pub. L. 100–352, 102 Stat. 662, enacted June 27, 1988, codified at 28 U.S.C. § 1257.

46. *See, e.g.*, Kate Zernike & Adam Liptak, *Texas Supreme Court Shuts Down Final Challenge to Abortion Law*, N.Y. TIMES (Mar. 11, 2022), https://www.nytimes.com/2022/03/11/us/texas-abortion-law.html (last visited Oct. 22, 2022) (noting state court

among state and federal courts, which asserts that state courts are equal to federal courts in their willingness and ability to adjudicate federal claims, the state courts are forbidden to adjudicate those claims against abortion providers in an impartial fashion by the very terms of the law.[47] All of these factors together likely explain why no additional providers, or aiders or abettors, other than Dr. Alan Braid, have come forward to mount a legal challenge. Wasserman and Rhodes thus underestimate the significant impact of S.B. 8's asymmetrical design—and states' ability to design similarly lopsided statutes in the future. Indeed, as Chief Justice Roberts asked, what if the bounty were "not $10,000 but a million dollars"?[48] Surely, there must be a stopping point to a state's ability to deter its citizens from seeking justice in its courts or the courts of the United States.

II. BEYOND OUR FORMALISM

Wasserman and Rhodes ingeniously identify a narrow path through the current procedural maze of civil rights litigation to engage in offensive federal-court litigation challenging S.B. 8 (and its future imitators). And indeed, I share the authors' general premise that "a preferred litigation posture is not a constitutionally guaranteed litigation posture," as well as their driving concern that the usual approach to offensive litigation against criminal statutes simply will not work here.[49] As a formal matter, the lack of a proper state official defendant dooms the case for pre-enforcement review under the fiction created by *Ex parte Young*.[50] And nothing less important than the limited jurisdiction of the federal courts is at stake in determining whether the courts can hear challenges brought against state officers to laws like S.B. 8, so the sovereign immunity problem at the heart of *Whole Woman's Health* cannot be lightly dismissed. Yet, Wasserman and Rhodes's doctrinal interpretation relies on a formalistic understanding of civil rights litigation, according to which the conceptual logic of

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hostility to would-be S.B. 8 defendants); Ariane de Vogue, *Supreme Court Rejects Another Attempt to Block Texas' Six-Week Abortion Ban*, CNN (Jan. 20, 2022), https://www.cnn.com/2022/01/20/politics/abortion-texas-sb8-supreme-court/index.html [https://perma.cc/H6J7-A7MD] (noting the same of the Supreme Court).

47. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 171.208(e)(4).

48. Transcript of Oral Argument at 50, *Whole Woman's Health*, 142 S. Ct. 522 (2022) (No. 21-463) (statement of Chief Justice Roberts); *see* Wasserman & Rhodes, *supra* note 1, at 1057 (citing same).

49. *See* Wasserman & Rhodes, *supra* note 1, at 1058.

50. *Id.*

Young trumps the policies behind it.[51] S.B. 8 and bills like it profoundly chill the exercise of constitutional rights, thus evading constitutional review through either offensive or defensive litigation. This powerful deterrent effect creates the possibility that a state will simply nullify any and all constitutional rights that its legislature disfavors, which would prove a threat to both the rule of law *and* our federalist system.[52] The conceptual framework created out of *Ex parte Young*'s legal fiction cannot be permitted to trump the important constitutional, policy, and federalism interests that lie at the heart of that decision.[53] In other words, Our Formalism is a direct threat to Our Federalism.[54] Because of this threat, there must be a way to seek pre-enforcement judicial review of such laws in a federal court.

Indeed, despite the formalist reasoning embraced by the Supreme Court in *Whole Woman's Health* and by lower courts regarding the need to sue an official with enforcement authority,[55] a brief look at the history of civil rights injunctions demonstrates that formalistic doctrinal rules have often given way before the urgent need to protect federal constitutional supremacy.[56] To begin with, *Ex parte Young* itself relied upon a brazen legal fiction in order to achieve the important policy goal of protecting federal constitutional rights.[57] In order to allow the plaintiff railroad to offensively challenge purportedly

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51. *Id.*

52. *See id.* at 1036–37 (discussing the possibility that the S.B. 8 scheme is used to chill other rights, including firearm possession and same-sex marriage).

53. *See* Charlton C. Copeland, Ex parte Young*: Sovereignty, Immunity, and the Constitution*, 40 U. TOL. L. REV. 843, 876–77 (2009) (stating that "*Young* represents the obligation of the amended Constitution's commitment to popular sovereignty and government accountability").

54. My use of the term "Our Formalism" is a play on "Our Federalism"—a term introduced by Justice Black in *Younger v. Harris* to justify the Court's failure to intervene to enjoin a state prosecution under an unconstitutional statute, suggesting that excessive federal oversight of state legal systems threatens the federalist structure. 401 U.S. 37, 44 (1971). As I explain below, ironically, the formalism that dominates the Court's approach to S.B. 8 threatens federalist principles from the opposite end—it creates the possibility that states can undermine the supremacy of federal law.

55. *See, e.g.*, Digital Recognition Network, Inc. v. Hutchinson, 803 F.3d 952, 957 (8th Cir. 2015) (holding that the plaintiff "lack[ed] standing to sue the governor and attorney general because the injury of which [it] complain[ed] is not 'fairly traceable' to either official); Okpalobi v. Foster, 244 F.3d 405, 429 (5th Cir. 2001) (holding that a case for injunctive relief must be dismissed for lack of Article III standing where the only named defendants lacked enforcement authority).

56. *See, e.g.*, *Ex parte* Young, 209 U.S. 123, 155–56 (1908); Dombrowski v. Pfister, 380 U.S. 479, 490–92 (1965); Steffel v. Thompson, 415 U.S. 452, 475 (1974).

57. *Ex parte* Young, 209 U.S. at 155–56.

confiscatory rate regulation under the Fourteenth Amendment, the Supreme Court held in *Young* that the Attorney General, who was charged with enforcing the law's criminal prohibitions, could be named as a defendant.[58] This required finding that the Attorney General—insofar as he was acting unconstitutionally and therefore, in a sense, *ultra vires*—was not "the State" and therefore was not protected by sovereign immunity.[59] At the same time, the Attorney General had to be viewed as a state actor because only state actors may be held liable for violations of the Fourteenth Amendment.[60] *Young* has thus been criticized for creating this paradox: "How could the suit against Attorney General Young be both against the state (for purposes of the Fourteenth Amendment) and yet at the same time not against the state (for purposes of the Eleventh Amendment)?"[61]

Other similarities exist between the situation in Texas and the situation that led to *Ex parte Young*. As Professor Barry Friedman has explained in his history of the case, the legislation challenged in *Young* was designed "to avoid litigation, as well as put the state in a better position should litigation result nonetheless"; to this end, it both "gave no particular state officer given authority to enforce the rates" and ensured that the penalties for violating the law were extraordinarily stiff so that no railroad employee would be willing to challenge the law by first violating it and defending on the ground of its unconstitutionality.[62] Indeed, Young had also argued before the U.S. Supreme Court that he lacked enforcement authority under the statute and thus could not be sued.[63] Arguably, the Supreme Court relied only on Young's residual enforcement authority as Attorney

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58. *Id.* ("[I]ndividuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and 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.").

59. *Id.* at 154 ("It is the settled doctrine of this court that a suit against individuals, for the purpose of preventing them, as officers of a state, from enforcing an unconstitutional enactment, to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of that Amendment.").

60. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 924 (1982) ("Because the [Fourteenth] Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as 'state action.'").

61. Barry Friedman, *The Story of* Ex parte Young*: Once Controversial, Now Canon, in* FEDERAL COURTS STORIES 247, 271 (Vicki C. Jackson & Judith Resnik eds., 2010).

62. *Id.* at 261.

63. *Id.* at 264–65.

General of Minnesota, rather than on any particular connection to the statute's enforcement scheme, in upholding the federal court's power to enjoin the law.[64] In the view of both the Supreme Court and the lower courts, the legal fiction created by *Young* was thus necessary to preserve the supremacy of the federal Constitution in the face of the state's attempt to evade judicial review.[65] Thus, while the Supreme Court's decision in *Whole Woman's Health* follows the technical rule of *Young*—which also held that the state defendant must have some connection to enforcement of the challenged law—it flies in the face of *Young*'s spirit, which embodies the value of providing an effective means to challenge state legislation that violates federal constitutional rights.[66]

A similar moment occurred during the civil rights movement of the 1960s, in which the Court again had occasion to assert the propriety of using federal injunctions to protect constitutional rights. In the 1943 Supreme Court case *Douglas v. City of Jeannette*,[67] the petitioners had asked a federal court to enjoin a threatened state-court criminal prosecution against them under a city ordinance that had been declared unconstitutional that same day.[68] The Supreme Court held, on statutory rather than jurisdictional grounds, that an injunction would not be appropriate, stating it is a "familiar rule that courts of equity do not ordinarily restrain criminal prosecutions."[69] The Court held that the requirement of irreparable harm—a prerequisite to injunctive relief—was lacking "since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction."[70] In other words, the Court told the plaintiffs to assert their constitutional rights in a defensive litigation posture.[71]

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64. *Id.* at 266 (noting that the Court relied on Young's "general powers" as Attorney General) (quoting *Young*, 209 U.S. at 154)).

65. *See, e.g.*, *id.* at 262–63 (noting that the trial judge "was scathing in discussing the penalties imposed by Minnesota in an attempt to forestall litigation, calling them 'vicious, almost a disgrace to the civilization of the age'" and insisting that there must be a remedy to enforce the Constitution in such a situation).

66. *Id.* at 269–70.

67. 319 U.S. 157 (1943).

68. *Id.* at 159.

69. *Id.* at 163.

70. *Id.*

71. *See id.*

But in *Dombrowski v. Pfister*,[72] decided in 1965 in the midst of the civil rights movement, the Supreme Court reversed course, making federal injunctive relief more broadly available for civil rights violations.[73] In permitting an injunction against bad-faith threats to prosecute individuals under statutes that violated the First Amendment, *Dombrowski* recognized that the opportunity to raise constitutional claims in the context of a criminal prosecution is sometimes insufficient to protect constitutional rights.[74] In *Dombrowski*, as in the case of civil suits under S.B. 8, the threats of enforcement were "not made with any expectation of securing valid [judgments], but rather [were] part of a plan . . . under color of the statutes to harass [the plaintiffs] and discourage them and their supporters from asserting and attempting to vindicate the constitutional rights" of others not before the Court.[75] The Court recognized that "considerations of federalism" required some limits on the ability of courts to interfere in state affairs, while at the same time insisting on the necessity of intervention when states seek to use the state judicial apparatus as a means to chill and inhibit federally guaranteed rights.[76]

As the pendulum continued to swing back and forth between concerns for the sovereignty of states and appreciation for the unique role of federal courts as protectors of constitutional rights, the Supreme Court subsequently narrowed the space for federal equitable intervention in state judicial proceedings, most notably in *Younger v. Harris*.[77] In *Younger*, the Court established a general rule that federal courts should not intervene in state criminal proceedings (later extended, as Wasserman and Rhodes explain, to quasi-criminal and similar proceedings).[78] In so doing, the Court invoked the "shibboleth" of "Our Federalism" as a justification—albeit one that apparently neither needed nor received any explanation—for denying federal injunctions in a large swath of cases where it might be needed in order to protect constitutional rights.[79]

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72. 380 U.S. 479 (1965).
73. *Id.* at 492.
74. *Id.* at 485–86.
75. *Id.* at 482.
76. *Id.* at 484–86.
77. 401 U.S. 37, 53 (1971).
78. *Id.* at 53 (1971); *see* Wasserman & Rhodes, *supra* note 1, at 1088.
79. Owen M. Fiss, Dombrowski, 86 YALE L.J. 1103, 1118 (1977) (stating that Justice Black "merely gave us a new shibboleth, 'Our Federalism,' to express the anti-

At the same time, the *Younger* Court preserved the "bad-faith" exception from *Dombrowski*, noting that, in bad-faith prosecutions, the availability of defensive litigation would be insufficient to protect the individual from the chilling effect and risk of repeated bad-faith legal attacks.[80] And this is where Wasserman and Rhodes see the relevance of *Younger*—they suggest that, *after* a party has been sued in what amounts to a quasi-criminal proceeding under S.B. 8, the "any person" plaintiff can be named as a state-actor defendant in a federal suit to enjoin the state-court litigation.[81] They further argue that *Younger* would not bar this suit for various reasons, including the bad-faith exception.[82]

But as noted above, laws like S.B. 8 are designed to prevent individuals from even taking the chance of a lawsuit.[83] Thus, a separate lesson is arguably lurking within these cases. While Wasserman and Rhodes apply the technical legal rules of these cases, they arguably ignore their broader import. Cases such as *Young*, *Dombrowski*, and *Younger* are grounded in the value of preserving "Our Federalism."[84] But "Our Federalism" includes as foundational principles, after all, not only the comity and sovereignty of states and state courts but also the supremacy of federal law over state law.[85] Indeed, federalism should not be reflexively understood as synonymous with deference to state prerogatives over those of the federal government; rather, federalism must be understood as a structure of overlapping but separately limited sovereignties designed to create a double layer of protection for individual rights.[86] In the face of state measures engineered with

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nationalist sentiment that was to guide his interpretation of the equitable doctrines that *Dombrowski* preserved from *Douglas*").

80. *Younger*, 401 U.S. at 49–50, 54.

81. *See* Wasserman & Rhodes, *supra* note 1, at 1087–89.

82. *Id.*

83. *See supra* notes 30–32 and accompanying text.

84. *See supra* note 53 and accompanying text; *supra* note 76 and accompanying text; *supra* notes 78–79 and accompanying text.

85. *See supra* note 54 (discussing the danger of erasing the federal government's essential role in federalism); *see also* Erwin Chemerinsky, *Federalism Not as Limits, but as Empowerment*, 45 U. KAN. L. REV. 1219, 1226 (1997) (noting that Article IV is the single most important provision in the constitution, and "focusing on federalism almost entirely as constraints on federal power commits a basic logical fallacy of confusing the part with the whole").

86. *See, e.g.*, Printz v. United States, 521 U.S. 898, 921–22 (1997). The Court in *Printz* quoted THE FEDERALIST for this proposition:

precision specifically to undermine federal constitutional supremacy by evading available forms of judicial review, Supreme Court precedent, together with Our Federalism, dictates that the judicial system must provide a remedy. And in the case of laws like S.B. 8 that are designed to deter even defensive litigation, the imperative to provide a remedy must entail creating a pre-enforcement pathway into federal court.

This Response does not take a position on what that pathway should be. Either the Attorney General could be subjected to suit under a theory of "residual enforcement authority,"[87] or an exception to the common-law doctrine of judicial and clerk immunity could be carved out for this unique set of circumstances, as Justice Sotomayor urged.[88] The point is that the judge-made doctrines of equity and comity (respect for state courts), as well as narrow understandings of "adverseness,"[89] must give way when the very concept of federal supremacy is threatened, and when plaintiffs whose federal constitutional rights are violated lack a meaningful remedy at law. Indeed, it seems fundamentally inconsistent with "Our Federalism" to tolerate a situation in which states may systematically undermine federal rights by picking and choosing those that they will allow their citizens to exercise.

CONCLUSION

As Wasserman and Rhodes demonstrate, there are alternate routes that the S.B. 8 litigation could have taken, and some might have been

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> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Id. at 922 (quoting THE FEDERALIST NO. 51 (James Madison)).

87. *See* Wasserman & Rhodes, *supra* note 1, at 1060.

88. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 549–50 (2021) (Sotomayor, J., concurring in part and dissenting in part) (arguing that clerks should be subject to suit when "two unique circumstances" are present: 1) a State law "deliberately seeks to evade federal judicial review by outsourcing enforcement" to private parties; and 2) the law creates special rules designed to "maximize harassment" and "make the timely and effective protection of constitutional rights impossible").

89. *See* Wasserman & Rhodes, *supra* note 1, at 1065–68, 1071 (discussing these issues with suits against state-court judges and clerks).

more successful than the one chosen by the abortion providers in *Whole Woman's Health*. Ultimately, however, what is needed is a broader rethinking of the purposes of civil rights litigation and the federalism values that underlie the doctrine. If the legal fiction of *Ex parte Young* and the legal intricacies that have evolved from it lead to the conclusion that states can undermine federal rights without accountability, it is the legal fiction, rather than federal supremacy, that must give way.