

## Ordering Conduct Yet Evading Review: A Simple Step Toward Preserving Federal Supremacy

*Georgina Yeomans*

**ABSTRACT.** In *Whole Woman's Health v. Jackson*, the Supreme Court declined to preliminarily enjoin the enforcement of Texas's patently unconstitutional Senate Bill 8, which bans abortions after fetal cardiac activity has been or could be detected. The Court's stated reason for doing so was that the plaintiffs' application for emergency relief raised novel questions about the Court's jurisdiction—specifically, whether the lawsuit named the appropriate defendants to establish the plaintiffs' standing. These purportedly novel questions stem from the statute's enforcement mechanism, which delegates enforcement entirely to private individuals.

Writing in dissent, Chief Justice Roberts suggested that it is an open question whether states should be allowed to insulate their laws from pre-enforcement review in this way. The Supreme Court has now granted certiorari before judgment and is expected to address this question. This Essay offers a roadmap for the Court to hold that states may not engage in such procedural trickery, calling upon well-established flexibility within the Court's Article III case-or-controversy precedents and sovereign-immunity jurisprudence. When a law orders conduct, yet evades review, litigants should be allowed to sue to enjoin state courts' enforcement of the law.

### INTRODUCTION

In May, Texas enacted a law called the Texas Heartbeat Act, Senate Bill 8 (S.B. 8), which prohibits physicians from performing an abortion if fetal cardiac activity is detectable.<sup>1</sup> The law is enforceable only by private parties,<sup>2</sup> who stand to gain at least \$10,000 for each successful claim.<sup>3</sup> This delegation of

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1. TEX. HEALTH & SAFETY CODE ANN. § 171.204(a) (West 2021). The law includes an exception for medical emergencies. *See id.* § 175.205(a).

2. *Id.* § 171.207(a).

3. *Id.* § 171.208(a)-(b).

enforcement was meant to prevent the law from being challenged in court before it was enforced.<sup>4</sup>

Reproductive-rights groups brought suit, representing abortion providers and assistors, in an attempt to enjoin the law's enforcement before it went into effect on September 1, 2021.<sup>5</sup> Their challenge made its way to the Supreme Court on the eve of the law's effective date.<sup>6</sup> On September 1, after the law had taken effect, the Supreme Court issued a decision declining to enjoin the law's enforcement pending litigation on its constitutionality because, as the Court put it, the plaintiffs' challenge presented "complex and novel antecedent procedural questions" that the Court could not be sure would be decided in the plaintiffs' favor.<sup>7</sup> These complex and novel questions concerned whether the plaintiffs had sued a proper defendant, and thus whether they had standing.<sup>8</sup> They also implicated a yet-unresolved question under the Court's sovereign-immunity doctrine: Whether state-court judges can be enjoined from enforcing unconstitutional laws under the *Ex parte Young* exception to sovereign immunity.<sup>9</sup> On October 22, almost two months after the law's effective date, the Court granted the plaintiffs' motion for certiorari before judgment and scheduled expedited briefing and argument to address these questions.<sup>10</sup>

Modern standing doctrine and the doctrine of sovereign immunity provided cover to the Supreme Court to deny the plaintiffs' emergency request to enjoin enforcement of S.B. 8. The resulting legal landscape is one in which Texas has been allowed to subvert the Constitution with impunity. Seeing S.B. 8's success, legislatures in other states have geared up to pass copycat bills.<sup>11</sup> These laws are part of a pattern of state legislation that substantially regulates conduct and, in many cases, implicates constitutional rights. But because of the Court's standing

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4. See Adam Liptak, *Texas Urges Supreme Court to Leave Its Restrictive Abortion Law in Place*, N.Y. TIMES (Oct. 27, 2021), <https://www.nytimes.com/2021/10/21/us/politics/texas-abortion-law-supreme-court.html> [<https://perma.cc/MVP3-CCAA>].

5. See *Whole Woman's Health v. Jackson*, No. 1:21-CV-616-RP, 2021 WL 3821062, at \*1 (W.D. Tex. Aug. 25, 2021), *cert. granted before judgment*, No. 21-463, 2021 WL 4928617 (U.S. Oct. 22, 2021).

6. See Emergency Application to Justice Alito for Writ of Injunction and, in the Alternative, to Vacate Stays of District Court Proceedings at 3, *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (Aug. 30, 2021) (No. 21A24).

7. *Whole Woman's Health*, 141 S. Ct. at 2495.

8. *Id.*

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

10. *Whole Woman's Health v. Jackson*, No. 21-463, 2021 WL 4928617, at \*1 (U.S. Oct. 22, 2021).

11. See Ian Millhiser, *The Staggering Implications of the Supreme Court's Texas Anti-Abortion Ruling*, VOX (Sept. 2, 2021, 2:30 PM EST), <https://www.vox.com/22653779/supreme-court-abortion-texas-sb8-whole-womans-health-jackson-roe-wade> [<https://perma.cc/KZK6-MEX9>].

and sovereign-immunity precedents, these legislative efforts are difficult to challenge pre-enforcement.

The Supreme Court can easily redress this situation. Both Article III limitations on the Court's jurisdiction and the doctrine of sovereign immunity are subject to exceptions, especially where, absent an exception, a litigant would be effectively precluded from having her rights enforced. In *Ex parte Young*, the Court famously created an exception to sovereign immunity for suits against state officials in their official capacities in order to constrain unconstitutional state conduct.<sup>12</sup> And in the Article III "case" or "controversy" realm, the mootness doctrine admits of several exceptions, including two that are particularly relevant to challenges like the one at play in *Whole Woman's Health v. Jackson*.<sup>13</sup>

The Court should use the S.B. 8 debacle as an opportunity to hold that when legislation implicates the exercise of fundamental rights, but does not admit of a clear path to pre-enforcement review, litigants can sue state-court judges under *Ex parte Young* to enjoin the law's enforcement. This is a modest proposal: The legal foundations for this holding already exist. This Essay attempts to provide additional support for this holding based on considerations that have long animated the Court's jurisdictional jurisprudence.

Part I provides background on Article III standing and the doctrine of sovereign immunity. Part II then describes the contexts in which these doctrines admit of exceptions in order to allow litigants access to the federal courts to vindicate federal rights. Part III explains S.B. 8 and the litigation that resulted in the Supreme Court's decision declining to enjoin it. It also discusses the broader legislative context in which laws like S.B. 8 that affect substantial rights but evade pre-enforcement review have proliferated. Finally, Part IV suggests that the Court recognize a limited right to sue state-court judges to enjoin the enforcement of state laws that order conduct, yet evade review.

## I. BACKGROUND PRINCIPLES OF STANDING AND SOVEREIGN IMMUNITY

In order to invoke the federal courts' jurisdiction, a plaintiff must (1) have suffered an injury in fact that (2) was caused by, or is traceable to, the defendant's actions, and that (3) would be redressed by a judgment in the plaintiff's favor.<sup>14</sup> Precedent requires that litigants sufficiently allege, and then prove, their standing at each stage of their case.<sup>15</sup> The Supreme Court has read the standing

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12. See *infra* Section II.B.

13. See *infra* Section II.A

14. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

15. *Id.* at 561.

requirement into Article III's grant of federal judicial power over "cases" and "controversies."<sup>16</sup> Along with the mootness and ripeness doctrines, standing is meant to ensure that federal courts decide only legal controversies in which the parties have a concrete stake.<sup>17</sup> In modern practice, the tripartite standing criteria are well established.<sup>18</sup>

But the injury-causation-redress framework is relatively new<sup>19</sup> and only loosely tied to the text of the Constitution.<sup>20</sup> And despite the simplicity with which the Supreme Court has defined the standing inquiry, its application is remarkably inconsistent.<sup>21</sup> There is no shortage of criticism of modern standing doctrine, including the critique that Justices and judges often use standing as a proxy for the merits, declining to find that jurisdictional requirements have been met because the plaintiff's claims are weak or disfavored.<sup>22</sup> Even setting aside such criticisms, the doctrine is indisputably fragmented.<sup>23</sup> And, like many areas

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16. See *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Constitutional limits on standing have also been grounded in separation-of-powers concerns. See *id.* at 500; see also *Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996) (explaining that the injury-in-fact requirement limits who can bring suit in federal court in order to "keep[] courts within certain traditional bounds vis-à-vis the other branches"). And standing contains a prudential component as well. See *Warth*, 422 U.S. at 498.
  17. See *Warth*, 422 U.S. at 498-99 (citing *Baker v. Carr*, 369 U.S. 186, 204 (1962)).
  18. See *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 598 (2007) (describing standing requirements as "well established").
  19. See Mark C. Rahdert, *Forks Taken and Roads Not Taken: Standing to Challenge Faith-Based Spending*, 32 CARDOZO L. REV. 1009, 1015 (2011) ("As some scholars have observed, the doctrine of standing probably grew out of the nineteenth-century common-law concept of the cause of action, but for the last sixty years it has developed independently. During that period, the Court has been guided more by the policies underlying federal jurisdiction and the pragmatic realities of contemporary litigation than by any quest for determination of the Framers' original intention." (internal citation omitted)).
  20. See Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 168 (1992) ("Article III contains no explicit constitutional requirement of 'standing' or 'personal stake.'").
  21. See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (noting that standing precedent "has not been defined with complete consistency").
  22. Christian B. Sundquist, *The First Principles of Standing: Privilege, System Justification, and the Predictable Incoherence of Article III*, 1 COLUM. J. RACE & L. 119, 121 (2011) ("This Article argues that the inherent indeterminacy of standing law can be understood as reflecting an unstated desire to protect racial and class privilege, which is accomplished through the dogma of individualism, equal opportunity (liberty), and 'white innocence.'"); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1742-43 (1999) ("[]udges provide access to the courts to individuals who seek to further the political and ideological agendas of judges.").
  23. See Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1061 (2015) ("Recent years have witnessed the accelerated fragmentation of standing into a multitude of varied, complexly related subdoctrines."); see also Steven L. Winter, *The Metaphor of Standing*

of constitutional law, standing doctrine is susceptible to manipulation of framing to achieve a preferred outcome. Whether a plaintiff has a cognizable injury, for instance, depends a great deal on the level of specificity or generality with which a court defines the harm that the plaintiff has suffered.<sup>24</sup>

Standing, under the Court’s framework, is perhaps most straightforward in a purely retrospective case – one in which the plaintiff seeks damages to compensate a past harm committed by the defendant. Standing becomes harder to establish in cases in which the plaintiff seeks prospective relief. For instance, the Supreme Court infamously held that a man who had been put in an illegal chokehold by the police could not seek injunctive relief preventing the use of illegal chokeholds in the future because he could not demonstrate a “real and immediate threat” that he would be in that situation again.<sup>25</sup>

Within the realm of lawsuits seeking prospective relief is an even more complicated subset of cases – those seeking to challenge a law before it has been enforced on the grounds that it is unconstitutional. In such cases, the Court has demanded a showing not only that the plaintiff is or certainly will be injured by the challenged but yet-to-be-enforced law,<sup>26</sup> but also that the defendant sued is the individual who would otherwise cause that harm.<sup>27</sup> This rigid requirement that litigants not only show that a law will harm them in the future, but also properly predict precisely which government official will cause that harm relies on a formalistic idea of the Court’s authority – that the Court enjoins people and not the operation of laws.<sup>28</sup>

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*and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1371 (1988) (“It is almost de rigeur for articles on standing to quote Professor Freund’s testimony to Congress that the concept of standing is ‘among the most amorphous in the entire domain of public law.’”); Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 68 (1984) (“Observers, with just cause, regularly accuse the Supreme Court of applying standing principles in a fashion that is not only erratic, but also eminently frustrating.”).

24. For instance, modern case law requires in certain circumstances that a court exercise its judgment to predict whether prospective harm is imminent or certainly impending. In such instances, the test itself betrays the indefinite and highly subjective nature of the inquiry. *See, e.g., Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013) (requiring threatened injury to be “*certainly impending* to constitute injury in fact” (emphasis in original)).
25. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983).
26. *See Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 392-93 (1988); *Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979).
27. *California v. Texas*, 141 S. Ct. 2104, 2115 (2021) (“Remedies, however, ordinarily ‘operate with respect to specific parties.’” (quoting *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1486 (2018) (Thomas, J., concurring))).
28. *See id.* (citing *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (“If a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding”)).

Jonathan F. Mitchell, the purported author of S.B. 8,<sup>29</sup> took this formalism to its extreme in *The Writ-of-Erasure Fallacy*.<sup>30</sup> In that article, Mitchell suggests that because a court's decision finding a law unconstitutional does not erase it from the books, if a later court were to overturn that decision, anyone who ran afoul of the law during the period when it was held unconstitutional could still be held accountable retroactively.<sup>31</sup> S.B. 8 itself purports to impose liability on anyone who provides or aids an abortion in violation of the statute, even during a time when the statute has been declared unconstitutional, if that decision was later overturned.<sup>32</sup>

Further complicating access to the courts is sovereign immunity: A doctrine that poses a significant barrier to the vindication of rights, with arguably little coherent justification in the American legal tradition.<sup>33</sup> According to the Supreme Court, states are immune from suit brought by individuals, even individuals seeking to enforce constitutional rights, under both the Eleventh Amendment and a broader common-law principle.<sup>34</sup> Congress can override immunity only through the exercise of its remedial enforcement power under the Fourteenth Amendment.<sup>35</sup> And even then, Congress must demonstrate clearly that it intends to abrogate sovereign immunity and that it has good reason to do so.<sup>36</sup>

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29. See Michael S. Schmidt, *Behind the Texas Abortion Law, a Persevering Conservative Lawyer*, N.Y. TIMES (Nov. 1, 2021), <https://www.nytimes.com/2021/09/12/us/politics/texas-abortion-lawyer-jonathan-mitchell.html> [<https://perma.cc/9ZGL-B37J>].

30. Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 936-37 (2018).

31. *Id.* at 938. *But see* James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex parte Young*, 72 STAN. L. REV. 1269, 1351 (2020) (discussing the use of administrative writs at common law to provide comprehensive relief for the whole community); *id.* at 1353 (discussing Supreme Court approval of nonparty-protective injunctions and statewide injunctions between 1890 and 1934).

32. TEX. HEALTH & SAFETY CODE ANN. § 171.208(e)(3) (West 2021).

33. See Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1202 (2001) (arguing that sovereign immunity is “inconsistent with the United States Constitution” and “deserves no place in American law”); *see also* Elias R. Feldman, *Strict Tort Liability for Police Misconduct*, 53 COLUM. J. L. & SOC. PROBS. 89, 124 (2019) (“The American adoption of sovereign immunity was more practical than principled.”); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1891 (1983) (“The eleventh amendment today represents little more than a hodgepodge of confusing and intellectually indefensible judge-made law.”); *cf.* William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1, 2 (2017) (offering a defense of sovereign immunity, but noting that the “doctrine is often invoked as major evidence that the U.S. Supreme Court wanders from the constitutional text”).

34. See *Alden v. Maine*, 527 U.S. 706, 712, 733 (1999).

35. *Seminole Tribe v. Florida*, 517 U.S. 44, 56-59 (1996).

36. In *City of Boerne v. Flores*, the Court held that Congress's enforcement power under Section 5 of the Fourteenth Amendment was remedial only, and that any exercise of that power had to

Most relevant to the context of this Essay, the Supreme Court has held that citizens of a state are precluded from suing their *own* state, absent that state's express consent.<sup>37</sup> This holding is not justified by the text of the Eleventh Amendment, which bars suits against states by "Citizens of another State, or by Citizens or Subjects of any Foreign State."<sup>38</sup>

## II. EXCEPTIONS TO THE CASE OR CONTROVERSY REQUIREMENT AND SOVEREIGN IMMUNITY

Despite the strictures of modern standing doctrine and sovereign immunity, both Article III's case-or-controversy requirement and sovereign immunity are flexible. This has proven especially true where, absent flexibility, a litigant would be effectively precluded from having her rights enforced.

### A. *Exceptions to the Mootness Doctrine*

Mootness is a close cousin to standing that allows flexibility in exceptional circumstances that closely parallel the procedural complexities in *Whole Woman's Health v. Jackson*. It is a jurisdictional doctrine that, like standing, arises from Article III's case-or-controversy requirement that courts adjudicate only live controversies.<sup>39</sup> Professor Henry Monaghan famously described mootness as the "doctrine of standing set in a time frame."<sup>40</sup>

The Supreme Court recognizes several exceptions to mootness, two of which are particularly salient here. The first, called "capable of repetition, yet evading review," applies when strict adherence to the requirements of standing at all stages of the case would effectively preclude the completion of litigation.<sup>41</sup> It is concerned in particular with the scenario in which a litigant could never have her rights adjudicated, but would suffer repeated harm, because of the harm's short-lived nature. The second exception to mootness, called "voluntary cessation,"

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show "congruence and proportionality" between its means and its ends. 521 U.S. 507, 520 (1997).

37. See *Hans v. Louisiana*, 134 U.S. 1, 18 (1890).

38. U.S. CONST. amend. XI.

39. See *Friends of the Earth, Inc. v. Laidlaw Env't Servs.*, 528 U.S. 167, 180 (2000) ("The Constitution's case-or-controversy limitation on federal judicial authority, Art. III, § 2, underpins both our standing and our mootness jurisprudence.").

40. Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973); see also *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 398 (1980) (adopting this description). *But see Friends of the Earth*, 528 U.S. at 190-91 (pushing back against a description of mootness as "standing set in a time frame").

41. See, e.g., *S. Pac. Terminal Co. v. Interstate Com. Comm'n*, 219 U.S. 498, 515 (1911).

arises to preclude defendants from escaping judicial review by changing their conduct after being sued when they could easily revert to their old ways once the case is dismissed.<sup>42</sup>

1. *Capable of Repetition, Yet Evading Review*

Since the early twentieth century, the Supreme Court has decided cases even though they are technically moot—and thus do not meet the Article III requirement that they present a live case or controversy—when the challenged action is capable of repetition, yet evading review.<sup>43</sup> Federal courts have invoked the exception more than 6,000 times since the Supreme Court recognized it.<sup>44</sup> The exception has held the courthouse doors open for litigants challenging residency requirements to vote,<sup>45</sup> election regulations<sup>46</sup> including campaign-finance laws,<sup>47</sup> and, of course, abortion.<sup>48</sup>

The modern doctrine has been packaged into a two-part inquiry. The exception applies where “(1) ‘the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration;’ and (2) ‘there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again.’”<sup>49</sup> The doctrine has proven highly flexible, especially when the Supreme Court views fundamental rights to be at issue.

In the First Amendment context in particular, the Court has invoked the doctrine to essentially condemn past behavior, even though it is highly speculative whether the same complaining party would be subject to the same action again. In doing so, the Court has betrayed a concern with the presence of bad law on the books, even if the immediate controversy that gave rise to the decisions has passed, because letting the bad law stand could affect future conduct and infringe on fundamental rights going forward.

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42. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953).

43. *S. Pac. Terminal Co.*, 219 U.S. at 515.

44. A Westlaw search on Nov. 3, 2021 for federal opinions containing the phrase “capable of repetition, yet evading review” returned 6,684 results.

45. *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972).

46. *Norman v. Reed*, 502 U.S. 279, 288 (1992).

47. *Davis v. FEC*, 554 U.S. 724, 735-36 (2008); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 774 (1978).

48. *Roe v. Wade*, 410 U.S. 113, 125 (1973).

49. *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)).



The Court's decision in *Nebraska Press Ass'n v. Stuart* is a prime example.<sup>50</sup> After the murder of an entire family in a small town in Nebraska, the police quickly arrested a suspect, who was then brought in for his arraignment.<sup>51</sup> The crime captivated the entire 850-person town and its press corps.<sup>52</sup> Fearing that reporting on the preliminary evidence against the defendant might taint the jury pool, the county judge presiding over the arraignment entered an order prohibiting anyone attending the criminal proceedings from publishing information about the evidence introduced.<sup>53</sup> The state district court, where the matter would be tried, entered its own order prohibiting the publication of information regarding the defendant's confession and other information implicating his guilt.<sup>54</sup> On a writ of mandamus, the Nebraska Supreme Court upheld the entry of the district court's order, but narrowed the list of prohibited content slightly.<sup>55</sup> Each of the orders expired at the end of jury selection.<sup>56</sup> Once the case reached the Supreme Court, the criminal trial had concluded in a murder conviction and was on appeal in the Nebraska Supreme Court.<sup>57</sup> The gag order as ultimately modified by the Nebraska Supreme Court had therefore expired.<sup>58</sup>

However, the Supreme Court declined to dismiss the appeal as moot, concluding that it fell within the "capable of repetition, yet evading review" exception.<sup>59</sup> The Court reasoned that the restraint on speech was capable of repetition in "two senses."<sup>60</sup> First, the Court concluded that if the defendant successfully had his conviction reversed and a new trial was held, the trial court might enter another restrictive order.<sup>61</sup> Second, the Court believed that because the Nebraska Supreme Court's decision was still on the books, prosecutors in other cases might seek similar restrictive orders.<sup>62</sup>

This decision illustrates the Court's willingness to flexibly apply mootness when fundamental rights are at stake.<sup>63</sup> What animated the Supreme Court's

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50. 427 U.S. 539 (1976).

51. *Id.* at 542.

52. *Id.*

53. *Id.*

54. *Id.* at 543-44.

55. *Id.* at 544-45.

56. *Id.* at 543, 546.

57. *Id.* at 546.

58. *Id.* at 539.

59. *Id.* at 546-47.

60. *Id.*

61. *Id.* at 546.

62. *See id.* at 546-47.

63. *See supra* notes 43-48 and accompanying text.

decision was its desire to correct the Nebraska Supreme Court's decision and to preclude it from governing any conduct—and thereby infringing on First Amendment rights—in the future. This concern is most apparent in the Supreme Court's second rationale—that because the Nebraska Supreme Court decision was still good law, prosecutors could invoke it in the future to obtain similar orders in entirely separate cases, involving different prosecutors, defendants, and judges.<sup>64</sup>

Even outside the fundamental-rights context, the Supreme Court has employed the capable of repetition, yet evading review exception where the mere existence of a government policy adversely affects a litigant's interests. In *Super Tire Engineering Co. v. McCorkle*, an employer whose workers went on strike challenged a New Jersey law that rendered striking workers eligible for public assistance.<sup>65</sup> The employer claimed that the workers' eligibility for such benefits would prolong the strike and undermine the employer's bargaining position.<sup>66</sup> Before the case went to trial, the strike ended and the employer's need for an injunction evaporated.<sup>67</sup> The Court nonetheless held that the employer who brought suit was entitled to continue litigating the case in pursuit of a declaratory judgment that the statutory scheme was unlawful. The Court reasoned that if review were conditioned on an ongoing strike, the case "most certainly would be of the type presenting an issue 'capable of repetition, yet evading review.'"<sup>68</sup> And because the availability of state assistance for striking workers would "lurk[]" in the background of every collective-bargaining agreement, the employer's claim should be heard.<sup>69</sup> In other words, even though the strike had ended and there was no reason to believe another strike was imminent, because the availability of public assistance to striking workers might undermine the employer's bargaining position, the courts should adjudicate the law's validity. The Court ended its opinion by stating "[t]he judiciary must not close the door to the resolution of the important questions these concrete disputes present."<sup>70</sup>

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64. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546-47 (1976). In order to connect the future, speculative action of other prosecutors to the controversy before the Court, the Court noted that the State was a party to the appeal—presumably implying that the prosecutors were agents of the State and thus represented before the Court in the appeal. *Id.*

65. 416 U.S. 115, 116-17 (1974).

66. *Id.* at 120.

67. *Id.* at 117.

68. *Id.* at 125 (quoting *S. Pac. Terminal Co. v. Interstate Com. Comm'n*, 219 U.S. 498, 515 (1911)).

69. *Id.* at 124.

70. *Id.* at 127.

## 2. *Voluntary Cessation*

Federal courts will also decline to find a case moot if the defendant has ceased the conduct that the lawsuit challenges but could resume the conduct at any time. Through this doctrine, called “voluntary cessation,” the Supreme Court has refused to allow defendants to change their conduct in order to evade review of the legality of their actions.

The foundational case articulating this exception is *United States v. W.T. Grant Co.*<sup>71</sup> In that case, the United States filed three lawsuits against three pairs of corporations, each of which shared a director. The complaints alleged that the companies’ overlapping directorship violated section 8 of the Clayton Act.<sup>72</sup> After the litigation began, the director resigned from the board of three of the companies so that he served on only one board involved in each case.<sup>73</sup> The district court granted summary judgment to the companies on the view that there would be no future anticompetitive activity between the companies, given the director’s resignation.<sup>74</sup>

The Supreme Court held that the case was not moot because the “voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case.”<sup>75</sup> The Court premised this conclusion on three considerations. First, although the defendants in each case ceased the conduct at the heart of the parties’ dispute, the controversy between the parties, including the “dispute over the legality of the challenged practices,” remained.<sup>76</sup> Not only that, but there was a public interest in “having the legality of the practices settled.”<sup>77</sup> And finally, the defendants were free to return to their “old ways.”<sup>78</sup>

Under the voluntary-cessation doctrine, the burden is on the defendant who has voluntarily ceased his illegal conduct to show that “there is no reasonable expectation that the wrong will be repeated.”<sup>79</sup> In later cases, the Court has articulated this test as requiring the defendant to show that it is “absolutely clear

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71. 345 U.S. 629, 632 (1953).

72. *Id.* at 630.

73. *Id.*

74. *Id.* at 630-31.

75. *Id.* at 632.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 633 (quoting *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 448 (2d Cir. 1945)). The Court has described this as a “formidable burden.” *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Friends of the Earth, Inc. v. Laidlaw Env’t Servs.*, 528 U.S. 167, 190 (2000)).

that the allegedly wrongful behavior could not reasonably be expected to recur.”<sup>80</sup> In other words, when a defendant has at least arguably attempted to prevent the plaintiff from having her rights adjudicated by altering his behavior, the Court will dismiss the case as moot only in exceptional circumstances.<sup>81</sup>

### B. Exception to Sovereign Immunity

Like the Supreme Court’s Article III requirements, sovereign immunity is also subject to exception where necessary to vindicate federal, and especially constitutional, rights.

The Court’s 1908 decision in *Ex parte Young* provides an exception to sovereign immunity for suits against state officials in their official capacities to enjoin the enforcement of unconstitutional state laws.<sup>82</sup> In that case, the Court sustained a federal-court injunction against the Attorney General of Minnesota that prohibited him from enforcing an allegedly unconstitutional law regulating railroad fares. The Court held that a suit against a state official in his official capacity was not a suit against the state barred by the Eleventh Amendment.<sup>83</sup> The Court’s decision was animated by at least two important values: (1) that federal courts should be able to restrain state officials from violating federal rights;<sup>84</sup> and (2) that litigants should not have to await the enforcement of a law before they are able to challenge its legality.<sup>85</sup>

The *Ex parte Young* exception to sovereign immunity exists to “permit the federal courts to vindicate federal rights.”<sup>86</sup> The doctrine has been described as “one of the Court’s most important decisions”<sup>87</sup> and is exceptionally critical to civil-rights suits.<sup>88</sup>

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80. *United States v. Concentrated Phosphate Exp. Ass’n*, 393 U.S. 199, 203 (1968).

81. *See, e.g., Already, LLC*, 568 U.S. at 91 (calling the voluntary cessation standard a “formidable burden” on the defendant).

82. *Ex parte Young*, 209 U.S. 123, 155-56 (1908).

83. *Id.* at 156-57.

84. *Id.* at 156.

85. *Id.* at 147-48.

86. *Va. Office for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 254-55 (2011).

87. Charlton C. Copeland, *Ex Parte Young: Sovereignty, Immunity, and the Constitutional Structure of American Federalism*, 40 U. TOL. L. REV. 843, 846 (2009).

88. *See* Kenneth Culp Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435, 437 (1962) (describing *Ex parte Young* as a “mainstay” in challenging governmental actions); John F. Duffy, *Sovereign Immunity, The Officer Suit Fiction, and Entitlement Benefits*, 56 U. CHI. L. REV. 295, 333 n.152 (1989) (quoting HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 3 n.7 (1973)) (describing *Ex parte Young* as “‘the fountainhead’ of federal power to enforce the Civil Rights Act”).

Of course, *Ex parte Young* was only necessary because of the Supreme Court’s broad interpretation of sovereign immunity, precluding suits against states by their own citizens.<sup>89</sup> And the *Ex parte Young* doctrine is not without limits. It requires that the state official being sued have “some connection” to the enforcement of the law or conduct being challenged.<sup>90</sup> This should not be an onerous requirement because it does not demand that the officer be tasked with the enforcement of the very law being challenged; the officer’s enforcement connection can arise out of “general law,” including by virtue of the official’s general authority.<sup>91</sup> But it complicates actions to enjoin purportedly unconstitutional laws pre-enforcement because it requires plaintiffs to identify who *could* in theory enforce the law against them in the future. It is also unclear, as I discuss in more detail *infra* Parts III and IV, whether state judges can be enjoined under the *Ex parte Young* exception.<sup>92</sup>

### III. LEGISLATION EVADING REVIEW

Recognizing the limitations of federal courts’ jurisdiction to enforce constitutional rights under the current standing regime, state legislators have begun to draft laws that they know are of questionable legality with the aim of burdening constitutional rights while simultaneously precluding pre-enforcement review of the laws.<sup>93</sup>

The most recent, prominent, and egregious example of this maneuvering is Texas’s S.B. 8, which effectively banned abortions in the state, but did so in a way that has (so far) evaded pre-enforcement review. The law’s mere existence on the books significantly chills the exercise of the right to an abortion recognized in *Roe v. Wade*.<sup>94</sup> But because it assigns enforcement exclusively to private parties, it has evaded pre-enforcement review.

S.B. 8 was purportedly enacted to further Texas’s “compelling interests from the outset of a woman’s pregnancy in protecting the health of the woman and

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89. See *supra* note 37.

90. *Ex parte Young*, 209 U.S. 123, 157 (1908).

91. *Id.*

92. See *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021); see *id.* at 2496 (Roberts, C.J., dissenting).

93. See Ruth Graham, Adam Liptak & J. David Goodman, *Lawsuits Filed Against Texas Doctor Could Be Best Tests of Abortion Law*, N.Y. TIMES (Sept. 21, 2021), <https://www.nytimes.com/2021/09/21/us/texas-abortion-lawsuits.html> [<https://perma.cc/9L8U-2X34>] (illustrating one proponent’s view that the “notion behind the law was that the mere threat of liability would be so intimidating that providers would simply comply”).

94. 568 U.S. 85, 91 (1973).

the life of the unborn child.”<sup>95</sup> It prohibits physicians from “knowingly” performing or inducing an abortion if the physician has detected fetal cardiac activity or has failed to perform a test that would detect such activity.<sup>96</sup>

Although the law creates a prohibition on conduct, which would normally be enforced by the government through either criminal or civil penalties, S.B. 8 assigns enforcement of its prohibitions to private parties and private parties only.<sup>97</sup> The law authorizes any private person to bring a civil action against any physician who violates the abortion prohibition, any other person who “aids or abets” the performance of an abortion, or any person who intends to do either.<sup>98</sup> The law is unusually explicit that it may be enforced “exclusively through the private civil actions described” therein.<sup>99</sup> It incentivizes private enforcement through a guarantee of no less than \$10,000 in damages upon proving a violation of the law.<sup>100</sup> This delegation of enforcement was a “shrewd way of getting around *Roe*” that has thus far prevented the law from being challenged in court before enforcement.<sup>101</sup>

Recognizing the immediate chill that this law would have on the access to abortion in Texas, several reproductive-rights groups brought suit on behalf of abortion providers and advocates in an effort to enjoin the law before its effective date.<sup>102</sup> They sued a state-court judge and clerk,<sup>103</sup> administrators of various state agencies that regulate the provision of healthcare in Texas, the Attorney General of Texas, and a private resident who was also the director of Right to Life East Texas and who had publicly said he planned to sue under the new law.<sup>104</sup> The defendants all moved to dismiss the case, arguing that there was no federal-court jurisdiction because the plaintiffs lacked standing as to each of the defendants and, on the state defendants’ part, because the action was barred by sovereign immunity.<sup>105</sup>

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95. TEX. HEALTH & SAFETY CODE ANN. § 171.202(3) (West 2021).

96. *Id.* § 171.204.

97. *Id.* §§ 171.207(a), 171.208.

98. *Id.* § 171.208(a)(1)-(3).

99. *Id.* § 171.207(a).

100. *Id.* § 171.208(b)(2).

101. Mimi Swartz, *Meet the Legal Strategist Behind the Texas Abortion Ban*, TEX. MONTHLY (Sept. 5, 2021), <https://www.texasmonthly.com/news-politics/meet-the-legal-strategist-behind-the-texas-abortion-ban> [<https://perma.cc/QSB3-X6ED>].

102. *Whole Woman’s Health v. Jackson*, No. 1:21-CV-616-RP, 2021 WL 3821062, at \*1 (W.D. Tex. Aug. 25, 2021), *cert. granted before judgment*, No. 21-463, 2021 WL 4928617 (U.S. Oct. 22, 2021).

103. Shortly after filing their complaint, the plaintiffs moved to certify a defendant class of all Texas state judges and clerks of court. *Id.*

104. *Id.* at \*6.

105. *Id.* at \*8.

The district court rejected all of these arguments. As to the Attorney General and the regulatory defendants, the court found that they were tasked with enforcing violations of Chapter 171 of the Texas Health and Safety Code, which S.B. 8 amended to include the abortion ban.<sup>106</sup> Therefore, state-executive defendants had sufficient enforcement authority to trigger the *Ex parte Young* exception to sovereign immunity and to tie them to the plaintiffs' harm—the anticipated violation of constitutional rights arising from S.B. 8's enforcement.<sup>107</sup> As to the private-party defendant, the court held that the plaintiffs had standing given the individual's stated intent to sue to enforce S.B. 8.<sup>108</sup> Finally, as to the judicial defendants, the court held that in adjudicating civil-enforcement actions under S.B. 8, the judicial defendants would enforce the law, tying them sufficiently to the act for standing and *Ex parte Young* purposes.<sup>109</sup> The court relied on federal precedent suggesting that actions for prospective relief under § 1983 may be available to enjoin state judicial actors from enforcing state statutes, “even through ministerial duties.”<sup>110</sup> The court also relied on § 1983's explicit contemplation of injunctive relief against judicial officers who “violate[] a declaratory decree or against whom declaratory relief is not available.”<sup>111</sup>

The defendants filed an interlocutory appeal challenging the district court's denial of sovereign immunity and requested an emergency stay of proceedings. The Fifth Circuit granted the stay request without providing any justification on August 29, 2021.<sup>112</sup> The court also stayed proceedings against the private-party defendant pending appeal, reasoning that it was collateral to the state-executive defendants' Eleventh Amendment interlocutory appeal, despite the fact that the immunity defense did not extend to the private party.<sup>113</sup>

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<sup>106.</sup> *Id.* at \*9.

<sup>107.</sup> *Id.* at \*8-13.

<sup>108.</sup> *Id.* at \*23-26.

<sup>109.</sup> *Id.* at \*14-23.

<sup>110.</sup> *Id.* at \*18 (collecting cases supporting the proposition).

<sup>111.</sup> *Id.*

<sup>112.</sup> *Whole Woman's Health v. Jackson*, No. 21-50792, 2021 WL 3919252 (5th Cir. Aug. 29, 2021). The court issued a written decision explaining its orders on September 10, 2021. *See Whole Woman's Health v. Jackson*, 13 F.4th 434 (5th Cir. 2021).

<sup>113.</sup> *Whole Woman's Health*, 13 F.4th at 445-47. The court reasoned that the individual's appeal could be appended to the interlocutory-immunity appeal because he raised standing arguments that were “inextricably intertwined” with the entire suit. *Id.* at 447. The court declined, however, to decide those issues in its written decision denying the plaintiffs' requests to enjoin the law pending appeal and to lift stays on the district-court proceedings. *Id.* at 444 n.14.

On the eve of the bill's effective date, the plaintiffs sought an emergency injunction in the Supreme Court.<sup>114</sup> On September 1, 2021 – the day S.B. 8 became effective – the Court declined the application for emergency injunctive relief.<sup>115</sup> Acknowledging that the lawsuit raised “serious questions regarding the constitutionality of the Texas law at issue,” the Court nonetheless found that the plaintiffs had not demonstrated that they were likely to succeed on the merits of their suit because the suit presented “complex and novel antecedent procedural questions on which [plaintiffs] have not carried their burden.”<sup>116</sup>

The Court did not describe in detail these “complex and novel” questions, but its concerns seemed to amount to an uncertainty as to whether the defendants before it possessed the authority or, in the case of the private individual, an imminent plan, to enforce S.B. 8, and thus an uncertainty whether the plaintiffs had standing to sue these defendants. The Court started by explaining that it could “enjoin individuals tasked with enforcing laws, not the laws themselves.”<sup>117</sup> This was a nod to the Court's insistence that courts do not actually “strike down” laws; rather, they adjudicate disputes between the parties before them and, in facial challenges, they necessarily opine on the challenged law's legality in doing so.<sup>118</sup> Next, the Court explained that it was “unclear” whether the governmental defendants could or would seek to enforce S.B. 8.<sup>119</sup> This was a nod both to the causation and redress prongs of standing, as well as to the *Ex parte Young* exception to sovereign immunity. Under modern standing doctrine, if the government officials cannot enforce the law, then they cannot be said to “cause” the chill of the exercise of plaintiffs' constitutional rights.<sup>120</sup> And if they

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114. See Emergency Application to Justice Alito for Writ of Injunction and, in the Alternative, to Vacate Stays of District Court Proceedings at 3, *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (Aug. 30, 2021) (No. 21A24).

115. *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (2021).

116. *Id.* at 2495.

117. *Id.* Despite the Court's commitment to the narrowness of its judgments, it is unlikely that the Court will embrace the theory set forth in the *Writ-of-Erasure Fallacy* and in the text of S.B. 8 that one can be held liable for violating a statute during a time in which the statute has been declared unconstitutional, when that decision is later overturned. See Mitchell, *supra* note 30, at 938; TEX. HEALTH & SAFETY CODE ANN. § 171.208(e)(3) (West 2021). To do so would signal to the public that opinions of the federal judiciary cannot be relied on – a direct affront to the rule of law and directly contrary to the Justices' recent public commitment to propping up the Court's legitimacy. See Ruth Marcus, *The Supreme Court's Crisis of Legitimacy*, WASH. POST (Oct. 1, 2021, 1:50 PM EST), <https://www.washingtonpost.com/opinions/2021/10/01/supreme-court-crisis-of-legitimacy> [<https://perma.cc/6495-T2TN>].

118. See Mitchell, *supra* note 30, at 935.

119. *Whole Woman's Health*, 141 S. Ct. at 2495.

120. *E.g.*, *California v. Texas*, 141 S. Ct. 2104, 2114 (2021) (requiring a showing of substantial likelihood of future enforcement).



have no enforcement authority as to S.B. 8, then the exception to sovereign immunity does not apply.<sup>121</sup> Finally, the Court noted that the private individual had filed an affidavit with the Court saying he had no “present intention” to enforce S.B. 8, even though that affidavit contradicted evidence before the district court.<sup>122</sup>

Also animating the Court’s unwillingness to weigh in on the merits was its uncertainty whether judges could be enjoined under the *Ex parte Young* exception to sovereign immunity. The Court cited only the decision in *Ex parte Young* itself to support this point, choosing not to engage with the district court’s persuasive explanation why precedent supported the plaintiffs’ right to sue the state-court judges.<sup>123</sup>

The hypertechnical standing regime that the Court has created over the last fifty years, as well as its textual sovereign-immunity jurisprudence, allowed the Court to insist that the plaintiffs show beyond doubt that the individual defendants they sued had the authority to enforce the challenged law and that enjoining those very individuals from enforcing S.B. 8 would remedy the plaintiffs’ harm.<sup>124</sup> These “novel” questions allowed the Court to ignore the reality that the plaintiffs brought suit because they were harmed by the existence of S.B. 8 on the books.

In other words, the Court willfully refused to see the forest for the trees. The Court asked whether *technically speaking* there was sufficient traceability in this case, instead of acknowledging that *practically speaking* a declaration from the Court that S.B. 8 was egregiously unconstitutional and an affront to Supreme Court precedent would give the plaintiffs what they desperately needed.

Seeing the success of S.B. 8 both in shutting down abortions in Texas and flummoxing the federal courts, several states have announced their intention to draft legislation like S.B. 8.<sup>125</sup> And although it is the most prominent, S.B. 8 is

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121. The Court in *Whole Woman’s Health* inexplicably cited *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013), for this point, presumably because, in its view, the plaintiffs did not establish certainly impending harm caused by the particular defendants before it. 141 S. Ct. at 2495.

122. *Whole Woman’s Health*, 141 S. Ct. at 2495; *Whole Woman’s Health v. Jackson*, No. 1:21-CV-616-RP, 2021 WL 3821062, at \*6 (W.D. Tex. Aug. 25, 2021).

123. *Whole Woman’s Health*, 2021 WL 3821062, at \*18; *Whole Woman’s Health*, 141 S. Ct. at 2495.

124. 142 S. Ct. at 2495.

125. Oren Oppenheim, *Which States’ Lawmakers Have Said They Might Copy Texas’ Abortion Law*, ABC NEWS (Sept. 3, 2021, 4:10 PM EST), <https://abcnews.go.com/Politics/states-lawmakers-copy-texas-abortion-law/story?id=79818701> [<https://perma.cc/Y83K-BJTA>] (noting lawmakers in Arkansas, Florida, South Dakota, Idaho, Indiana, and Oklahoma have called for copycat legislation); Michael Smith & Jonathan Levin, *Florida Lawmaker Proposes Abortion Ban that Mimics Texas SB-8 Law*, TIME (Sept. 22, 2021, 11:24 PM EST), <https://time.com/6100983/florida-abortion-bill-texas-sb8> [<https://perma.cc/NV54-RFSG>] (discussing proposed legislation in Florida).

not the only example of a law that significantly chills constitutional rights, but whose pre-enforcement review is complicated by modern standing doctrine. Republican lawmakers in several states have granted individuals private rights of action to deter conduct that they disfavor. Others laws chilling constitutional rights include: A law in Idaho creating a cause of action for parents to sue schools for providing “venues” for speakers who advance “any racist or sexist concept,” in order to ban the discussion of anything that could be characterized as Critical Race Theory; a law in Florida under which students can sue their schools for requiring them to playing sports with transgender athletes; and a law in Tennessee allowing students, teachers, and public-school employees to sue for having to share a bathroom with a transgender person.<sup>126</sup> Professors Jon D. Michaels and David L. Noll have deemed laws that attempt to chill disfavored behavior through the prospect of private civil litigation “rights-suppressing laws.”<sup>127</sup>

Rights-suppressing laws may have only gained traction in Republican-controlled legislatures, but they are not just a problem for Democratic ideals. Blue-state legislatures could just as easily draft laws granting private rights of action against anyone possessing a gun, for instance, thus burdening the Second Amendment right.<sup>128</sup> In other words, the “novel” questions the Court initially declined to answer in *Whole Woman’s Health v. Jackson*, if not definitively answered by the Court in the certiorari before judgment proceedings in that case, may soon become the subject of recurrent litigation.

#### IV. ORDERING CONDUCT, YET EVADING REVIEW

The Supreme Court should continue its tradition of flexibly applying Article III and sovereign-immunity limitations to causes of action that seek to protect fundamental rights, but otherwise lack a clear path to review. When laws order conduct, yet evade review, litigants should be unambiguously allowed to sue state-court judges to enjoin their enforcement. Without having to decide

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126. See Jon D. Michaels & David L. Noll, *Legal Vigilantes and the Institutionalization of Anti-Democratic Politics 2* (Sept. 2, 2021) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3915944](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3915944) [<https://perma.cc/ZDH6-6QHN>].

127. *Id.* at 3; see generally Maya Manian, *Privatizing Bans on Abortion: Eviscerating Constitutional Rights Through Tort Remedies*, 80 TEMP. L. REV. 123 (2007) (discussing the phenomenon of private-tort actions that substantially burden constitutional rights and suggesting a right of action against state legislatures).

128. See Julia Kaye & Marc Hearron, *Even People Who Oppose Abortion Should Fear Texas’s New Ban*, WASH. POST (July 19, 2021, 8:56 AM EST), <https://www.washingtonpost.com/outlook/2021/07/19/texas-sb8-abortion-lawsuits> [<https://perma.cc/7J5-T4GV>] (noting a law that creates a roadmap to target any federal right, including free speech and gun rights).

whether judges should *always* be subject to the *Ex parte Young* exception, the Court should hold that under these limited circumstances, they are.

This is a rather modest proposal. Recognizing an “ordering conduct, yet evading review” exception to sovereign immunity would not require the Court to overrule any precedent in the standing or sovereign-immunity realms. Rather, it would simply provide the Court with added justification for resolving a currently open question in favor of jurisdiction.

The legal foundations for this doctrine already exist. First, the Court noted that it is an open question whether judges should be subject to suit under the *Ex parte Young* exception to sovereign immunity. The majority ruling explained that it is not “clear whether, under existing precedent” the Court could enjoin state-court judges in the context of the *Whole Woman’s Health* challenge.<sup>129</sup> As noted above, the Court cited only *Ex parte Young* itself for this uncertainty, failing to grapple with the district court’s persuasive reasoning that precedent supported the plaintiffs’ right to sue the state-court judges.<sup>130</sup>

*Ex parte Young* found “ample justification” to hold that state officers, who 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.<sup>131</sup> The adjudication of a lawsuit under an unconstitutional law falls comfortably within this definition.

Indeed, while purely private discriminatory conduct has been exempted from constitutional restraints,<sup>132</sup> Supreme Court precedent makes clear that

129. *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021).

130. See *Whole Woman’s Health v. Jackson*, No. 1:21-CV-616-RP, 2021 WL 3821062, at \*18 (W.D. Tex. Aug. 25, 2021), *cert. granted before judgment*, No. 21-463, 2021 WL 4928617 (U.S. Oct. 22, 2021). The decision was emblematic of the Court’s “shadow docket,” through which it disposes of thousands of cases per term by short orders and without the benefit of full briefing or oral argument. See *Texas’s Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 2 (2021) (testimony of Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas School of Law), <https://www.justsecurity.org/wp-content/uploads/2021/09/Vladeck-SJC-Testimony-09-29-2021.pdf> [<https://perma.cc/3ABH-AMBE>]. In dissent in *Whole Woman’s Health*, Justice Kagan argued that the lightly reasoned majority decision was “emblematic of too much of th[e] Court’s shadow-docket decisionmaking – which every day becomes more unreasoned, inconsistent, and impossible to defend.” *Whole Woman’s Health*, 141 S. Ct. at 2500 (Kagan, J. dissenting).

131. 209 U.S. 123, 155-56 (1908).

132. See *United States v. Cruikshank*, 92 U.S. 542, 554-55 (1876) (holding that the Fourteenth Amendment applies only to state action); *Civil Rights Cases*, 109 U.S. 3, 8-25 (1883) (holding that neither the Thirteenth Amendment nor Fourteenth Amendment reaches purely private discrimination). *But see* Michael C. Dorf, *A Modest Proposal: Extend Ex Parte Young to Cover*

judicial enforcement of an otherwise private matter confers the requisite state action to implicate the Constitution.<sup>133</sup> In *Shelley v. Kraemer*, the Court held that judicial enforcement of racially restrictive covenants violated the Fourteenth Amendment on the basis that, through the courts, the state had “made available to such individuals the full coercive power of government to deny to petitioners” the right to buy and sell property on the basis of race.<sup>134</sup> More recently, the Court held that the enforcement of state-created legal obligations through the power of the state courts unambiguously constitutes state action under the Fourteenth Amendment.<sup>135</sup> Given these precedents, state courts are clearly without authority to adjudicate cases brought under a patently unconstitutional law. That brings them squarely within the *Ex parte Young* exception.<sup>136</sup>

Moreover, laws that order conduct, yet evade review, implicate the prudential considerations that animate the Article III and sovereign-immunity exceptions discussed in Part II. Indeed, precedent suggests that a limited exception is appropriate here. First, the state has passed an unconstitutional law that, without a jurisdictional exception, would be unreviewable until *after* enforcement proceedings had already commenced against a party. The parallels to *Ex parte Young* are undeniable.<sup>137</sup> Second, would-be plaintiffs suffer ongoing harm because of the unconstitutional state law. Like in the “capable of repetition, yet evading review” context, the Court should not throw its hands in the air at the prospect of ongoing harm that nonetheless evades review.<sup>138</sup> Third, the reason that pre-enforcement review is complex and potentially unavailable is because of the state’s conduct. As in the “voluntary cessation” context, a party that otherwise inflicts

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*the Likes of Texas Bounty Hunters*, DORF ON L. (Sept. 9, 2021), <http://www.dorfonlaw.org/2021/09/a-modest-proposal-extend-ex-parte-young.html> [<https://perma.cc/3GP9-6B6L>] (proposing to extend *Ex parte Young* actions to private citizens).

133. See *Shelley v. Kraemer*, 334 U.S. 1, 18-19 (1948); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 668 (1991).

134. 334 U.S. at 19. Patrick O. Patterson has persuasively argued that *Shelley* “stands for the proposition that the state itself violates the Constitution when it adopts or enforces an unconstitutional law.” Patrick O. Patterson, *The Texas Abortion Law and Shelley v. Kraemer*, ACS EXPERT F. (Sept. 21, 2021), <https://www.acslaw.org/expertforum/the-texas-abortion-law-and-shelley-v-kraemer> [<https://perma.cc/8QAG-VEPD>].

135. *Cohen*, 501 U.S. at 668.

136. See 209 U.S. 123, 159 (1908) (“The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the State in its sovereign or governmental capacity.”).

137. See *supra* Section II.B (arguing that *Ex parte Young* was concerned with providing a forum for federal review of unconstitutional state action and providing a mechanism for pre-enforcement review).

138. See *supra* Section II.A.1.

harm should not be allowed to evade review through procedural manipulation.<sup>139</sup>

In dicta in *Ex parte Young*, the Court clarified that the right it recognized to enjoin a state official from commencing suit in certain circumstances did not “include the power to restrain a court from acting in any case brought before it.”<sup>140</sup> According to the Court, “an injunction against a state court would be a violation of the whole scheme of our Government.”<sup>141</sup> This passage should not be taken to preclude the relief proposed here for three reasons. First, the language surrounding these passages makes clear that the Court was clarifying that in the event a state official who has been enjoined from bringing suit nonetheless brings suit, the injunction against the official does not bind the state court.<sup>142</sup> Second, the Court could not have meant that an injunction against a state court is always a violation of the scheme of government because it had just acknowledged several circumstances in which federal-court injunctions against state courts are appropriate.<sup>143</sup> And third, the Court has the authority, of course, to clarify or revisit this dicta when applying the principles proposed in this Essay.

Once judges are held to be proper defendants for purposes of the “ordering conduct, yet evading review” exception, plaintiffs would have little trouble establishing standing. Take *Whole Woman’s Health v. Jackson*. The plaintiffs – abortion providers and those who support patients in need of an abortion – can establish injury in fact based on imminent enforcement action against them for engaging in conduct in which they would otherwise normally engage.<sup>144</sup> They can also assert third-party standing on behalf of putative patients whose constitutional right to an abortion has been unduly burdened by S.B. 8.<sup>145</sup>

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<sup>139</sup>. See *supra* Section II.A.2.

<sup>140</sup>. 209 U.S. at 163.

<sup>141</sup>. *Id.*

<sup>142</sup>. See *id.* (“If an injunction against an individual is disobeyed, and he commences proceedings before a grand jury or in a court, such disobedience is personal only, and the court or jury can proceed without incurring any penalty on that account.”).

<sup>143</sup>. See *id.* at 161–62.

<sup>144</sup>. See, e.g., *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 392–93 (1988) (finding standing where the very existence of an allegedly unconstitutional law causes individuals to refrain from exercising constitutional rights); *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979) (holding that plaintiffs must show a “realistic danger” of direct injury from the challenged statute but need not await consummation of said injury).

<sup>145</sup>. The Court has “long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations,” and it has “generally permitted plaintiffs to assert third-party rights in cases where the ‘enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties’ rights.” *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2118–19 (2020) (quoting *Warth v. Seldin*, 422 U.S. 490, 510 (1975)).

As a practical matter, plaintiffs' harm is caused by the existence of S.B. 8 on the books. But even accepting that the mere existence of a law separate from its prospect of enforcement may be insufficient to establish causation under modern standing doctrine, the plaintiffs can establish standing through the prospect of a state judge adjudicating a claim against them under S.B. 8.

Finally, the plaintiffs' harm would be redressed by an injunction against the law's enforcement. While the Supreme Court has taken an increasingly restrictive view of the practical extent of its judgments,<sup>146</sup> suing even one state-court judge should be enough to redress the plaintiffs' harm. That is because the law does not require that a favorable judgment ameliorate *all* harm against the plaintiff in order to satisfy Article III—some relief is enough.<sup>147</sup> And Supreme Court decisions are binding on state courts as to issues of federal law.<sup>148</sup>

### CONCLUSION

Recognizing a limited right to sue state judges for injunctive relief to challenge a law that otherwise orders conduct, yet evades review, would preserve fundamental rights and the supremacy of federal law. A decision to do so would be consistent with precedent and would continue the Court's tradition of flexibly applying jurisdictional bars to litigation where federal rights might otherwise not be adjudicated. Not doing so would not only frustrate the rights at stake in the *Whole Woman's Health* case, but would invite legislatures nationwide to similarly target their disfavored rights.

*Assistant Counsel, NAACP Legal Defense & Educational Fund, Inc., J.D. Columbia Law School 2015. Many thanks to Sam Spital, Eric Konopka, Michael Pfautz, William Yeomans, and the editors of the Yale Law Journal for helpful comments and encouragement.*

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146. See *supra* text accompanying notes 30-31.

147. See, e.g., *Moody v. Holman*, 887 F.3d 1281, 1287 (11th Cir. 2018) (noting that Article III does not require “complete” redress).

148. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).