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How Do You Solve a Problem Like SB8? Flagrantly Unconstitutional Laws, Procedural Scheming, and the Need for Pre-Enforcement Offensive Litigation

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HOW DO YOU SOLVE A PROBLEM LIKE S.B. 8? FLAGRANTLY UNCONSTITUTIONAL LAWS, PROCEDURAL SCHEMING, AND THE NEED FOR PRE-ENFORCEMENT OFFENSIVE LITIGATION

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Reproductive rights are facing multiple existential threats. While the Supreme Court has overturned the constitutional right to pre-viability elective abortions in Dobbs v. Jackson Women's Health Organization, *in Texas the ability to obtain a pre-viability abortion vanished almost ten months earlier. With the enactment of S.B. 8, the so-called "Texas Heartbeat Act," abortions after approximately the sixth week of pregnancy, including those that result from rape or incest, were banned months before the Court ruled in* Dobbs. *Despite being clearly unconstitutional under the then-existing precedent of*

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Roe v. Wade *and* Planned Parenthood of Southeastern Pennsylvania v. Casey, *the Texas law was allowed to go into effect because of a unique and unprecedented scheme of private enforcement. This strategy, which was designed to insulate the State from responsibility for implementing and enforcing its regulatory regime, enabled Texas to evade judicial review for months while* Casey *and* Roe *were still the law of the land. While the Court refused to enjoin state judges and private actors from enforcing this law, abortion providers in Texas and the women they serve were irreparably harmed. Abortion providers, as well as anyone else sued under the law for "aiding and abetting" an abortion, faced the danger of being forced into a defensive posture to assert their constitutional arguments and being subjected to burdensome litigation, attorney's fees, and potential liability, with no guarantee that an appellate court would vindicate the then-constitutionally protected right to a pre-viability abortion. This article argues that federal legislation authorizing offensive pre-enforcement litigation is necessary when a state has usurped the federal power of defining constitutional rights by developing such an elaborate procedural scheme of private enforcement, as Texas has done with the enactment of S.B. 8 by prohibiting the vast majority of pre-viability abortions and deputizing private individuals to enforce its anti-abortion agenda, thereby eliminating the possibility of injunctions against State actors.*

INTRODUCTION

This is the way abortion rights end: not with a bang, but a whimper. While the Supreme Court abolished the constitutional right to elective pre-viability abortions in *Dobbs v. Jackson Women's Health Organization*[1] on June 24, 2022, almost ten months earlier, on the night of August 31, 2021, reproductive rights advocates, abortion opponents, journalists, and myriads of Texas women[2] waited to see if abortion would become functionally illegal in the country's second

1. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022).

2. The author recognizes that non-binary people, trans men, genderfluid and genderqueer individuals, as well as other people who do not identify as a "woman" may also become pregnant and seek abortions. The use of the terms "pregnant women," "women," "she/her" pronouns, and other related phrases is not meant to be exclusionary but reflects the language of almost fifty years of legislation and judicial decisions regarding abortion since Roe v. Wade, 410 U.S. 113 (1973), as well as the misogyny which drives many abortion restrictions.

most populous state.[3] It turns out that all of the "hysterical women"[4] who had long warned of the Republicans' plan to fill the Supreme Court with justices committed to undoing the legal right to an abortion were correct. With the Court's failure to act on an emergency appeal from abortion providers,[5] millions of women lost the then-constitutionally protected right to obtain a pre-viability abortion.[6] Nearly fifty years ago, in *Roe v. Wade*, the Supreme Court ruled that Texas could not prohibit abortions prior to a fetus's ability to survive outside its mother's womb.[7] However, through a devious scheme of procedural wrangling, the Court allowed Texas to accomplish indirectly what it was barred from achieving directly: a near-total ban on abortions in the state, signaling the imminent reversal of a half-

3. S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021).

4. "During [the last three Supreme Court] confirmation fights, progressives were mocked for warning *Roe* was on the chopping block. Their warnings are looking prescient now, considering the Texas action and with a coming Mississippi case which will allow the [C]ourt to formally overturn *Roe*, if it so chooses." Tierney Sneed, *Supreme Court Ruling on Texas Law Was the Result of Decades of Pressure from Anti-Abortion Groups to Shape the Court*, CNN (Dec. 10, 2021, 10:43 AM), https://www.cnn.com/2021/09/04/politics/abortion-legal-strategy-roe-v-wade-texas-abortion-ban/index.html. Senator Ben Sasse, a Republican representing Nebraska, accused women protesting Justice Kavanaugh's confirmation to the Supreme Court of being hysterical, a gendered term long used to dismiss women's concerns, rob them of their bodily autonomy, and exclude them from political debate *See* Press Release, Ben Sasse, Sen., Sasse on Kavanaugh Hearing: "We Can and We Should Do Better Than This" (Sept. 4, 2018), https://www.sasse.senate.gov/public/index.cfm/2018/9/sasse-on-kavanaugh-hearing-we-can-and-we-should-do-better-than-this (describing "a 31-year tradition" of "screaming protestors saying, 'Women are going to die' at every [Supreme Court confirmation]" and "[t]he hysteria around Supreme Court confirmation hearings" as "a fundamental misunderstanding of the role of the Supreme Court in American life now"); *see also* Alison Espach, *What It Really Means When You Call a Woman "Hysterical"*, VOGUE (Mar. 10, 2017), https://www.vogue.com/article/trump-women-hysteria-and-history (detailing the dark and complicated history of women being labeled hysterical, from the ancient Greek belief that the uterus was the origin of all disease, medieval witch trials, nineteenth century diagnoses of "hysteria" to suppress the burgeoning feminist movement, to insults lobbed by modern politicians in an attempt to shut down criticism and dissent).

5. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021).

6. *See* Chloe Atkins, *Texas Abortion Clinics Turning Away Patients as Strict New Law Takes Effect*, NBC NEWS (Sept. 1, 2021, 2:06 AM), https://www.nbcnews.com/politics/politics-news/texas-abortion-clinics-turning-away-patients-ahead-draconian-new-law-n1278184 (explaining that "7 million Texas women of reproductive age will lose access to abortion after six weeks of pregnancy, forcing those seeking to end their pregnancy to travel hundreds of miles out of state for their abortion, if they can afford to do so").

7. *Roe*. 410 U.S. at 163–65 (analyzing the State's interest in protecting fetal life, determining that it becomes compelling only after viability, and declaring that a State may "proscribe abortion during that period, except when necessary to preserve the life or health of the mother").

century of abortion rights precedent in the term's later decision in *Dobbs*.[8]

The belated brief opinion issued nearly one day after Texas's so-called "Heartbeat Bill"[9] (S.B. 8 or "the Act")[10] went into effect fails to mention either *Roe* or *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[11] the Court's then-current precedent on abortion rights. Instead, the opinion claims that although the abortion providers challenging the Texas law raised serious questions regarding its constitutionality, "complex and novel antecedent procedural issues" prevented the Court from providing injunctive relief, allowing the Texas law to become operative.[12] The effects were immediate; two hours before the Act took effect, abortion providers' waiting rooms were filled with patients urgently seeking care while protestors gathered outside, shining lights in the parking lot.[13] Anti-abortion advocates immediately set up hotlines and websites for people to anonymously report on abortions prohibited by the Act.[14] All day long, the physicians and staff at many clinics had been working nonstop in an attempt to provide care to as many women as possible

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

9. The term "fetal heartbeat" is defined as "cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac." TEX. HEALTH & SAFETY CODE ANN. § 171.201 (West 2021). Many physicians specializing in women's reproductive health maintain that the term "fetal heartbeat" is misleading, as "embryo" is the scientific term for that stage of development. Furthermore, the flickering detected on an ultrasound that early in the pregnancy is electrical activity from the ultrasound machine and not a functional cardiovascular system and functional heart, since embryos at that stage of development lack the cardiac valves necessary to make the noise that physicians hear when they listen to a patient's heart. *See* Selena Simmons-Duffin & Carrie Feibel, *The Texas Abortion Ban Hinges on 'Fetal Heartbeat.' Doctors Call That Misleading*, NAT'L PUB. RADIO HEALTH SHOTS (May 3, 2022, 4:55 PM), https://www.npr.org/sections/health-shots/2021/09/02/1033727679/fetal-heartbeat-isnt-a-medical-term-but-its-still-used-in-laws-on-abortion. However, this article uses the terms "heartbeat" and "fetal heartbeat" to describe such electrical activity to discuss S.B. 8 and its prohibition on most pre-viability abortions.

10. TEX. HEALTH & SAFETY CODE ANN. § 171 (West 2021).

11. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022).

12. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021).

13. *Id.* at 2499 n.1 (Sotomayor, J., dissenting) (citations omitted); *see also* Ariane de Vogue, *Texas 6-Week Abortion Ban Takes Effect After Supreme Court Inaction*, CNN (Sept. 1, 2021, 12:20 PM), https://www.cnn.com/2021/09/01/politics/texas-abortion-supreme-court-sb8-roe-wade/index.html.

14. Aimee Picchi, *Texas Abortion Ban Turns Citizens into "Bounty Hunters,"* CBS NEWS (Sept. 3, 2021, 7:22 AM), https://www.cbsnews.com/news/texas-abortion-law-bounty-hunters-citizens (describing Texas Right to Life's website, https://www.prolifewhistleblower.com, which has since been removed by domain hosting service, GoDaddy.com).

while it was still legal to do so.[15] As S.B. 8 became law at midnight, many providers ceased offering abortion care for patients whose pregnancies had exceeded the six week time period, measured from their last menstrual period.[16] Some quit providing abortions entirely[17] and others are now wary of providing other reproductive medical care.[18] The vast majority[19] of pregnant Texans seeking abortions were unable to receive an abortion within state lines and were left to choose between traveling hundreds of miles to a neighboring state's clinic, remaining pregnant against their wishes, or attempting to end their pregnancy without the supervision of a medical professional.[20]

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15. "I saw women coming in desperate. . .willing to wait five or six hours. . .I saw a dedicated staff, who came in at 7:30 in the morning, and worked without stopping. . .until well into the early hours of the very next morning." Sheena Goodyear, *'Chaos' at Texas Abortion Clinic as New Restrictions Come into Effect*, CBC RADIO, (Sept. 3, 2021) (quoting Marva Sadler, senior director of clinical services at Whole Woman's Health), https://www.cbc.ca/radio/asithappens/as-it-happens-the-thursday-edition-1.6162616/chaos-at-texas-abortion-clinic-as-new-restrictions-come-into-effect-1.6162617.

16. *See, e.g.*, *Whole Woman's Health of Austin*, WHOLE WOMAN'S HEALTH (Sept. 1, 2021), https://www.wholewomanshealth.com/clinic/austin ("Abortion care options are restricted by S.B. 8. Abortions will only be provided if no embryonic or fetal cardiac activity is detected in the sonogram we will provide for you."); *Abortion Services*, ALAMO WOMEN'S REPRODUCTIVE CARE (last visited Aug. 26, 2022), https://alamowomensclinic.com ("We cannot provide abortion services to anyone with detectable embryonic or fetal cardiac activity[,] which is typically found at 6 weeks or more from last menstrual period").

17. Elizabeth Zavala et al., *New Texas Abortion Law Sparks Jubilation and Despair*, SAN ANTONIO EXPRESS-NEWS (Sept. 1, 2021), https://www.expressnews.com/news/local/article/SB8-ends-abortions-San-Antonio-Planned-Parenthood-16428197.php (explaining that San Antonio-area Planned Parenthood centers have completely stopped providing abortions).

18. *See* Sarah McCammon, *Doctors Say the Texas Abortion Ban Is Complicating Other Types of Medical Decisions*, NAT'L PUB. RADIO (Oct. 1, 2021, 12:05 PM), https://www.npr.org/2021/10/01/1042209230/federal-judge-weighs-in-on-biden-administrations-attempt-to-block-texas-abortion (describing how S.B. 8 is complicating medical decisions for physicians and their patients when patients are experiencing miscarriage or a non-viable pregnancy due to severe fetal abnormalities).

19. It is estimated that at least 85% of abortion-seeking patients' pregnancies have progressed past the six-week period after which fetal cardiac activity can be detected. *See* Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2498 (2021) (Sotomayor, J., dissenting).

20. The Texas legislature has also advanced legislation aimed at restricting access to abortion-inducing medication. Days before S.B. 8 took effect, the Texas House passed S.B. 4, a bill which would prevent physicians or abortion providers from administering abortion-inducing pills to patients who have been pregnant for more than seven weeks. Mychael Schell, *Legislation Extending Medication Abortion Restrictions Advances in Texas*, THE HILL (Aug. 31, 2021), https://thehill.com/homenews/state-watch/570150-legislation-extending-medication-abortion-restrictions-advances-in-texas.

It is undoubtedly clear that S.B. 8 placed an undue burden on Texas women's ability to obtain an abortion of a non-viable fetus, in clear contravention of the contemporaneous precedent of *Casey*. Yet the law remained in effect because Texas's unprecedented scheme of private enforcement, designed to "insulate the State from responsibility for implementing and enforcing [its] regulatory regime,"[21] thereby evading judicial review, apparently baffled the majority of the Supreme Court and rendered it incapable of action.[22] While the Court refused to act, abortion providers in Texas and the women they serve were irreparably harmed.[23] Abortion providers, as well as anyone else sued under the law for "aiding and abetting" an abortion,[24] faced the threat of being forced into a defensive posture in order to assert their constitutional arguments, subjecting them to burdensome litigation,[25] attorney's fees,[26] and potential liability[27]

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21. *Jackson*, 141 S. Ct. at 2496 (Roberts, C.J., dissenting).
22. *Id.* at 2495.
23. *Id.* at 2497 (Breyer, J., dissenting) (noting that many abortion "clinics will be unable to run the financial and other risks that come from waiting for a private person to sue them under the Texas law; they will simply close, depriving care to more than half the women seeking abortions in Texas clinics"); Elizabeth Nash et al., *Impact of Texas' Abortion Ban: A 14-Fold Increase in Driving Distance to Get an Abortion*, GUTTMACHER INST. (Aug. 4, 2021), https://www.guttmacher.org/article/2021/08/impact-texas-abortion-ban-20-fold-increase-driving-distance-get-abortion (describing how Texas residents whose pregnancies had surpassed the 6-week time period would have to travel much further (an average one-way driving distance of 247 miles as opposed to 17 miles before S.B. 8 took effect) to obtain abortion services, escalating the financial and logistical barriers that many abortion patients must already face and likely increasing the number of women unable to exercise the then-constitutionally protected right to receive a pre-viability abortion).
24. TEX. HEALTH & SAFETY CODE ANN. § 171.208(a)(2) (West 2021) (subjecting any person to civil liability if he or she "knowingly engages in conduct that aids or abets the performance or inducement of an abortion . . . if the abortion [is] in violation of the [prohibition on abortion on fetuses/embryos where cardiac activity is detected], regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of this subchapter").
25. *See Whole Woman's Health v. Jackson*, 556 F. Supp. 3d 595, 607 (W.D. Tex.) (noting that abortion providers feared subjecting themselves and their staff to private enforcement suits and professional discipline for providing "abortions that they believe are constitutionally protected, but are prohibited by S.B. 8"), *denying motion for injunction*, No. 21-50792, 2021 WL 3919252 at*1 (5th Cir.), *denying application for injunctive relief*, 141 S. Ct. 2494 (2021).
26. TEX. HEALTH & SAFETY CODE ANN. § 171.208(i) (West 2021) (prohibiting courts from awarding costs or attorney's fees to any defendant in an action brought under this law); *see also Jackson*, 556 F. Supp. 3d at 607 (noting that plaintiffs allege "potentially ruinous liability for attorney's fees and costs").
27. *See Jackson*, 556 F. Supp. 3d at 607 (noting plaintiffs' allegation that "S.B. 8 incentivizes lawsuits accusing individuals of aiding and abetting prohibited abortions

with no guarantee that an appellate court would vindicate the then-constitutionally protected right to a pre-viability abortion. Although the Justice Department filed suit, challenging the constitutionality of S.B. 8, and seeking both declaratory and injunctive relief, the Act remained in effect.[28] When faced with further attempts by abortion providers to challenge the restrictive law, the Supreme Court repeatedly allowed the law to remain in force,[29] despite

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through generous award of fees to successful claimants."); *Id.* at 624 (noting that "S.B. 8 empowers 'any person' to initiate enforcement actions . . . as those who are politically opposed to [abortion providers] are empowered to sue them for substantial monetary gain" and that "S.B. 8 incentivizes anti-abortion advocates to bring as many lawsuits . . . as possible by awarding private enforcers of the law $10,000 per banned abortion").

28. The complaint filed by the U.S. Justice Department sought:

> [A] declaratory judgment that S.B. 8 is invalid under the Supremacy Clause and the Fourteenth Amendment, is preempted by federal law, and violates the doctrine of intergovernmental immunity. The United States also seeks an order preliminarily and permanently enjoining the State of Texas, including its officers, employees, and agents, including private parties who would bring suit under the law, from implementing or enforcing S.B. 8.

Complaint at 3, United States v. Texas, 556 F. Supp. 3d 605 (W.D. Tex. 2021) (No. 1:21-cv-796). On September 14, 2021, the Justice Department requested emergency injunctive relief "enjoining the enforcement of S.B. 8 . . . to protect the constitutional rights of women in Texas and the sovereign interest of the United States in ensuring that its States respect the terms of the national compact." Emergency Motion for a Temp. Restraining Order or Preliminary Injunction at 1, *Texas*, 556 F. Supp. 3d 605 (No. 1:21-cv-796). On October 6, the district judge issued an order blocking enforcement of the law, *Texas*, 566 F. Supp. 3d at 691; however, this was only a temporary victory for reproductive rights advocates, as the Fifth Circuit issued a stay of the injunction. United States v. Texas, No. 21-50949, 2021 WL 4786458, at *1 (5th Cir. Oct. 14, 2021) (granting a stay of the preliminary injunction pending an expedited appeal). The Supreme Court took up the case, United States v. Texas, 142 S. Ct. 14 (2021), heard oral argument on November 1, and issued a brief, unsigned order dismissing the case as improvidently granted and denied the application to vacate the Fifth Circuit's stay. United States v. Texas, 142 S. Ct. 522 (2021).

29. *See In re* Whole Woman's Health, 142 S.Ct. 701, 702 (2022) (denying a petition for a writ of mandamus that would have ordered the Fifth Circuit to immediately remand the case to the district court). In dissent, Justice Sotomayor noted that this had further delayed a determination of the constitutionality of S.B. 8, as:

> The Fifth Circuit should have immediately remanded this case to the District Court, allowing it to consider whether to issue preliminary relief. But Texas moved to certify to the Supreme Court of Texas the question this Court had just decided: whether state licensing officials had authority under state law to enforce S. B. 8. Texas never asked the Fifth Circuit to certify this question during

acknowledging that certain defendants fell within *Ex parte Young*'s exception to sovereign immunity.[30]

In this article, Part I describes the current status of the national debate over abortion, including the Court's abortion jurisprudence, specifically the undue burden standard for abortion restrictions announced in *Casey*. Additionally, Part I describes the various attempts by abortion opponents to find innovative legal avenues for restricting access to abortion, culminating in the passage of Texas's S.B. 8, and addresses the Supreme Court's recent evisceration of the right to an elective abortion in *Dobbs v. Jackson Women's Health Organization*. Part II analyzes the constitutionality of Texas's S.B. 8 at the time it was enacted, comparing the Texas law to other civil litigation involving state action, namely *Shelley v. Kraemer* and *New York Times v. Sullivan,* as well as detailing the procedural complexities involved in the Texas law and the Supreme Court's denial of emergency injunctive relief under *Ex parte Young*. Finally, Part III argues that offensive pre-enforcement litigation is necessary when states have developed an elaborate procedural scheme of private enforcement to deny people of their constitutionally protected rights and evade judicial review, as Texas did with the enactment of S.B. 8 by prohibiting most pre-viability abortions and deputizing private individuals to enforce its anti-abortion agenda, thereby eliminating the possibility of injunctions against state actors. A potential strategy for combatting the usurpation by states of the federal power to define constitutional rights is also suggested.

I. ABORTION: A NATION DIVIDED

Abortion is a highly contentious and divisive topic in American politics. At the time S.B. 8 was enacted, when asked whether they would describe themselves as "pro-choice" or "pro-life," Americans were nearly evenly split.[31] The sharp divide is echoed in the question

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> its first pass through that court, nor did it ever ask this Court to do so.

Id. at 705 (Sotomayor, J., dissenting).

30. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 535 (2021) (holding that certain defendants "fall within the scope of *Ex parte Young*'s historic exception to state sovereign immunity" as "[e]ach of these individuals is an executive licensing official who may or must take enforcement actions against the petitioners if they violate the terms of Texas's Health and Safety Code, including S. B. 8").

31. After being asked about the circumstances in which they believed abortion should be legal, 49% of respondents described themselves as "pro-choice" and 47% described themselves as "pro-life." *Abortion*, GALLUP (last visited Jul. 14, 2022)

of whether abortion is morally acceptable;[32] nonetheless, a clear majority of Americans supported maintaining the precedent of *Roe v. Wade*, with 58% stating that they did not wish to see this decision recognizing a woman's constitutional right to obtain a pre-viability abortion overturned.[33] Given this longstanding schism, it is unsurprising that both opponents and supporters of abortion rights continue to battle over the issue in courts, at the ballot box, in state legislatures, and in the realm of public opinion.[34] However, despite this national debate and the ensuing politicization of abortion,[35] it remains a common medical procedure.[36]

In examining Texas's S.B. 8, it is necessary to understand the historical background involved in the law, including both the nearly five decades of Supreme Court abortion jurisprudence and attempts by abortion opponents to restrict access to the procedure.

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https://news.gallup.com/poll/1576/abortion.aspx. In 2022, following the leak of the Supreme Court's draft opinion in *Dobbs v. Jackson Women's Health Organization*, the percentage of Americans identifying as "pro-choice" jumped to a near record high of 55%. Lydia Saad, *'Pro-Choice' Identification Rises to Near Record High in U.S.*, GALLUP (Jun. 2. 2022), https://news.gallup.com/poll/393104/pro-choice-identification-rises-near-record-high.aspx.

32. Saad, *supra* note 31 (stating that for the first time in Gallup's polling, most Americans (52%) said that abortion was morally acceptable and a record-low 38% said it was morally wrong). In 2021, when S.B. 8 was enacted, the numbers were more evenly split; *see* Megan Brenan, *Record-High 47% in U.S. Think Abortion Is Morally Acceptable*, GALLUP (Jun. 9, 2021), https://news.gallup.com/poll/350756/record-high-think-abortion-morally-acceptable.aspx (stating that 47% of Americans believe that abortion is "morally acceptable" while 46% believe it is "morally wrong").

33. Only 35% favored overturning the decision. *See* GALLUP, *supra* note 31. Similarly, 58% opposed a ban on abortions after a fetal heartbeat had been detected. Lydia Saad, *Americans Still Oppose Overturning Roe v. Wade*, GALLUP (Jun. 9, 2021), https://news.gallup.com/poll/350804/americans-opposed-overturning-roe-wade.aspx.

34. DAVID S. COHEN & CAROLE E. JOFFE, OBSTACLE COURSE: THE EVERYDAY STRUGGLE TO GET AN ABORTION IN AMERICA 8–9 (2020) (noting that while the nation's most anti-abortion states are "racing one another to ban abortion earlier and earlier in pregnancy . . . some of the country's most abortion-supportive states are . . . working to make abortion as safe, accessible, and protected as possible").

35. *See* Anna North, *How Abortion Became a Partisan Issue in America*, VOX (Apr. 10, 2019, 7:30 AM), https://www.vox.com/2019/4/10/18295513/abortion-2020-roe-joe-biden-democrats-republicans (describing the combination of grassroots activism and establishment political strategy that has led to the increasing political polarization on the issue of abortion).

36. For example, in 2018, 619,591 legal induced abortions were reported to the CDC. There were 189 abortions for every 1000 live births. *See* Katherine Kortsmit et al., *Abortion Surveillance – United States, 2018*, 69 CDC MORBIDITY & MORTALITY WKLY. REP. 1, 5 (2020), https://www.cdc.gov/mmwr/volumes/69/ss/pdfs/ss6907a1-H.pdf.

A. *Abortion Jurisprudence*

1. *Roe v. Wade* and *Planned Parenthood of Central Missouri v. Danforth*

In *Roe v. Wade,* the Supreme Court expanded the fundamental right of privacy, first recognized in *Griswold v. Connecticut,*[37] to include the right to an abortion.[38] The Court ruled the Texas statutes criminalizing abortion unconstitutional,[39] explaining that the right of privacy, "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action," was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[40] *Roe v. Wade* set up a trimester framework for evaluating abortion restrictions, with the abortion decision being left solely to a woman and her doctor in the first trimester, allowing state regulation of "the abortion procedure to the extent that the regulation reasonably relates to the [compelling state interest in] preservation and protection of maternal health" in the second trimester, and allowing the state to ban abortion, except when necessary to preserve the life or health of the mother, once the fetus has reached viability since "the state's important and legitimate interest in potential life" has become compelling.[41]

In *Planned Parenthood of Central Missouri v. Danforth,*[42] the Court affirmed *Roe*'s holding that the decision of whether to have an abortion during the first trimester of pregnancy was to be left solely

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37. Griswold v. Connecticut, 381 U.S. 479 (1965). The Court stated that the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.* at 484. The Court then went on to declare that the marital relationship lay within "the zone of privacy created by several fundamental constitutional guarantees," including the First Amendment's right of association, the Third Amendment's prohibition against quartering soldiers in peacetime, the Fourth Amendment's protection against unreasonable searches and seizures, the Fifth Amendment's prohibition on forced self-incrimination, and the Ninth Amendment's statement that certain rights were retained by the people, despite the fact that they were not enumerated in the Bill of Rights. *Id.* at 484–85. The Connecticut laws were ruled unconstitutional due to their interference with marital privacy. The laws' prohibition of the use of contraceptives was said to have a "maximum destructive impact" upon the marital relationship and to be "repulsive to the notions of privacy" surrounding marriage. *Id.* at 485–86. Seven years later, the Court expanded the privacy protections of *Griswold* to unmarried persons in *Eisenstadt v. Baird,* 405 U.S. 438 (1972).

38. Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022).

39. *Id.* at 164.

40. *Id.* at 153.

41. *Id.* at 163–65.

42. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).

to the woman and her doctor.[43] The case involved a Missouri law that required written spousal consent for first trimester abortions unless the abortion was necessary to preserve the mother's life.[44] A similar provision required parental consent for minors seeking abortions.[45] The Court held that the spousal consent provision was unconstitutional: "[S]ince the State cannot regulate or proscribe abortion during the first [trimester], when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period."[46] Applying similar reasoning in declaring the parental consent provision unconstitutional, the Court said that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy."[47]

2. *Planned Parenthood of Southeastern Pennsylvania v. Casey*

In 1992, the Supreme Court revisited the abortion issue in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[48] ruling on the constitutionality of amendments to the Pennsylvania Abortion Control Act of 1982.[49] The plurality opinion reaffirmed *Roe's* essential holding recognizing a woman's right to choose an abortion before viability, but abandoned the trimester framework in favor of the undue burden standard.[50] Many viewed the undue burden standard as weakening the protections of *Roe v. Wade* by establishing a middle-tier level of scrutiny instead of the strict scrutiny of *Roe*.[51]

The Court adopted the undue burden standard "[t]o protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life."[52] While *Roe* had held that a state's interest in potential life becomes compelling only once the fetus has reached viability, in contrast,

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43. *Id.* at 80.
44. *Id.* at 67–68.
45. *Id.* at 72.
46. *Id.* at 69.
47. *Id.* at 74.
48. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022).
49. 18 PA. CONS. STAT. §§ 3202-20 (1990).
50. *Casey*, 505 U.S. at 874.
51. *See, e.g.*, Linda J. Wharton et al., *Preserving the Core of Roe: Reflections on* Planned Parenthood v. Casey, 18 YALE. J.L. & FEMINISM 317, 353–85 (2006) (noting that lower courts have inconsistently applied the undue burden standard of *Casey*).
52. *Casey*, 505 U.S. at 878.

Casey proclaimed that "[e]ven in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage [a pregnant woman] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term."[53] Under *Casey*, laws constitute an undue burden if their "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[54] The Court proceeded to rule on the specific provisions in the Pennsylvania statute, declaring that the only undue burden in the law was the spousal notification requirement[55] since the informed consent requirements,[56] the 24-hour waiting period,[57] the parental consent provision,[58] and the reporting and recordkeeping requirements of the Pennsylvania statute did not impose substantial obstacles in the path of women seeking abortions.[59]

3. Application of the Undue Burden Standard Pre-*Dobbs*

Following *Casey*, the Court consistently purported to apply the undue burden standard when ruling on the constitutionality of abortion restrictions. In 2007, the Supreme Court upheld the constitutionality of the federal Partial-Birth Abortion Ban Act of 2003 in *Gonzales v. Carhart*,[60] even though the statute lacked an exception for procedures necessary for the mother's health.[61] Many viewed this decision as further restricting a woman's right to an abortion; an article in the *New England Journal of Medicine* noted that this was the "first time the Court has ever held that physicians can be prohibited from using a medical procedure deemed necessary by the

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53. *Id.* at 872.

54. *Id.* at 878. The Court said "[t]he Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth." *Id.* at 872 (quoting Webster v. Reprod. Health Servs., 492 U.S. 490, 511 (1989)).

55. *Id.* at 893–94.

56. The Court had previously struck down two informed consent provisions in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

57. Casey, 505 U.S. at 887.

58. *Id.* at 899.

59. *Id.* at 900–01.

60. Gonzales v. Carhart, 550 U.S. 124, 133 (2007).

61. *Id.* at 143. The Court had previously invalidated Nebraska's partial-birth abortion ban for imposing an undue burden on women seeking abortions. Stenberg v. Carhart, 530 U.S. 914, 929–30 (2000) (reasoning that the law violated the Constitution since it (1) failed to contain an exception for preserving the health of the mother and (2) imposed an undue burden on a woman's ability to choose a D&E abortion since the statute applied to D&E abortions as well as D&X abortions).

physician to benefit the patient's health."[62] The Court declared that the Act's ban on partial-birth abortions furthered the government's objectives of expressing a respect for human life and protecting the "integrity and ethics of the medical profession."[63] The opinion also described the potential regret that a woman who has had an abortion may feel, stating that the Act's prohibition on partial-birth abortions would advance the government's interest in respecting fetal life by promoting a better-informed dialogue about "the consequences that follow from a decision to elect a late-term abortion."[64]

In 2016, the Court revisited the abortion issue for the first time in almost a decade. In *Whole Woman's Health v. Hellerstedt*, the Court again applied the undue burden standard announced in *Casey* to declare that Texas's "admitting privileges" and "surgical center" requirements were unconstitutional.[65] The "admitting privileges" provision required that physicians performing an abortion have active admitting privileges at a hospital within thirty miles from the location the abortion was performed, and the "surgical center" provision required that abortion facilities meet the same medical standards as ambulatory surgical centers.[66] The Court appeared to adopt a balancing test to determine whether abortion regulations constituted an undue burden, stating that "neither of these provisions confers medical benefits sufficient to justify the burdens upon access that each imposes. Each places a substantial obstacle in the path of women seeking a [pre-viability] abortion[;] each constitutes an undue burden on abortion access."[67] Therefore, the Court concluded that both requirements were unconstitutional under the Fourteenth Amendment.[68]

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62. George J. Annas, *The Supreme Court and Abortion Rights*, 356 NEW ENG. J. MED. 2201, 2201 (2007).

63. *Carhart*, 550 U.S. at 157 (quoting Washington v. Glucksberg, 521 U.S. 702, 731 (1997)). The Court described the partial-birth abortion procedure as "laden with the power to devalue human life." *Id.* at 158.

64. *Id.* at 160. The Court held that the statute did not impose an undue burden on women seeking abortions since there was "medical uncertainty" as to whether the Act subjected women to significant health risks and since alternative procedures existed for women seeking second-trimester abortions. *Id.* at 164.

65. Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 591 (2016), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

66 *Id.* at 590–91; *see* TEX. HEALTH & SAFETY CODE ANN. §§ 171.0031(a), 245.010(a) (West 2017).

67. *Hellerstedt*, 579 U.S. at 591.

68. *Id.* Following the enactment of the admitting privileges requirement, the number of licensed abortion facilities in Texas dropped from over 40 to almost half that number. If the surgical center requirement had been allowed to take effect, only seven abortion facilities would have remained in Texas, all in major metropolitan areas. *Id.* at 593.

In *June Medical Services v. Russo*, the Court invalidated Louisiana's admitting privileges requirement, which was almost word-for-word identical to the Texas requirement.[69] The plurality opinion once again applied a balancing test to determine if the regulation at issue failed the undue burden standard of *Casey*;[70] however, Chief Justice Roberts's concurrence suggested a lower standard of review than the plurality—that abortion regulations are valid unless they present a "substantial obstacle" in obtaining a pre-viability abortion, regardless of whether they have any medical benefits.[71] The circuit courts split over whether to apply the standard from Roberts's concurrence or the balancing test of the majority, with the Sixth[72] and Eighth Circuits[73] stating that Roberts's standard was controlling and the Fifth[74] and Seventh Circuits[75] applying the plurality's balancing test.

4. Dobbs v. Jackson Women's Health Organization

In the most dramatic change to abortion jurisprudence in nearly fifty years, the Supreme Court overturned the precedents of

69. June Med. Servs. v. Russo, 140 S. Ct. 2103, 2112–13 (2020), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); *see* LA. STAT. ANN. § 40:1061.10(A)(2)(a) (2017).

70. *June Med. Servs.*, 140 S. Ct. at 2120.

71. *Id.* at 2139 (Roberts, C.J., concurring).

72. EMW Women's Surgical Ctr., P.S.C. v. Friedlander, 978 F.3d 418, 433 (6th Cir. 2020) (noting that because Chief Justice Roberts's position is the narrowest, his "concurrence therefore 'constitutes [*June Medical Services*'] holding and provides the governing standard'" for laws analyzing abortion regulations) (citation omitted), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

73. "Chief Justice [Roberts's] vote was necessary in holding unconstitutional Louisiana's admitting-privileges law, so his separate opinion is controlling." Hopkins v. Jegley, 968 F.3d 912, 915 (8th Cir. 2020) (vacating the district court's preliminary judgment preventing enforcement of abortion restrictions in Arkansas and remanding the case for reconsideration considering Chief Justice Roberts's concurrence in *June Medical Services*), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

74. "[T]he plurality's and concurrence's descriptions of the undue burden test are not logically compatible, and *June Medical* thus does not furnish a controlling rule of law on how a court is to perform that analysis. Instead, *Whole Woman's Health* . . . retains its precedential force." Whole Woman's Health v. Paxton, 978 F.3d 896, 904 (5th Cir. 2020) (citations omitted) (applying the plurality's balancing test to invalidate a Texas law requiring women to undergo an additional and unnecessary medical procedure prior to a D&E abortion).

75. Planned Parenthood of Ind. & Ky. v. Box, 991 F.3d 740, 741 (7th Cir. 2021) (stating that the plurality's balancing test was still the controlling precedent since the only guidance Chief Justice Roberts's concurrence provided was "giving stare decisis effect to *Whole Woman's Health v. Hellerstedt*" and declaring that the rest of his opinion was dicta), *vacated*, 142 S. Ct. 2893 (2022).

Roe and *Casey*, declaring that the decisions recognizing a constitutional right to pre-viability abortions were "egregiously wrong . . . from the day [they were] decided."[76] The case involved a 2018 Mississippi law banning all abortion procedures after the first 15 weeks of pregnancy.[77] The Court granted certiorari regarding the question of whether all pre-viability prohibitions on elective abortions are unconstitutional.[78] After noting that "the Constitution makes no express reference to a right to obtain an abortion,"[79] the Court declared that those "who claim that it protects such a right must show that the right is somehow implicit in the constitutional text."[80] The Court then described the Fourteenth Amendment's Due Process Clause as providing substantive, as well as procedural, protections for liberty,[81] for rights guaranteed by the first eight Amendments, and certain fundamental rights that are not mentioned anywhere in the Constitution.[82] In order to be protected, the Court said that a right must be "deeply rooted in [our] history and tradition" and "essential to our Nation's scheme of ordered liberty."[83]

The Court then performed a historical analysis and determined that "a right to abortion is not deeply rooted in the Nation's history and traditions,"[84] and therefore held that a "historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated."[85] The Court also rejected applying stare decisis to continue the precedents of *Roe* and *Casey*, calling the decisions "egregiously wrong and deeply damaging"[86] and described the Court's previous decisions,

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76. Dobbs, 142 S. Ct. at 2237.

77. Jackson Women's Health Org. v. Dobbs, 945 F.3d 265 (5th Cir. 2019), *rev'd*, 142 S. Ct. 2228 (2022); *see* MISS. CODE ANN. § 41-41-191 (2018). The Fifth Circuit reasoned that the Mississippi law amounted to an unconstitutional ban on pre-viability abortions and emphasized that a state may regulate abortions prior to viability but may not ban them. *Jackson Women's Health Org.*, 945 F.3d at 269.

78. Dobbs v. Jackson Women's Health Org., 945 F.3d 265 (5th Cir. 2019), *cert. granted*, 141 S. Ct. 2619 (2021); *see* Petition for a Writ of Certiorari at i, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

79 *Dobbs*, 142 S. Ct. at 2245.

80. *Id.*

81. The majority noted that the concept of substantive due process "has long been controversial." *Id.* at 2246. Justice Thomas's concurrence went a step further, declaring that "the Due Process Clause does not secure *any* substantive rights" and called for reconsidering all of the "Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*." *Id.* at 2301 (Thomas, J., concurring).

82. *Id.* at 2246 (majority opinion).

83. *Id.* (citations omitted).

84. *Id.* at 2253.

85. *Id.* at 2257.

86. *Id.* at 2265.

as "usurp[ing] the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people."[87] In holding that the Due Process Clause of the Fourteenth Amendment did not protect the right to obtain a pre-viability abortion, the Court undid nearly fifty years of precedent and paved the way for states to enact any and all restrictions on abortion.[88]

B. *Attempts to Restrict Abortion*

The *Dobbs* decision followed decades of tireless activism by abortion opponents. Ever since the Court's seminal decision in *Roe*, anti-abortion advocates have attempted to interfere with, limit, and eliminate access to abortion. These attempts have run the gamut from using normal democratic political processes to committing acts of violence and terrorism. Opponents of abortion rights have long focused their political efforts on electing politicians that promise to further restrict abortion rights,[89] changing the composition of the Supreme Court,[90] and even attempting to amend the Constitution.[91] With the *Dobbs* decision, they have finally succeeded at undoing the legacy of *Roe* and *Casey*.

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87. *Id.* The Court also claimed that *Casey*'s undue burden standard was unworkable and that traditional reliance interests would not be harmed by overturning *Roe* and *Casey*. *Id.* at 2272–78.

88. *Id.* at 2279 (describing the Court's decision as returning "the authority to regulate abortion . . . to the people and their elected representatives").

89. *See, e.g.*, *About Susan B. Anthony Pro-Life America*, SUSAN B. ANTHONY PRO-LIFE AM. (last visited Sept. 4, 2022), https://sbaprolife.org/about (describing "[Susan B. Anthony] Pro-Life America's mission . . . to end abortion by electing national leaders and advocating for [pro-life] laws" by "combin[ing] politics with policy [and] investing heavily in voter education to ensure pro-life Americans know where their lawmakers stand on protecting the unborn"); *National Right to Life Mission Statement*, NAT'L RIGHT TO LIFE (last visited Sept. 4, 2022), https://www.nrlc.org/about/mission (detailing the activities of National Right to Life, including "supporting the election of public officials who defend life").

90. *See* Dan Mangan, *Trump: I'll Appoint Supreme Court Justices to Overturn Roe v. Wade Abortion Case*, CNBC (Oct. 19, 2016, 9:31 PM), https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html; *Our Impact*, MARCH FOR LIFE (last visited Sept. 4, 2022), https://marchforlife.org/our-impact/ (noting that "March for Life Action mobilize[d 24,000] activists to send over [62,000] petitions to their Senators in support of Amy Coney Barrett['s appointment] to the Supreme Court").

91. *Human Life Amendment*, HUM. LIFE ACTION (last visited Sept. 4, 2022) https://www.humanlifeaction.org/issues/human-life-amendment (noting that since 1973, there have been more than 330 "Human Life Amendment" proposals introduced in Congress and "[s]everal sets of extensive hearings").

1. Direct Protests and Extremist Violence "for Life"

In the 1980s, the politics of abortion became more heated as abortion opponents joined "more radical groups that rejected the politics of legislative reform"[92] and instead concentrated on "direct action protest tactics and violence aimed at clinics, doctors, and women seeking abortions."[93] The most famous of these pro-life protest groups was Operation Rescue, which sought to end abortion by "any means necessary" and created human blockades in front of clinics.[94] In one of the most dramatic displays, Wichita, Kansas, became the center of the national abortion debate for several weeks, as members of Operation Rescue "focus[ed] on the city's three abortion clinics, flinging themselves under cars, sitting by the hundreds at clinic doorways and blocking women from entering as they read them Scripture,"[95] which culminated in "more than 1,600 arrests and the closing of all three abortion clinics for more than a week."[96] This chaos necessitated that the city assign "a quarter of its police force to control the protests" and compelled a federal judge to order Federal Marshals to keep the clinics open, as doctors "perform[ed] abortions in the predawn hours to avoid disruption."[97] As a response to these ongoing protests, Congress, with the support of President Clinton, passed the Freedom of Access to Clinic Entrances Act of 1994,[98] which criminalizes the use of force, threat of force, or physical obstruction intended to injure, intimidate, or interfere with any person because that person is or has been obtaining or providing reproductive health services, or plans to do so in the future.[99] Many states and localities have attempted to enact buffer zones prohibiting protestors from congregating around abortion clinics, but in the most recent case on the matter, the Supreme Court unanimously struck down a Massachusetts thirty-five foot buffer zone around reproductive health

92. *See* Jennifer L. Holland, *Abolishing Abortion: The History of the Pro-Life Movement in America*, AM. HISTORIAN (Nov. 2016), https: //www.oah.org/tah/issues/2016/november/abolishing-abortion-the-history-of-the-pro-life-movement-in-america.
93. Caroline Hymel, *Louisiana's Abortion Wars: Periodizing the Anti-Abortion Movement's Assault on Women's Reproductive Rights, 1973-2016*, 59 LA. HIST. 67, 71 (2018).
94. Holland, *supra* note 92. These protests "[tied] up . . . police departments, fill[ed] local jails, and [made] it incredibly difficult to get an abortion." *Id.*
95. Isabel Wilkerson, *Drive Against Abortion Finds a Symbol: Wichita*, N.Y. TIMES, Aug. 4, 1991 (§1), at 20.
96. *Id.*
97. *Id.*
98. 18 U.S.C. § 248 (2018).
99. 18 U.S.C. § 248(a)(1) (2018).

facilities as a violation of the protestors' First Amendment right to free speech.[100]

Extremists in the pro-life movement went even further than protesting abortion clinics: "Between the early 1980s and the 2000s, there were 153 assaults, 383 death threats, 3 kidnappings, 18 attempted murders, and 9 murders related to abortion providers."[101] The threat of violence at abortion clinics remains ever-present, as demonstrated by the murder of Dr. George Tiller by an anti-abortion extremist in 2009[102] and the 2015 shooting at a Planned Parenthood clinic in Colorado, which resulted in the deaths of three people.[103] Although this kind of terrorism is widely condemned by nearly all abortion opponents,[104] the threat of violence remains a haunting specter.[105]

2. A Move Towards Incremental Restrictions

Most anti-abortion advocates did not resort to violence or dramatic protests; instead, they steadily worked on passing legislation aimed at targeting abortion providers and undermining the constitutional right to a pre-viability abortion. Some of these laws focused on the

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100. McCullen v. Coakley, 573 U.S. 464 (2014). *But see* Hill v. Colorado, 530 U.S. 703 (2000) (upholding an 8-foot buffer zone around patients entering health care facilities). Localities and lower courts are now left to determine whether a buffer zone is too broad, like the one at issue in *McCullen v. Coakley*, or whether it is narrow enough to survive, like the Colorado one.

101. Holland, *supra* note 92.

102. Robin Abcarian & Nicholas Riccardi, *Abortion Doctor George Tiller Is Killed, Suspect in Custody*, L.A. TIMES (Jun. 1, 2009), https://www.latimes.com/archives/la-xpm-2009-jun-01-na-tiller1-story.html. Dr. George Tiller was one of the few physicians who performed late-term abortions and was the frequent target of both violent extremists and anti-abortion advocates who condemned such violence. *Id.*

103. *Planned Parenthood Shooting Suspect Robert Dear Asked for Directions to Clinic*, NBC NEWS (Dec. 8, 2015) https://www.nbcnews.com/news/us-news/planned-parenthood-shooting-suspect-robert-dear-asked-directions-clinic-n476296. Prior to the shooting, the suspect had asked for directions to the Planned Parenthood clinic, and after his arrest he rambled to police about "no more baby parts," suggesting he was targeting the reproductive health organization. *Id.*

104. *See, e.g.*, David N. O'Steen, *National Right to Life Condemns the Killing of Dr. George Tiller*, NAT'L RIGHT TO LIFE (May 31, 2009), https://www.nrlc.org/communications/releases/2009/release053109/ ("[T]he National Right to Life Committee unequivocally condemns any such acts of violence regardless of motivation.").

105. FED. BUREAU OF INVESTIGATION & DEP'T OF HOMELAND SEC., STRATEGIC INTELLIGENCE ASSESSMENT AND DATA ON DOMESTIC TERRORISM 7 (2021), https://www.fbi.gov/file-repository/fbi-dhs-domestic-terrorism-strategic-report.pdf ("Abortion-Related Violent Extremists . . . also remained sources of harm and economic damage through criminal acts of destruction, sabotage, or arson.").

concept of "fetal personhood," with a move to treat a fetus as a "person" in contexts other than abortion.[106] Others restricted insurance coverage, both public and private, for abortion procedures.[107] This financial hardship can be devastating for many women seeking abortions, half of whom live below the federal poverty level.[108] Furthermore, anti-abortion advocates championed so-called TRAP ("targeted regulation of abortion providers") laws that applied stricter licensing requirements for abortion providers than those that already applied.[109] The group Americans United for Life, which publishes *Defending Life*, a compendium of fifty pieces of legislation written by the group and its staff attorneys, has "focuse[d] on a quiet legislative strategy . . . in which pro-lifers chip away at the total number of abortions by helping enact new constraints" and has succeeded at getting many of their proposed anti-abortion regulations

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106. Mary Ziegler & Robert L. Tsai, *How the Anti-Abortion Movement Used the Progressive Playbook to Chip Away at* Roe v. Wade, POLITICO (Jun. 13, 2021), https://www.politico.com/news/magazine/2021/06/13/anti-abortion-progressive-roe-v-wade-supreme-court-492506. Anti-abortion advocates pushed "for fetal protection well outside the abortion context" and were "remarkably successful: 38 states now treat [a fetus] as a person in non-abortion homicide cases [and] [t]wenty-three states and the District of Columbia treat drug use by pregnant people as child abuse." *Id.*

107. *See* Alina Salganicoff et al., *Coverage for Abortion Services in Medicaid, Marketplace Plans, and Private Plans*, KAISER FAM. FOUND. at 1 (Jun. 2019), https://files.kff.org/attachment/issue-brief-coverage-for-abortion-services-in-medicaid-marketplace-plans-and-private-plans ("[H]undreds of thousands of women seeking abortion services annually are left without coverage options – even when they are victims of rape or incest or if the pregnancy is determined to be a threat to their health."). As of May 2019, "[i]n 11 states, women enrolled in Medicaid, Private, and Marketplace Plans, ha[d] essentially no abortion coverage options" and "[i]n 15 additional states, women who qualify for Medicaid or who seek to get coverage through their state Marketplace also lack abortion coverage; in 9 other states and [D.C.,] women enrolled in Medicaid have abortion coverage limited to the circumstances permitted in the Hyde Amendment." *Id.* at 7.

108. COHEN & JOFFE, *supra* note 34, at 86.

109. *Targeted Regulation of Abortion Providers (TRAP) Laws*, GUTTMACHER INST. (Jan. 22, 2020), https://www.guttmacher.org/print/evidence-you-can-use/targeted-regulation-abortion-providers-trap-laws. "[N]early half of states have imposed additional regulations [on abortion providers] . . . that go beyond what is necessary to ensure patient safety. . .their primary purpose is to limit access to abortion." *Id.* These TRAP laws have resulted in clinic closures that force many women to travel hundreds of miles to obtain abortions. *See id.*; NAT'L ACADS. OF SCIS., ENG'G, AND MED., THE SAFETY AND QUALITY OF ABORTION CARE IN THE UNITED STATES 32 (2018) (noting that the number of abortion clinics is declining, with "[t]he greatest proportional decline . . . in states that have enacted abortion-specific regulations."). Some of these TRAP laws have been struck down by the Supreme Court as constituting an undue burden on a woman's right to obtain a pre-viability abortion. *See, e.g.*, June Med. Servs. v. Russo, 140 S. Ct. 2103, 2109 (2020), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

enacted.[110] Additionally, many abortion opponents favored the enactment of waiting periods[111] and onerous "informed consent" laws.[112] These laws, which often necessitated multiple trips to an abortion provider, made obtaining an abortion a financial hardship for many women, especially when they had to travel long distances and take time off of work, which could lead to delay and even higher costs.[113] All of these tactics shamed and stigmatized women who sought abortions[114] and furthered "abortion exceptionalism": the idea that abortion is and should be "subject . . . to unique, and uniquely burdensome, rules."[115]

3. The Background of Texas's S.B. 8

Texas's S.B. 8 was a unique piece of legislation when it was enacted. Unlike other laws that incrementally limited the right to abortion, S.B. 8 flatly prohibited most pre-viability abortions and was enforceable through private lawsuits.[116] The idea of using lawsuits to end abortion is not new;[117] it first gained steam in the 1990s, when

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110. Olga Khazan, *Planning the End of Abortion*, THE ATLANTIC (Jul. 16, 2015), https://www.theatlantic.com/politics/archive/2015/07/what-pro-life-activists-really-want/398297.

111. *Counseling and Waiting Periods for Abortion*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion (last visited Sept. 7, 2021).

112. *See* Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 940 (2007); *see also* Kimberley Harris, *Ultra-Compelled: Abortion Providers' Free Speech Rights After NIFLA* 85 ALB. L. REV. 95, 102 (2022).

113. *See* COHEN & JOFFE, *supra* note 34, at 102 (noting that "[E]very day spent tracking down funds leads to delay [, which], in turn, means that the price of the abortion goes up, as do the risk of a complication and the risk of being pushed beyond the gestational age limit for the clinic or state.").

114. *See* Paula Abrams, *The Scarlet Letter: The Supreme Court and the Language of Abortion Stigma*, 19 MICH. J. GENDER & L. 293, 300 (2013) (arguing that "the backlash against legalized abortion suggests an enduring legacy of stigma" as "[r]estrictions on access to abortion and intrusive informed consent requirements send a message that abortion is immoral" and "[t]he exclusion of abortion coverage from government and, increasingly, private health insurance demonstrates how political and economic policies create abortion stigma").

115. Caitlin E. Borgmann, *Abortion Exceptionalism and Undue Burden Preemption*, 71 WASH. & LEE L. REV. 1047, 1048 (2014).

116. TEX. HEALTH & SAFETY CODE ANN. §§ 171.204, 171.207 (West 2021),

117. *See* Caitlin E. Borgmann, *Legislative Arrogance and Constitutional Accountability*, 79 S. CAL. L. REV. 753, 755 (2006) (describing how "state legislatures have burdened or suppressed constitutionally protected conduct, not by banning the targeted conduct outright, but by creating the risk of massive civil liability for engaging in it" and noting that "these statutes effectively suppress the conduct before

Mark Crutcher, a Texas anti-abortion activist,[118] became convinced that civil lawsuits were the path to eviscerating *Roe v. Wade* and eliminating abortion.[119] "[H]e provided lawyers across the country with a 79-page manual" on suing abortion providers for medical malpractice, anticipating that many doctors would be unwilling to pay the ensuing legal bills and "skyrocketing insurance rates."[120] Rather than hoping for a Court decision overturning *Roe v. Wade*, Crutcher and similar activists wanted to eliminate abortion access through burdensome litigation.[121] This strategy of obstructing abortion providers through medical malpractice and informed consent litigation gained popularity,[122] and Louisiana even enacted a statute

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the constitutional issues can be addressed by the courts"). One such proposed law was the privately enforced anti-pornography statute proposed by Catharine MacKinnon and Andrea Dworkin, which would have held everyone "involved in the production and distribution of pornographic material civilly liable to those who claimed to be harmed by the pornography." *Id.* at 758–59 (describing how Massachusetts failed to pass the law after a similar Indianapolis ordinance that allowed for public enforcement was ruled unconstitutional in *American Booksellers Association v. Hudnut*, 771 F.2d 323, 327–32 (7th Cir. 1985), *aff'd* 475 U.S. 1001 (1986)). Borgmann notes that this "legislative vehicle has thus far been employed mainly in the context of abortion." Borgmann, *supra* note 117, at 760.

118. Mark Crutcher, a former car dealer, founded Life Dynamics Inc., a group which engaged in legal research regarding potential lawsuits against abortion providers, solicited plaintiffs for these lawsuits, and "offered expert witnesses on controversial issues such as post abortion trauma and the causal nexus between a higher risk of breast cancer and abortion." Kathy Seward Northern, *Procreative Torts: Enhancing the Common-Law Protection for Reproductive Autonomy*, 1998 U. ILL. L. REV. 489, 494–95 n. 33 (1998). Besides offering services to attorneys representing abortion malpractice clients, Life Dynamics worked towards limiting abortions: "[a] 1992 antiabortion manual the group distributed[, promoted] abortion malpractice lawsuits 'to protect women, but also to force abortionists out of business by driving up their insurance rates.'" *Id.* at 495 (quoting Tamar Lewin, *Malpractice Lawyers' New Target*, MED. ECON., June 26, 1995, at 56); *see also* Mark Ballard, *The New Abortion Front*, TEX. LAW., Apr. 22, 1996, at 2 (stating that Ballard described Life Dynamics' mission as "defeat[ing] abortion by nonviolently undermining the social and legal framework that supports abortion").

119. Mary Ziegler, *The Deviousness of Texas's New Abortion Law*, THE ATLANTIC (Sept. 1, 2021), https://www.theatlantic.com/ideas/archive/2021/09/deviousness-texass-new-abortion-law/619945.

120. *Id.*

121. *Id.*

122. *See* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1723, n. 87 (2008) ("Professor Northern noted that: A 1995 article appearing in Medical Economics reports that there has been a significant increase in the number of medical malpractice actions filed alleging that the plaintiff was injured as a result of a negligently performed abortion procedure or the failure to provide informed consent to the procedure. In 1995, there were initial reports of "the newest anti-abortion strategy—malpractice suits against the doctors who perform abortions." (quoting Northern, *supra* note 118, at 494–95 (1998)).

creating private tort claims against doctors who perform abortions.[123] The law was challenged by a group of abortion providers, but the Fifth Circuit ruled that they lacked standing to sue.[124] However, interest in these private lawsuits lessened, as most abortion opponents were committed to attacking *Roe v. Wade* directly and seeing the decision overturned.[125]

But Texas's S.B. 8 did not rely on tort law actions such as medical malpractice. Instead, it flatly banned most pre-viability abortions, in direct defiance of then-existing Supreme Court precedent, and made the law enforceable through private lawsuits, turning citizens into bounty hunters. Even though the Supreme Court has overturned the Constitutional right to abortion,[126] allowing for Texas's and other states' "trigger" laws criminalizing abortions to take effect,[127] S.B. 8 and its scheme of private enforcement still remain. This hearkens back to the days of the Fugitive Slave Act, when citizens who aided and abetted people daring to exercise the liberty and personal autonomy of escaping slavery were punished,[128] and private citizen slavecatchers were deputized to surveil, stalk, and apprehend people escaping slavery and were then rewarded with bounties for doing so.[129] Similarly, S.B. 8 rewards its bounty hunters; each successful action under S.B. 8 is worth at least $10,000 to the citizen plaintiff, as the law states:

> If a claimant prevails in an action brought under this section, the court shall award . . . statutory damages in

123. LA. STAT. ANN. § 9:2800.12(A) (1997).

124. Okpalobi v. Foster, 244 F.3d 405, 409 (5th Cir. 2001) (en banc). The court held that the abortion providers lacked Article III standing to sue Louisiana's governor and attorney general, who had no more than a "general duty" to enforce the law in question. *Id.* at 418–419. A plurality also concluded that the abortion providers failed to show that those state officers had a sufficient "enforcement connection" to enable relief under *Ex parte Young*. *Id.* at 423; *see also id.* at 416 (characterizing the required enforcement connection as a "particular duty to enforce the statute . . . and a demonstrated willingness to exercise that duty").

125. *See* Ziegler, *supra* note 119.

126. TEX. HEALTH & SAFETY CODE §§ 171.204, 171.207 (2021).

127. *See Abortion Policy in the Absence of Roe*, GUTTMACHER INST. (last visited June 2, 2022), https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe (noting that seven states retain their pre-*Roe* abortion bans, thirteen states have post-*Roe* "trigger" laws to ban all or nearly all abortions once *Roe* is overturned, and that nine states have post-*Roe* restrictions that were blocked by courts prior to *Dobbs* and that could be brought back into effect with a court order in the absence of *Roe*).

128. *See* Fugitive Slave Act of 1850, ch. 60, § 7, 9 Stat. 462 (1850) (punishing any person aiding a fugitive slave by providing food or shelter with six months' imprisonment and a $1000 fine) (repealed 1864).

129. *See, e.g.*, 1833 Md. Laws, at cxxxi–cxxxii (providing that any person who captured a runaway slave shall receive at least six dollars).

> an amount of not less than $10,000 for each abortion that the defendant performed or induced in violation of this subchapter, and for each abortion performed or induced in violation of this subchapter that the defendant aided or abetted; and costs and attorney's fees.[130]

The Act begins with defining a "fetal heartbeat" as "cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac"[131] and then requires that physicians determine whether the embryo/fetus has such cardiac activity before performing an abortion.[132] Then, the Act prohibits all abortions where a fetal heartbeat has been detected, stating that except for cases of medical emergency,[133] "a physician may not knowingly perform or induce an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child . . . or failed to perform a test to detect a fetal heartbeat."[134] The law lacks any exceptions for rape, incest, or a serious or fatal fetal anomaly. However, this ban on most pre-viability abortions is not what makes Texas's law exceptional—many states have passed so-called "heartbeat bills" and were blocked from enforcing them by federal or state courts.[135] What makes Texas's

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130. TEX. HEALTH & SAFETY CODE ANN. § 171.208(b)(2)–(3) (West 2021).

131. *Id.* § 171.201(1). This definition of a "fetal heartbeat" is disputed by many physicians who specialize in reproductive health. *See* Simmons-Duffin & Feibel, *supra* note 9 and accompanying text.

132. HEALTH & SAFETY § 171.203(b) ("[A] physician may not knowingly perform or induce an abortion on a pregnant woman unless the physician has determined . . . whether the woman's unborn child has a detectable fetal heartbeat.").

133. *Id.* § 171.205(a).

134. *Id.* § 171.204(a).

135. *See e.g.*, Human Life Protection Act, ALA. CODE § 26-23H-4 (2019) (banning almost all abortions) (enjoined by Robinson v. Marshall, 415 F. Supp. 3d 1053, 1060 (M.D. Ala. 2019)); Arkansas Human Heartbeat Protection Act, ARK. CODE ANN. §§ 20-16-1301–1307 (2013) (banning abortions where a fetal heartbeat is detected and the pregnancy has passed the 12-week gestational period) (enjoined by Edwards v. Beck, 786 F.3d 1113, 1115 (8th Cir. 2015); Living Infants Fairness Equality (LIFE) Act, 2019 Ga. Laws 711 (prohibiting all abortions after the detection of a fetal heartbeat) (permanently enjoined and ruled unconstitutional by SisterSong Women of Color Reprod. Just. Collective v. Kemp, 472 F. Supp. 3d 1297, 1328 (N.D. Ga. 2020), *rev'd and vacated*, 40 F.4th 1320 (2022); Fetal Heartbeat Preborn Child Protection Act, IDAHO CODE §§ 18-8801–18-8808 (2021) (banning abortions once a fetal heartbeat is detected and to become effective 30 days after a similar heartbeat ban is upheld by any U.S. appellate court); IOWA CODE § 146C.2 (2018) (banning all abortions after the detection of a fetal heartbeat) (enjoined and ruled unconstitutional under the Iowa Constitution by Planned Parenthood of the Heartland, Inc. v. Reynolds, No. EQCE83074, 2019 WL 312072 (Iowa Dist. Ct. Jan. 22, 2019)); KY. REV. STAT. ANN. §

law stand out is the innovative and unprecedented delegation of enforcement to private individuals.[136] Unlike qui tam actions,[137] which allow for a mix of public and private enforcement, [138] or whistleblower provisions,[139] which encourage individuals to come

311.7706 (West 2019) (banning almost all abortions) (enjoined by EMW Women's Surgical Ctr., P.S.C. v. Beshear, No. 3:19-cv-178-DJH, 2019 WL 1233575 at *4 (W.D. Ky. Mar. 15, 2019); LA. STAT. ANN. § 40:1061.1.3 (2019) (banning abortions once a fetal heartbeat is detected and to become effective if a similar Mississippi law is upheld by the 5th Circuit); MISS. CODE. ANN. § 41-41-34.1 (West 2019) (banning abortions once a fetal heartbeat is detected) (ruled unconstitutional by Jackson Women's Health Org. v. Dobbs, 951 F.3d 246, 269 (5th Cir. 2020), *rev'd*, 142 S. Ct. 2228 (2022)); Missouri Stands for the Unborn Act, MO. REV. STAT. § 188.056 (2019) (banning abortions after 8-week gestational period) (enjoined by Reprod. Health Servs. Of Planned Parenthood of the St. Louis Region, Inc. v. Parson, 1 F.4th 552, 556–57 (8th Cir. 2021), *reh'g en banc granted, vacated* (July 13, 2021); N.D. CENT. CODE § 14-02.1-05.2 (2013) (banning abortions after detectable heartbeat) (enjoined and held unconstitutional by MKB Mgmt. Corp. v. Stenehjem, 795 F.3d 768, 776 (8th Cir. 2015)); Human Rights and Heartbeat Protection Act, OHIO REV. CODE ANN. § 2919.195 (West 2019) (banning abortions after the detection of a fetal heartbeat) (held unconstitutional and enjoined by Preterm-Cleveland v. Yost, 394 F. Supp. 3d 796, 804 (S.D. Ohio 2019)); 2021 Okla. Sess. Laws 833 (banning abortions after a detectable heartbeat, to go into effect Nov. 1, 2021); S.C. CODE ANN. § 44-41-680 (2021) (banning abortions where a fetal heartbeat was detected) (enjoined by Planned Parenthood S. Atl. V. Wilson, 527 F. Supp. 3d 801, 805–06 (D.S.C. 2021), *vacated*, No. 3:21-CV-00508, 2022 WL 2900658, at *1 (4th Cir. July 21, 2022)); TENN. CODE ANN. § 39-15-216 (2020) (banning abortions after a detectable heartbeat and after various gestational time periods) (enjoined by Memphis Ctr. For Reprod. Health v. Slatery, No. 3:20-cv-00501, 2020 WL 4274198 (M.D. Tenn. July 24, 2020), *vacated*, No. 20-5969, 2022 WL 2570275, at *1 (6th Cir. June 28, 2022)).

136. TEX. HEALTH & SAFETY CODE § 171.207 (2021).

137. Qui tam actions offer "an unconventional means by which [the legislature] may enlist the aid of private citizens in enforcing . . . statutory schemes[;] . . . a private person maintains a civil proceeding on behalf of both herself and [the State] to recover damages and/or to enforce penalties available under a statute prohibiting specified conduct." Evan Caminker, *The Constitutionality of* Qui Tam *Actions*, 99 YALE L.J. 341, 341 (1989). Monetary recovery is shared by the private plaintiff and the State. *Id.*; *see also* Marvin v. Trout, 199 U.S. 212, 225 (1905) ("[S]tatutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government."). The most famous example of a law allowing for qui tam actions is the False Claims Act, which imposes civil liability upon those presenting false claims for payment or otherwise defrauding the federal government. 31 U.S.C. §§ 3729, 3730(b) (2010). Qui tam actions are also well known in the state context.

138. *See, e.g.*, Texas Medicaid Fraud Prevention Act, TEX. HUM. RES. CODE ANN, §§ 36.051(a), 36.101(a) (1995) (authorizing actions by both the Attorney General and private parties to bring actions alleging Medicaid fraud).

139. *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78u-6(b)(1) (2018) (providing monetary awards to "whistleblowers who voluntarily

forward with information about illegality, S.B. 8 flatly prohibited the state, its political subdivisions, its district or county attorneys, and its officers and employees from enforcing the Act. The relevant provision reads:

> Sec. 171.207. LIMITATIONS ON PUBLIC ENFORCEMENT.
>
> (a) [T]he requirements of this subchapter shall be enforced exclusively through the private civil actions described in Section 171.208. No enforcement of this subchapter . . . may be taken or threatened by this state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person[.][140]

The procedural anomaly of S.B. 8 requiring enforcement of its abortion ban solely through private lawsuits existed solely to evade pre-enforcement offensive litigation. The exception to sovereign immunity articulated in *Ex parte Young*,[141] which allows suits in federal courts to enjoin state officials from enforcing state laws contrary to the Constitution or other federal law, is seemingly inapplicable here since state officials are prohibited from enforcing the law.[142] The roots of this scheme can be traced back to an article by former Texas solicitor general, Jonathan F. Mitchell, *The Writ-of-*

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provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action"); IRS Whistleblower Law, 26 U.S.C. § 7623(b)(1) (2019) (allowing for individuals who provide information on tax code violations to receive a monetary award of between 15 and 30 percent of proceeds collected as a result of any administrative or judicial action brought based on information provided).

140. TEX. HEALTH & SAFETY CODE ANN. § 171.207(a) (2021).

141. *Ex parte Young* states:

> So, where the state official . . . is about to commence suits which have for their object the enforcement of an act which violates the Federal Constitution, to the great and irreparable injury of the complainants . . . [t]he State cannot . . . impart to the official immunity from responsibility to the supreme authority of the United States.

209 U.S. 123, 167 (1908).

142. TEX. HEALTH & SAFETY CODE § 171.207 (2021).

Erasure Fallacy.[143] Mitchell theorized that a law could be modified to "provide for private enforcement . . . by authorizing civil lawsuits and *qui tam* relator actions against statutory violators[, which could proceed in state courts] even after a federal district court issues declaratory and injunctive relief against executive officials . . . until the Supreme Court declares the statute unconstitutional."[144]

The idea was extended to abortion in 2019 when Mitchell advised Mark Lee Dickson,[145] an anti-abortion East Texas pastor, in drafting an ordinance adopted by a number of small East Texas towns, which along with banning abortion, allowed private citizens to sue abortion providers and anyone who aided and abetted in an abortion.[146] In May 2021, Lubbock adopted the ordinance, barring public enforcement and providing for lawsuits by citizens and certain family members of the aborted fetus/embryo.[147] Foreshadowing the Supreme Court's refusal to enjoin S.B. 8, the district court addressing the Lubbock ordinance ruled that an abortion provider couldn't sue the city over the law since its claims were not redressable, as "an injunction against the city would not bind the state courts that will hear private-enforcement actions under the ordinance."[148]

Mitchell was closely involved with the drafting of S.B. 8, which was passed in May 2021 "with votes split almost entirely along party lines."[149] In July, a group of abortion providers sued, requesting declaratory and injunctive relief to prevent the law from taking

143. Jacob Gershman, *Behind Texas Abortion Law, an Attorney's Unusual Enforcement Idea*, WALL ST. J. (Sept. 4, 2021, 9:38 EDT), https://www.wsj.com/articles/behind-texas-abortion-law-an-attorneys-unusual-enforcement-idea-11630762683.

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

145. The Supreme Court denied emergency relief from a group of abortion providers requesting an order enjoining Dickson from enforcing S.B. 8 as a private citizen plaintiff. Dickson claimed he had no present intention to enforce the law. *See* Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495–96 (2021).

146. Emily Wax-Thibodeaux, *Anti-Abortion Law Spreads in East Texas as "Sanctuary City for the Unborn" Movement Expands*, WASH. POST (Oct. 1, 2019), https://www.washingtonpost.com/national/antiabortion-law-spreads-in-east-texas-as-sanctuary-city-for-the-unborn-movement-expands/2019/09/30/cfef46d8-daf1-11e9-bfb1-849887369476_story.html; *see also* Gershman, *supra* note 143; Mimi Schwartz, *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.

147. *See* Planned Parenthood of Greater Tex. Surgical Health Servs. V. City of Lubbock, 542 F. Supp. 3d 465, 471–73 (N.D. Tex. 2021), *appeal dismissed*, No. 21-11148, 2022 WL 1554993, at *1 (5th Cir. Jan. 21, 2022).

148. *Id.* at 481, 482.

149. *See* Gershman, *supra* note 143.

effect.[150] They sought an injunction against the entire Texas court system, including judges, clerks, and Dickson as a hypothetical private citizen plaintiff, to prevent any Texas court from hearing lawsuits filed under S.B. 8.[151] The district court denied the defendants' motions to dismiss for lack of subject matter jurisdiction and lack of standing.[152] The Fifth Circuit granted an administrative stay of the district court's proceedings.[153] The abortion providers appealed to the Supreme Court, requesting injunctive relief, or alternatively, for the Supreme Court to vacate the Fifth Circuit's stay.[154]

The law went into effect September 1, and the Supreme Court issued an order denying the request to vacate the stay and denying injunctive relief, noting that although the Texas law "raised serious questions regarding [its] constitutionality," "complex and novel antecedent procedural questions" prevented the Court from granting relief.[155] The Court reasoned that injunctive relief was unavailable since "federal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves."[156] It was unclear whether the named defendants in the lawsuit could or would seek to enforce the Texas law against the applicants in a manner that might permit the Court's intervention.[157] It was also unclear whether "under existing precedent, [the Supreme Court could] issue an injunction against state judges asked to decide a lawsuit under Texas's law."[158] On September 10, 2021, the Fifth Circuit granted a stay pending an expedited appeal,[159] keeping S.B. 8 in effect.[160] In an apparent, although very limited,[161] victory for abortion providers, the Supreme

150. Whole Woman's Health v. Jackson, 556 F. Supp. 3d 595, 602 (W.D. Tex.), *denying motion for injunction*, No. 21-50792, 2021 WL 3919252 at*1 (5th Cir.), *denying application for injunctive relief*, 141 S. Ct. 2494 (2021).
151. *See* Whole Woman's Health v. Jackson, 13 F.4th 434, 438 (5th Cir. 2021).
152. *Whole Woman's Health*, 556 F. Supp. 3d at 602, 610, 618, 633.
153. Whole Woman's Health v. Jackson, No. 21-50792, 2021 WL 3919252 at *1 (5th Cir.), *denying application for preliminary injunction*, 141 S. Ct. 2494 (2021).
154. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021).
155. *Id.*
156. *Id.* (citing California v. Texas, 141 S.Ct. 2104, 2115–16 (2021).
157. *Id.* (citing Clapper v. Amnesty Int'l USA, 568 U.S. 398 (2013).
158. *Id.*
159. The Fifth Circuit had previously granted an administrative stay of the district court's proceedings. Whole Woman's Health v. Jackson, 13 F.4th 434, 441, 448 (5th Cir. 2021).
160. *Id.*
161. *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 531–39 (2021) (holding that no case or controversy existed in the abortion providers' suit against a state-court judge and a state-court clerk, that the *Ex parte Young* exception to sovereign immunity

Court, in an 8-1 decision, held that the providers' suit could go forward against certain executive licensing officials who were permitted or required to "take enforcement actions against the petitioners if they violate the terms of Texas's Health and Safety Code, including S. B. 8."[162] However, even this narrow victory was soon undone, as the Fifth Circuit certified to the Texas Supreme Court the question of whether the state licensing officials had any authority under Texas law to take disciplinary or adverse actions against anyone who violated S.B. 8.[163] While the Fifth Circuit was awaiting the Texas Supreme Court's answer, the Supreme Court denied a petition for a writ of mandamus from the abortion providers that would have compelled the Fifth Circuit to immediately remand the case to the district court.[164] This denial allowed S.B. 8, a law whose "clear purpose and actual effect . . . has been to nullify [the] Court's rulings" to remain in place, turning

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did not apply to claims for injunctive relief against the state-court judge and state-court clerk, that the *Ex parte Young* exception did not apply to claims for injunctive relief against the Texas Attorney General, and that the plaintiffs lacked Article III standing for claims against the private individual, Mark Lee Dickson, who attested that he had no intention to file suit against plaintiffs).

162. *Id.* at 535.

163. The Fifth Circuit asked:

> Whether Texas law authorizes the Attorney General, Texas Medical Board, the Texas Board of Nursing, the Texas Board of Pharmacy, or the Texas Health and Human Services Commission, directly or indirectly, to take disciplinary or adverse action of any sort against individuals or entities that violate the Texas Heartbeat Act, given the enforcement authority granted by various provisions of the Texas Occupations Code, the Texas Administrative Code, and the Texas Health and Safety Code and given the restrictions on public enforcement in sections 171.005, 171.207 and 171.208(a) of the Texas Health and Safety Code.

Whole Woman's Health v. Jackson, 23 F.4th 380, 389 (5th Cir.), *denying mandamus*, *In re* Whole Woman's Health, 142 S. Ct. 701 (2022).

164 *See In re* Whole Woman's Health, 142 S. Ct. 701 (2022) (order denying writ of mandamus). In dissent, Justice Sotomayor noted that this had further delayed a determination of the constitutionality of S.B. 8, as:

> the Fifth Circuit should have immediately remanded this case to the District Court, allowing it to consider whether to issue preliminary relief. But Texas moved to certify to the Supreme Court of Texas the question this Court had just decided: whether state licensing officials had authority under state law to enforce S. B. 8. Texas never asked the Fifth Circuit to certify this question during its first pass through that court, nor did it ever ask this Court to do so.

Id. at 703 (Sotomayor, J., dissenting).

"the [C]onstitution itself [into] a solemn mockery."[165] The Texas Supreme Court eventually concluded that "Texas law does not authorize the state-agency executives to enforce the Act's requirements, either directly or indirectly,"[166] and the Fifth Circuit remanded the case with "instructions to dismiss all challenges to the private enforcement provisions of the statute."[167] S.B. 8 remains in place, only one of multiple laws restricting abortion in Texas.[168]

II. CHALLENGING S.B. 8

A. *S.B. 8 was an Unconstitutional Infringement on the Right to a Pre-Viability Abortion*

S.B. 8 unconstitutionally infringed on a woman's ability to obtain a pre-viability abortion at the time it was enacted. The Act flatly prohibited abortions once a fetal heartbeat has been detected:

> Sec. 171.204. PROHIBITED ABORTION OF UNBORN CHILD WITH DETECTABLE FETAL HEARTBEAT; EFFECT.
> (a) Except as provided by Section 171.205, a physician may not knowingly perform or induce an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child as required by Section

165. *See Whole Woman's Health*, 142 S. Ct. at 545 (Roberts, C.J., concurring in part) (stressing "The nature of the federal right infringed does not matter; it is the role of the Supreme Court in our constitutional system that is at stake."). *See also id.* at 545–46 (Sotomayor, J., concurring in part) (emphasizing that Texas, "in open defiance of [the] Court's precedents" "has substantially suspended a constitutional guarantee" and warning that by foreclosing suits against state court officials, "the Court effectively invites other States to refine S. B. 8's model for nullifying federal rights[,] thus betray[ing] not only the citizens of Texas, but also our constitutional system of government").

166. Whole Woman's Health v. Jackson, 642 S.W.3d 569, 574 (Tex. 2022).

167. Whole Woman's Health v. Jackson, 31 F.4th 1004, 1006 (5th Cir. 2022).

168. The Texas Supreme Court has allowed an abortion ban from 1925 to be enforced. *In re* Paxton, No. 22-0527 2022 WL 2425619 at *1 (Tex. July 1, 2022) (order issuing stay and granting writ of mandamus); *see* Zach Despart, *Texas Can Enforce 1925 Abortion Ban, State Supreme Court Says*, TEX. TRIB. (Jul. 2, 2022), https://www.texastribune.org/2022/07/02/texas-abortion-1925-ban-supreme-court. A trigger law, subjecting abortion providers to both criminal and civil penalties, except in cases in which pregnant women are faced with life-threatening conditions that place them at risk of death or substantial bodily impairment, is set to take effect thirty days after the Supreme Court's judgment overturning *Roe* and *Casey*. *See* Human Life Protection Act of 2021, 2021 Tex. Sess. Law Serv. Ch. 800 (H.B. 1280) (West).

> 171.203 or failed to perform a test to detect a fetal heartbeat.
> (b) A physician does not violate this section if the physician performed a test for a fetal heartbeat as required by Section 171.203 and did not detect a fetal heartbeat.[169]

The only exception the law made was for medical emergencies:

> Sec. 171.205. EXCEPTION FOR MEDICAL EMERGENCY; RECORDS.
> (a) Sections 171.203 and 171.204 do not apply if a physician believes a medical emergency exists that prevents compliance with this subchapter.
> (b) A physician who performs or induces an abortion under circumstances described by Subsection (a) shall make written notations in the pregnant woman's medical record of:
> (1) the physician's belief that a medical emergency necessitated the abortion; and
> (2) the medical condition of the pregnant woman that prevented compliance with this subchapter.
> (c) A physician performing or inducing an abortion under this section shall maintain in the physician's practice records a copy of the notations made under Subsection (b).[170]

This prohibition affected the vast majority of pre-viability abortions since a "fetal heartbeat" as defined in the law is usually detectable approximately six weeks after a woman's last menstrual period,[171] or roughly three to four weeks after conception,[172] a time

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169. TEX. HEALTH & SAFETY CODE ANN. § 171.204 (West 2021).
170. *Id.* § 171.205.
171. Jane Chertoff, *How Early Can You Hear Baby's Heartbeat on Ultrasound and By Ear?* HEALTHLINE (Sept. 6, 2018), https://www.healthline.com/health/pregnancy/when-can-you-hear-babys-heartbeat (noting that "A fetal heartbeat may first be detected by a vaginal ultrasound as early as 5 ½ to 6 weeks after gestation.").
172. Erica Hersch, *Pregnancy Lingo: What Does Gestation Mean?*, HEALTHLINE (Oct. 26, 2018), https://www.healthline.com/health/pregnancy/what-is-gestation (explaining the difference between gestational age and fetal age as gestational age is measured "from the first day of [a woman's] last menstrual period" whereas fetal age is measured "from the date of conception" meaning that "fetal age is about two weeks behind gestational age").

period before many women know that they are pregnant.[173] A fetus is not considered "viable" until it attains a gestational age of around twenty-four to twenty-eight weeks,[174] roughly four months after abortions are banned under S.B. 8.[175] Therefore, S.B. 8 directly contravened the precedent of *Roe v. Wade*, which the state of Texas tacitly conceded was binding, as it asked the Supreme Court to overrule *Roe* in an amicus brief it filed in *Dobbs v. Jackson Women's Health Organization*.[176]

However, *Roe* was not the Court's last word on abortion restrictions when S.B. 8 was enacted. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court held that states may enact regulations affecting pre-viability abortions as long as they do not constitute an "undue burden" on women seeking abortions.[177] A law constitutes an "undue burden" if its "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[178] S.B. 8 was clearly an undue burden: it outright banned all abortions once a "heartbeat" is detected,[179] at approximately six weeks after the first day of a

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173. Amy M. Branum & Katherine A. Ahrens, *Trends in Timing of Pregnancy Awareness Among US Women*, 21 MATERNAL AND CHILD HEALTH J. 715, 722–24 (2016) (finding that the mean gestational age at which women became aware of their pregnancies was 5.5 weeks and that 23% of women became aware of their pregnancies after a gestational age of 6 weeks. Late pregnancy awareness was correlated with lower maternal age, lower socioeconomic status, and a higher rate of unintended pregnancies, and was more prevalent among black and Hispanic women when compared to non-Hispanic white women).

174. Roe, 410 U.S. at 160 (1973) (stating that "[v]iability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks"), *overruled by* Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022); *see also* Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 271–72 (5th Cir. 2019) (ruling that Mississippi's ban on abortions after 15 weeks was an unconstitutional ban on pre-viability abortions, as there was no medical evidence that a fetus could survive outside the womb that early), *rev'd*, 142 S. Ct. 2228 (2022).

175. TEX. HEALTH & SAFETY CODE ANN. § 171.204 (West 2021).

176. Brief for the States of Texas, et al. as Amici Curiae Supporting Petitioners at 14, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) 2020 WL 4227872 (stating that "[m]edical and [s]cientific [a]dvances [r]equire [r]econsideration of the [v]iability [f]ramework").

177. Planned Parenthood v. Casey, 505 U.S. 833, 874 (1992), *overruled by* Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022).

178. *Id.* at 878; *see also* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016) (applying a balancing test to determine that both Texas's admitting privileges provision and surgical center provisions failed to "confer[] medical benefits sufficient to justify the burdens upon access that each imposes" and holding that both requirements "place[] a substantial obstacle in the path of women seeking a [pre-viability] abortion[; and] each constitutes an undue burden on abortion access"), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

179. TEX. HEALTH & SAFETY CODE ANN. § 171.204 (West 2021).

pregnant woman's last menstrual period.[180] While states may have regulated pre-viability abortions consistent with *Planned Parenthood of Southeastern Pennsylvania v. Casey*, they were not permitted to ban such abortions.[181]

The Texas law attempted to skirt this issue by providing an extremely limited "undue burden" affirmative defense, stating that defendants who are sued only have the standing to assert the third-party rights of women seeking abortions if the Supreme Court requires Texas courts to confer such standing or if the defendant meets the test for third-party standing established by the Supreme Court.[182] The Supreme Court had already ruled that abortion providers have the standing to assert the third-party rights of women seeking abortions in *Singleton v. Wulff*, holding that the closeness of the relationship between a woman seeking an abortion and an abortion provider,[183] as well as the woman's difficulty in asserting her own constitutional rights,[184] justify third-party standing.[185] However, whether third-party standing applied to the boyfriend who paid for an abortion, the mother who helped her teen daughter schedule an abortion, or even the Uber driver who drove a woman to an abortion clinic—all of whom could be liable under S.B. 8's provision

180. *See* Chertoff, *supra* note 171.

181. As the Fifth Circuit recognized:

> In an unbroken line dating to *Roe v. Wade*, the Supreme Court's abortion cases have established (and affirmed, and re-affirmed) a woman's right to choose an abortion before viability. States may *regulate* abortion procedures prior to viability so long as they do not impose an undue burden on the woman's right, but they may not ban abortions.

Jackson Women's Health Org., 945 F.3d at 269.

182. HEALTH & SAFETY § 171.209(a).

183. *See* Singleton v. Wiff, 428 U.S. 106, 114–15 (1976) (stating that courts must examine "the relationship of the litigant to the person whose right he seeks to assert" and requiring that "the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter"). The Court went on to cite multiple cases, including *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965), *Eisenstadt v. Baird*, 405 U.S. 438, 445 (1972), and *Doe v. Bolton*, 410 U.S. 179, 188–189 (1973) in which the Court had recognized such a close relationship in the physician-patient context. *Id.* at 115–17 (stating that "[a]side from the woman herself, therefore, the physician is uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against, [the abortion] decision").

184. *Singleton*, 428 U.S. at 117–18 (noting "several obstacles" women seek face in asserting their own constitutional right to pre-viability abortions, including the "desire to protect the very privacy of her decision from the publicity" of a lawsuit and the risk of "imminent mootness" of her claim).

185. *Id.* at 118.

criminalizing the aiding and abetting of "post-heartbeat" abortions—was unclear.[186]

Even if third-party standing could be established, S.B. 8 required a defendant asserting the affirmative defensive of unconstitutionality to "introduce[] evidence proving that an award of relief will prevent a woman or a group of women from obtaining an abortion[,] or . . . an award of relief will place a substantial obstacle in the path of a woman or a group of women who are seeking an abortion."[187] This distorted *Casey*'s undue burden test beyond all recognition; as S.B. 8 banned the vast majority of pre-viability abortions, it clearly posed a "substantial obstacle" in the path of a woman seeking such an abortion, whatever limited affirmative defenses the State might have allowed a defendant in a civil action to assert. A ban on abortions is still a ban even if physicians could choose to keep performing abortions and assert an (extremely limited) affirmative defense.

The effects of S.B. 8 were immediately felt in the state; as S.B. 8 became law at midnight on September 1, 2021, many providers ceased offering abortion care for patients whose pregnancies had exceeded the six-week gestational time period.[188] Others quit providing abortions entirely.[189] The vast majority[190] of pregnant Texans seeking abortions were unable to receive an abortion within state lines and were left to choose between traveling hundreds of miles to a neighboring state's clinic, remaining pregnant against their wishes, or attempting to end their pregnancy without the supervision of a medical professional. In *Whole Woman's Health v. Hellerstedt*, the Court found that Texas's admitting privileges requirement placed a substantial obstacle in a woman's path to a pre-viability abortion because of the dramatic drop in the number of clinics allowed to operate, leading to fewer available doctors, longer waiting times, increased crowding, and increased driving distances.[191] If a law that cut the number of abortion providers in the state in half constituted

186. HEALTH & SAFETY § 171.208(b). According to a University of Texas study, 43% of women seeking abortion care in Texas had someone else drive them to the appointment and 57% had a friend, family member, or partner who helped them pay. Kari White et al., *Texas Senate Bill 8: Medical and Legal Implications*, TEX. POL'Y EVALUATION PROJECT (2021), http://sites.utexas.edu/txpep/files/2021/07/TxPEP-research-brief-SB8.pdf.

187. HEALTH & SAFETY § 171.209(c).

188. *See* Goodyear, *supra* note 15 and accompanying text.

189. *See* Zavala et al., *supra* note 17.

190. It is estimated that at least 85% of abortion-seeking patients' pregnancies have progressed past the six-week period after which fetal cardiac activity can be detected. *See* Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2498 (2021) (Sotomayor, J., dissenting).

191. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2298 (2016), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

an undue burden under *Casey*'s precedent,[192] a far more prohibitive law such as S.B. 8 clearly did as well. If the landscape of abortion availability in Texas after S.B. 8 was enacted did not constitute an undue burden or a substantial obstacle, nothing did.

B. *State Action?*

Although S.B. 8 authorized private enforcement lawsuits[193] and barred public enforcement of its expansive abortion ban in Section 171.207,[194] it did not preclude state action; indeed, the law implicitly required it. Since private lawsuits brought under Section 171.208 must be brought in state courts, the state judiciary would have been required to be complicit in S.B 8's abortion ban. As the Court explained in *Shelley v. Kramer*:

> the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment...[This is] a proposition which has long been established by decisions of this Court.[195]

In *New York Times v. Sullivan*, a seminal First Amendment decision, the Court extended this concept to civil lawsuits seeking private enforcement of an unconstitutional state law, explaining that "[t]he test [for state action] is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."[196] The case arose in the context of the Civil Rights movement, during which southern officials and politicians frequently used libel lawsuits as a means of chilling opposition speech, especially

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192. *See id.* at 2296.
193. TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (West 2021).
194. *Id.* § 171.207.
195. Shelley v. Kramer, 334 U.S. 1, 14 (1948) (holding that judicial enforcement of racially restrictive covenants was prohibited by the Fourteenth Amendment's Equal Protection Clause as judicial enforcement constituted state action). The Court proceeded to detail the history of judicial action being regarded as state action under the Fourteenth Amendment, citing cases dating from 1879 onward to declare that "[t]he short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials" and that "it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government." *Id.* at 18.
196 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964).

from northern newspapers.[197] This outburst of libel lawsuits in the early 1960s "was to discourage not false but true accounts of life under a system of white supremacy."[198] Often overlooked in analyses of the case is the fact that "it arose from a complex puzzle of constitutional, statutory, and judge-made jurisdictional and procedural rules . . . [which] kept the case in hostile Alabama state courts for four years"[199] and allowed "a half-million-dollar judgment [to be entered] before the *Times* and its civil-rights-leader co-defendants finally could avail themselves of the structural protections of federal court and Article III judges."[200]

The New York Times had published an editorial advertisement entitled "Heed Their Rising Voices" which detailed civil rights abuses faced by Black college students in the Jim Crow South and appealed for donations to support the student movement, the struggle for the right to vote, and the legal defense of Martin Luther King, Jr.[201] The advertisement contained minor factual inaccuracies,[202] which served as the basis for the lawsuit. Eventually vindicated in the Supreme Court,[203] the New York Times was forced to adopt a defensive posture to assert its constitutional claims, enduring years of litigation in antagonistic state courts and multiple expensive, potentially ruinous, judgments.[204]

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197. ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 34 (1991) (noting that southern politicians and officials viewed the northern newspapers as "reckless publishers" who had the "habit of permitting anything detrimental to the South and its people to appear in their columns").

198. *Id.* at 35.

199. Howard M. Wasserman, *A Jurisdictional Perspective on* New York Times v. Sullivan, 107 NW. U. L. REV. 901, 901 (2013).

200. *Id.*

201. The advertisement stated that "[a]s the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights." It went on to charge that the students were "being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom," described certain events constituting this wave of terror, and ended with an appeal for funds. *See Sullivan*, 376 U.S. at 256; *Heed Their Rising Voices*, N.Y. TIMES, Mar. 29, 1960, at 25.

202. *See Sullivan*, 376 U.S. at 258–59.

203. *Id.* at 279–80 (holding that a public official is barred "from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not").

204. New York Times managing editor Turner Catledge was terrified of the lawsuits, warning other newspaper editors "'I'm frightened as hell at this new weapon of intimidation which seems in the making'" and cautioning that "they too were in danger

Abortion providers in Texas found themselves in a similar situation as the *New York Times* and other newspapers did sixty years ago: due to S.B. 8's reliance on private lawsuits and prohibition of public enforcement, they were unable to obtain pre-enforcement offensive relief for a blatantly unconstitutional law.[205] They were seemingly left with two options—either stop performing all abortions after a "fetal heartbeat" has been detected and deprive millions of women of the ability to exercise a then-constitutionally protected right, or continue to perform those abortions and risk massive financial liability by facing potentially ruinous litigation in order to assert those rights.

C. *Procedural Complexities of S.B. 8 and the Lack of Injunctive Relief*

As described in Section I(B)(2) and Section I(B)(3), anti-abortion advocates and lawmakers have succeeded in passing many abortion regulations that both outright ban many pre-viability abortions in clear contravention of the then-existing precedents of *Roe* and *Casey* and incrementally limit a woman's right to obtain such an abortion.[206] However, these laws have been subject to pre-enforcement challenges, in which abortion providers were able to challenge the law before it went into effect by requesting a preliminary injunction under § 1983[207] from a federal district court.[208] Section 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...,

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of being dragged into southern courts for civil rights coverage." AIMEE EDMONDSON, IN SULLIVAN'S SHADOW: THE USE AND ABUSE OF LIBEL LAW DURING THE LONG CIVIL RIGHTS STRUGGLE 1 (2019) (citations omitted). The New York Times ended up facing "libel actions totaling more than $4.6 million—more than $25 million in current dollars," causing Catledge to worry that the newspaper and journalism could not endure the lawsuits. *Id.* at 1–2.

205. *See* Whole Woman's Health v. Jackson, 141 S. Ct. 2494. 2495 (2021).

206. *See supra* notes 102–08 and accompanying text.

207. 42 U.S.C. § 1983 (2018).

208. *See, e.g.*, Memphis Ctr. for Reprod. Health v. Slatery, No. 3:20-cv-00501, 2020 WL 4274198 at *16 (M.D. Tenn. July 24, 2020) (enjoining enforcement of TENN. CODE ANN. § 39-15-216 (2020)), *vacated*, No. 20-5969 2022 WL 2570275 at *1 (6th Cir. June 28, 2022); Robinson v. Marshall, 415 F. Supp. 3d 1053, 1055 (M.D. Ala. 2019) (enjoining enforcement of ALA. CODE § 26-23H-4 (2019)); Preterm-Cleveland v. Yost, 394 F. Supp. 3d 796, 803 (S.D. Ohio 2019) (enjoining enforcement of OHIO REV. CODE ANN. § 2919.195 (West 2019)); Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 676–77 (W.D. Tex. 2014) (enjoining enforcement of TEX. HEALTH & SAFETY CODE ANN. § 245.010(a) (West 2015) and § 171.0031(a)(1) (West 2015)), *vacated*, 833 F.3d 565 (5th Cir. 2016).

> subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...[209]

The central objective of § 1983 and its predecessor[210] was to "ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief."[211] The statute "opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation"[212] and "assigned to the federal courts a paramount role in protecting constitutional rights."[213] And it did so by providing a mechanism for pre-enforcement judicial review of alleged civil rights deprivations, a suit in equity, so that litigants could obtain this judicial review before subjecting themselves to liability for violating an unconstitutional law.[214]

In *Ex parte Young*,[215] the Supreme Court recognized an exception to state sovereign immunity,[216] allowing suits in federal

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209. 42 U.S.C. § 1983 (2018).

210. Ku Klux Klan Act of 1871, Pub. L. No. 42-22, § 1, 17 Stat. 13 (1871).

211. Burnett v. Grattan, 468 U.S. 42, 52, 55 (1984); *see also* McNeese v. Board of Ed. for Cmty. Unit Sch. Dist. 187, 373 U.S. 668, 671–72 (1963); Monroe v. Pape, 365 U.S. 167, 168–89, 173 (1961).

212. Mitchum v. Foster, 407 U.S. 225, 239 (1972).

213. Patsy v. Board of Regents of Fla., 457 U.S. 496, 503 (1982).

214. *See id.* at 504 (finding that Congress, in enacting the precursor to § 1983, intended to "'throw open the doors of the United States courts to individuals who were threatened with . . . the deprivation of constitutional rights . . . and to provide these individuals immediate access to the federal courts notwithstanding any provision of state law to the contrary" (citation omitted)). *But see* Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 485 (1982) (noting that a historical analysis of § 1983's predecessor "addressed an enormously important, but nevertheless limited, problem": the formation of the Ku Klux Klan and "the failure of the states to cope with that violence", thereby requiring "[a]ny application of section 1983 beyond the confines of racial problems . . . [to] seek justification in something more than the intent of section 1983's framers"). *But see* Eric A. Harrington, *Judicial Misuse of History and § 1983: Toward a Purpose-Based Approach*, 85 TEX. L. REV. 999 (finding fault with the Court's use of legislative history in their attempts to determine the legislative intent behind § 1983 and its predecessor).

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

216. *See* Hans v. Louisiana, 134 U.S. 1, 15 (1890) (holding that state sovereign immunity, which is reflected in the Eleventh Amendment, bars suits by citizens

court for injunctions against state officials acting on behalf of a State that has acted contrary to the Constitution or any federal law to proceed.[217] State sovereign immunity typically deprives federal courts of jurisdiction over "suits against a state, a state agency, or a state official in his official capacity unless that state has waived its sovereign immunity or Congress has clearly abrogated it."[218] The exception is based on the legal fiction that a sovereign state cannot act unconstitutionally.[219] Therefore, "[i]t is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce"[220] an unconstitutional law. If the state official "comes into conflict with the superior authority of th[e federal] Constitution, and he is . . . stripped of his official or representative character[, t]he State has no power to impart to him any immunity from responsibility to the supreme authority of the United States."[221]

Suits seeking injunctions under § 1983 and the *Ex parte Young* exception to sovereign immunity were the typical litigation strategy for reproductive rights advocates; abortion providers would "bring a lawsuit in federal court against the state officer responsible for enforcing the law . . . , seeking a declaratory judgment that the law [wa]s constitutionally invalid and an injunction prohibiting the officer from enforcing the law, [and c]ourts grant[ed] these injunctions" [222] after declaring that the challenged law was invalid under the then-binding precedent of *Casey*. In order to obtain injunctive relief under § 1983, the target of the injunction must be acting "under color of" state law,[223] traditionally defined as requiring "that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law

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against their own state, despite the Eleventh Amendment not expressly prohibiting such suits).

217. *Young*, 209 U.S. at 155–56 (stating that "individuals who, as officers 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").

218. Moore v. La. Bd. of Elementary & Secondary Educ., 743 F.3d 959, 963 (5th Cir. 2014); *see also* Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267 (1997); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55 (1996).

219. *Young*, 209 U.S. at 159.

220. *Id.*

221. *Id.* at 159–60.

222. Charles W. ("Rocky") Rhodes & Howard W. Wasserman, *Solving the Procedural Puzzles of Texas' Fetal-Heartbeat Law* 5 (FIU Legal Studies Research Paper Series, Research Paper No. 21-15, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3906693 (citing June Medical Servs. LLC v. Russo, 140 S. Ct. 2103 (2020) and Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016) as examples of such litigation).

223. 42 U.S.C. § 1983 (2018).

and made possible only because the wrongdoer is clothed with the authority of state law.'"[224] If a defendant's conduct fulfills the Fourteenth Amendment's state action requirement, "that conduct [is] also action under color of state law and will support a suit under § 1983."[225] The paradigmatic defendant in a § 1983 action is a state official.[226]

However, a § 1983 suit under *Ex parte Young* was not available to abortion providers or others who wished to challenge S.B. 8. The law was seemingly tailor-made to avoid such actions, as it expressly prohibited enforcement by state officials[227] while simultaneously empowering private citizens to act as bounty hunters.[228] Individuals were unable to turn to the federal courts for pre-enforcement equitable relief and were instead left with a defensive strategy[229] as

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224. *See* West v. Atkins, 487 U.S. 42, 49 (1988) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

225. Lugar v. Edmondson Oil Co., 457 U.S. 922, 935 (1982).

226. *But see* Anthony J. Colangelo, *Suing Texas State Senate Bill 8 Plaintiffs under Federal Law for Violations of Constitutional Rights*, 74 SMU L. REV. 136, 137–38 (2021) (suggesting that private citizen plaintiffs can be targets of § 1983 actions challenging S.B. 8 since the private plaintiffs are acting as prosecutors).

227. TEX. HEALTH & SAFETY CODE ANN. § 171.207 (West 2021).

228. *Id.* § 171.208; *see also* Whole Woman's Health v. Jackson, 556 F. Supp. 3d 595, 607 (W.D. Tex.) (acknowledging the concern that "S.B. 8 incentivizes lawsuits accusing individuals of aiding and abetting prohibited abortions through generous award of fees to successful claimants"), *denying motion for injunction*, No. 21-50792, 2021 WL 3919252 at*1 (5th Cir. 2021), *denying application for injunctive relief*, 141 S. Ct. 2494 (2021); *Id.* at 624 (noting that "S.B. 8 empowers 'any person' to initiate enforcement actions . . . [such that] those who are politically opposed to [abortion providers] are empowered to sue them for substantial monetary gain" and that "S.B. 8 incentivizes anti-abortion advocates to bring as many lawsuits . . . as possible by awarding private enforcers of the law $10,000 per banned abortion").

229. The test case employing this defensive strategy is currently underway—one physician has publicly admitted to performing a first-trimester abortion that is illegal under S.B. 8. *See* 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 (saying "I provided an abortion to a woman who . . . was beyond the state's new limit . . . I fully understood that there could be legal consequences — but I wanted to make sure that Texas didn't get away with its bid to prevent this blatantly unconstitutional law from being tested."). On September 20, an Arkansas man filed suit against the doctor in Bexar County. *See* Ann E. Marimow, *Texas Doctor Who Violated State's Abortion Ban Is Sued, Launching Potential First Test of Constitutionality*, WASH. POST (Sept. 20, 2021, 4:55 PM), https://www.washingtonpost.com/politics/courts_law/texas-abortion-doctor-sued/2021/09/20/f5ab5c56-1a1c-11ec-bcb8-0cb135811007_story.html. An Illinois man, identifying himself as a "pro-choice plaintiff" has also sued, requesting that the court declare S.B. 8 unconstitutional and refusing to seek monetary damages. *See* Reese Oxner, *Texas Doctor Who Admitted to Violating the State's Near-Total Abortion Ban*

the only option for asserting the then-constitutionally protected right to a pre-viability abortion—someone would have to violate the law and risk ruinous litigation,[230] attorney's fees,[231] and potential liability with no guarantee that an appellate court would vindicate the right recognized in *Roe*.

The strategy employed by the Texas legislature has been remarkably successful. In early September, the Supreme Court issued a shadow docket[232] order denying the abortion providers' request for injunctive relief, citing "complex and novel antecedent procedural questions," which prevented the Court from granting relief, despite

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Sued Under New Law, TEX. TRIB. (Sept. 20, 2021), https://www.texastribune.org/2021/09/20/texas-abortion-ban-doctor-alan-braid. Whether either of these suits will be allowed to proceed in the Texas state courts is uncertain, as the Texas Supreme Court recently said that "the Texas standing requirements parallel the federal test for Article III standing, which provides that '[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *In re* Abbott, 601 S.W.3d 802, 807 (Tex. 2020) (quoting Heckman v. Williamson Cnty., 369 S.W.3d 137, 154 (Tex. 2012)). No such injury has been alleged by the plaintiffs suing Braid. Operation Rescue has asked the Texas Medical Board to investigate Dr. Braid and to suspend and permanently revoke his license, arguing that he has committed unprofessional conduct by performing an abortion that violates the Act. *See Complaint Against Alan Braid*, OPERATION RESCUE (Sept. 20, 2021), https://www.operationrescue.org/wp-content/uploads/2021/09/2-Complaint-Narrative-Alan-Braid-9-20-2021-Letterhead.pdf. Indirect enforcement of S.B. 8 by a regulatory board would involve state officials enforcing the law, which in turn would potentially allow Braid to file suit in federal court to enjoin the enforcement of an unconstitutional law under § 1983 and *Ex parte Young*. The original request for injunctive relief included a request to enjoin the director of the Texas Medical Board from enforcing the law. *See* Complaint at 8, Whole Woman's Health v. Jackson, 556 F. Supp. 3d 595 (W.D. Tex. 2021) (No. 1:21-cv-616); *Id.* at 608. The Fifth Circuit held that such indirect enforcement by state regulatory boards was prohibited by "[t]he law's plain language [which] provides that '[n]o enforcement . . . in response to violations . . . may be taken or threatened by . . . an executive or administrative officer or employee of this state.'" Whole Woman's Health v. Jackson, 13 F.4th 434, 443 (5th Cir. 2021) (quoting TEX. HEALTH & SAFETY CODE ANN. § 171.207(a) (West 2021)).

230. *See Jackson*, 556 F. Supp. 3d at 607 (noting that abortion providers feared subjecting themselves and their staff to private enforcement suits and professional discipline for providing "abortions that they believe[d we]re constitutionally protected, but are prohibited by S.B. 8.").

231. TEX. HEALTH & SAFETY CODE ANN. § 171.208(i) (West 2021) (prohibiting courts from awarding costs or attorney's fees to any defendant in an action brought under this law). *See also Jackson*, 556 F. Supp. 3d at 607 (describing the "potentially ruinous liability for attorney's fees and costs").

232. The term "shadow docket" refers to "the significant volume of orders and summary decisions that the Court issues without full briefing and oral argument." Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 125 (2019); *see also* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 3–5 (2015).

"serious questions regarding the constitutionality of the Texas law."[233] Despite multiple challenges from both abortion providers and the United States Justice Department, S.B. 8 remains in effect.[234] Millions of women were deprived of their constitutionally protected right to obtain a pre-viability abortion without undue burdens or substantial obstacles being placed in their way, months before the Supreme Court vitiated that right in *Dobbs*.

III. THE NEED FOR OFFENSIVE PRE-ENFORCEMENT LITIGATION

There is a very good reason why reproductive rights advocates, as well as other litigants alleging civil rights violations, typically attempted to get courts to enjoin laws that restricted abortion access: most people and organizations are risk-averse and unwilling to engage in behavior that, while constitutionally protected, could lead to years of expensive litigation and incur the risk, however small,[235] of potential liability.[236] Accordingly, since S.B. 8 was enacted, it became practically impossible[237] to obtain an abortion after a "fetal heartbeat" had been detected. Millions of women in Texas were without access to abortion care within their state prior to *Dobbs*, and most had to drive hundreds of miles to receive such care.[238] The longer the law remained in effect, the more women were impacted and forced to continue an unwanted pregnancy unless they could afford the time and expenses required to travel out of state to obtain an abortion.

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233. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021).

234. Whole Woman's Health v. Jackson, 13 F.4th 434, 438–39 (5th Cir. 2021).

235. Although it is apparent that S.B. 8 was unconstitutional under the then-current precedent, see discussion *supra* Section II(A), the Court granted certiorari in *Dobbs v. Jackson Women's Health Organization* to answer the question of whether all pre-viability prohibitions on elective abortions are unconstitutional, making the risk that the Court would ultimately find S.B. 8 constitutional appear much greater to abortion providers, a risk that now seems very likely. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

236. *See* Meaghan Winter, *Why It's So Hard to Run an Abortion Clinic—And Why So Many Are Closing*, BLOOMBERG BUSINESSWEEK (Feb. 24, 2016), https://www.bloomberg.com/features/2016-abortion-business (noting that the risk-averse nature of physicians and hospitals as well as the hostile political climate has made it increasingly difficult to offer abortion care).

237. *See supra* notes 15–16 and accompanying text.

238. *See* Nash et al., *supra* note 23 (describing how the average one-way driving distance to obtain an abortion after the 6-week gestational period has passed was 248 miles as opposed to 12 miles before the law took effect). This distance increased when Oklahoma has passed a law, which went into effect November 1, 2021, that bans abortions after a fetal heartbeat is detected and makes doctors who perform such abortions guilty of homicide. *See* 2021 Okla. Sess. Law Serv. Ch. 219 (H.B. 2441) (West).

This is a paradigmatic example of where pre-enforcement offensive litigation is necessary. If the federal courts had been able to effectively "block" S.B. 8 before it went into effect, Texas women would not have been deprived of their rights and abortion providers would have been able to continue providing care to their patients. But because this strategy was unavailable under S.B. 8, constitutionally protected activity was chilled, since many abortion providers feared the avalanche of litigation that would ensue if they violated the law.[239]

This strategy of anti-abortion advocates was not limited to Texas. Since the successful implementation of S.B. 8, lawmakers in other states have vowed to enact similar laws restricting pre-viability abortions,[240] indeed, such a law became effective in Oklahoma[241] prior to the Supreme Court paving the way for further abortion restrictions with the decision in *Dobbs*. And laws restricting access to abortion are only the beginning—"[t]he ripple effects . . . and the law's creative workaround method that involves using the threat of civil lawsuits" may lead to "a rush of similar efforts in other states, prompting local legislators to pursue new measures on gun rights, immigration and other divisive political issues, all in an effort to sidestep the federal government."[242] If this kind of strategy is allowed to prevail, we could

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239. *See, e.g.*, Jennifer Gerson, *'No One Wants to Get Sued': Some Abortion Providers Have Stopped Working in Texas*, 19TH NEWS (Sept. 15, 2021), https://19thnews.org/2021/09/abortion-providers-texas-stopped-working-under-threat-sued (describing how half of the doctors at one of Texas's largest abortion providers have stopped working since S.B. 8 went into effect).

240. *See* Alison Durkee, *Ohio Bill Copies Texas' Abortion Ban—And Goes Further. Here's Which States Could Be Next*, Forbes.com (Nov. 3, 2021), https://www.forbes.com/sites/alisondurkee/2021/11/03/ohio-bill-copies-texas-abortion-ban-and-goes-further-heres-which-states-could-be-next/?sh=50f68a055b84; Kurtis Lee & Jaweed Kaleem, *The New Texas Abortion Law Is Becoming a Model for Other States*, L.A. TIMES (Sept. 18, 2021), https://www.latimes.com/world-nation/story/2021-09-18/texas-abortion-united-states-constitution (detailing how lawmakers in Mississippi and Missouri have also expressed their intent to pass similar laws); Oren Oppenheim, *Which States' Lawmakers Have Said They Might Copy Texas' Abortion Law*, ABC NEWS (Sept. 3, 2021), https://abcnews.go.com/Politics/states-lawmakers-copy-texas-abortion-law/story?id=79818701 (noting that lawmakers and anti-abortion advocates in Arkansas, Florida, Idaho, Indiana, Oklahoma, and South Dakota have all expressed interest in S.B. 8 and that several lawmakers were planning to introduce bills that mirror Texas's law).

241. 2022 Okla. Sess. Laws, ch. 321 (H.B. 4327) (West); *see also* Rebekah Riess et al., *Oklahoma Lawmakers Pass One of Nation's Strictest Abortion Bills Banning Procedure 'From Fertilization'*, CNN (May 20, 2022), https://www.cnn.com/2022/05/19/politics/oklahoma-abortion-ban-hb-4327-passed/index.html (explaining that Oklahoma's abortion ban was enforceable through private lawsuits, much like Texas's S.B. 8).

242. *See* Lee & Kaleem, *supra* note 240.

transform into a nation of lawsuit-wielding vigilantes,[243] authorized by the state government to privately enforce its legislative prerogatives. As Attorney General Merrick Garland said:

> This kind of scheme to nullify the Constitution of the United States is one that all Americans, whatever their politics or party, should fear . . . . If it prevails, it may become a model for action in other areas, by other states, and with respect to other constitutional rights and judicial precedents.[244]

Justice Sotomayor has noted that the real "dispute is over whether States may nullify federal constitutional rights by employing schemes"[245] like the one present in S.B. 8, warning that the Court's "choice to shrink from Texas' challenge to federal supremacy will have far-reaching repercussions."[246] Issues such as pornography,[247] gun rights,[248] transgender rights,[249] and mask requirements and other

243. Jon Michaels & David Noll, *We Are Becoming a Nation of Vigilantes*, N.Y. TIMES (Sept. 4, 2021), https://www.nytimes.com/2021/09/04/opinion/texas-abortion-law.html (noting how Republican lawmakers have "inverted private enforcement laws[—]marshaled over the years to discipline fraudulent government contractors, racist or sexist bosses and toxic polluters[—]to enable individuals to suppress the rights of their neighbors, classmates and colleagues").

244. *See* Lee & Kaleem, *supra* note 240 (quoting Merrick Garland).

245. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 550 (2021) (Sotomayor, J., concurring in part).

246. *Id.*

247. *See* UTAH CODE ANN. § 78B-6-2105 (West 2020) (banning websites that distribute pornographic materials from distributing obscene materials without including a warning that "obscene material may damage or negatively impact minors" and making such a violation enforceable by civil lawsuits); *see also Adult Websites Complying with New Utah Warning Label Law*, ASSOCIATED PRESS (Nov. 25, 2020), https://apnews.com/article/entertainment-adult-entertainment-utah-legislation-pornography-dd3196277e21ebccce701128be977929 (noting that free speech advocates and pornography companies have commented on the law's problematic compelled speech component).

248. *See* Second Amendment Preservation Act, MO. ANN. STAT. § 1.430 (West 2021) (declaring all federal laws that "infringe on the people's right to keep and bear arms as guaranteed by the Second Amendment to the Constitution of the United States" and the Missouri Constitution to be invalid and unenforceable); *Id.* § 1.450 (banning any person or entity from enforcing or attempting to enforce such federal gun control laws); *Id.* § 1.460 (creating a private right of action and a civil penalty of $50,000 for "[a]ny political subdivision or law enforcement agency that employs a law enforcement officer who acts knowingly. . .to. . .deprive a citizen of Missouri of the rights or privileges" of the Second Amendment or the Missouri Constitution).

249. *See* Fairness in Women's Sports Act, FLA. STAT. § 1006.205 (2021) (banning students designated male at birth from public school athletic teams designated for

public health measures related to the COVID-19 pandemic[250] have already been the subject of similar laws. It is difficult to see where this concept ends—California could give citizens the right to sue their neighbors for recklessly keeping guns in their homes, New York could encourage its citizens to sue churches and other houses of worship that refuse to adhere to COVID-19 safety protocols, and Massachusetts could authorize its citizens to seek damages from their neighbors who insist on driving wasteful, gas-guzzling SUVs. Indeed, California Governor Gavin Newsom has signed a bill modeled on S.B. 8 allowing private individuals to sue gun manufacturers and sellers who dealt in firearms that were illegal in the state while barring public enforcement of the law.[251] On the other end of the political

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females, women, or girls and creating a civil action for "[a]ny student who is deprived of an athletic opportunity or suffers any direct or indirect harm as a result" to sue a school violating the ban); Tennessee Accommodations for All Children Act, TENN. CODE ANN. § 49-2-805 (2021) (creating a private right of action authorizing students and teachers to sue schools for psychological, emotional, and physical harm if the schools allow transgender students to use a bathroom that matches their gender identity).

250. KAN. STAT. ANN. § § 48-925; 48-932 (2021) (creating an expedited civil action for anyone claiming to be aggrieved by actions taken by the governor or local government in response to an emergency declaration that "substantially burden[] or inhibit[]the gathering or movement of individuals or the o peration of any religious, civic, business or commercial activity"); *Id.* Ch. 7, § 1 (similarly creating an expedited civil action for any public school employee, student, or parent who is aggrieved by an action or policy taken by a school board in response to the COVID-19 pandemic). A trial court ruled that this law violated the Kansas Constitution in *Butler v. Shawnee Mission School District Board of Education*, No. 21CV2385, 2021 WL 3011059 at *2 (Kan. Dist. Ct. July 14, 2021), but the Kansas Supreme Court reversed, citing the avoidance doctrine, so the law remains in effect. Butler v. Shawnee Mission School Dist. Bd. of Educ., 502 P.3d 89, 90–91 (Kan. 2022).

251. Hannah Wiley, *Newsom Signs Gun Law Modeled After Texas Abortion Ban, Setting Up Supreme Court Fight*, L.A. TIMES (Jul. 22, 2022); *see* 2022 Cal. Legis. Serv. Ch. 146 (S.B. 1327) (West). In a clear indication that this bill was proposed retaliation for Texas's S.B. 8, the law was to become inoperative and be repealed upon "invalidation of Subchapter H . . . of Chapter 171 of the Texas Health and Safety Code in its entirety." CAL. BUS. & PROF. CODE § 22949.71 (West 2021). California Governor Gavin Newsom had previously promised to pursue legislation allowing for private enforcement actions against gunowners, modeled on S.B. 8:

> I am outraged by [the] U.S. Supreme Court decision allowing Texas's ban on most abortion services to remain in place, and largely endorsing Texas's scheme to insulate its law from the fundamental protections of Roe v. Wade. But if states can now shield their laws from review by the federal courts that compare assault weapons to Swiss Army knives, then California will use that authority to protect people's lives, where Texas used it to put women in harm's way. I have directed my staff to work with the Legislature

spectrum, Florida recently enacted private enforcement bills which would allow parents to sue schools that teach critical race theory or discuss LBGTQ topics,[252] despite potential conflicts with the First Amendment.[253] These private enforcement laws are "an assault on our legal system and on the idea that law enforcement is up to the government, not our neighbors."[254] They not only chill constitutionally protected behavior: the laws turn neighbor against neighbor, as citizens are incentivized to spy on each other and sue alleged violators of the law. Indeed, as Justice Sotomayor noted, "the Court effectively invites other States to refine S. B. 8's model for nullifying federal rights[,] betraying not only the citizens of Texas, but also our constitutional system of government."[255]

Given the problematic nature of S.B. 8 and the seemingly endless scope of the procedural "stratagems designed to shield [the] unconstitutional [Texas] law from judicial review,"[256] it becomes clear

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> and the Attorney General on a bill that would create a right of action allowing private citizens to seek injunctive relief, and statutory damages of at least $10,000 per violation plus costs and attorney's fees, against anyone who manufactures, distributes, or sells an assault weapon or ghost gun kit or parts in the State of California.

Governor Newsom Statement on Supreme Court Decision, STATE OF CAL. OFF. OF THE GOVERNOR (Dec. 11, 2021), https://www.gov.ca.gov/2021/12/11/governor-newsom-statement-on-supreme-court-decision. California has also enacted a separate law that empowered not only private individuals but also the State and local governments to sue those that violated firearm safety standards. 2022 Cal. Legis. Serv. Ch. 98 (A.B. 1594) (West); *see also* Jon Healey, *California Opens the Door to Suing Gun Makers. Here's What the New Law Does*, L.A. TIMES (Jul. 13, 2022), https://www.latimes.com/california/story/2022-07-13/california-law-allows-lawsuits-against-gun-makers-and-dealers.

252. Parental Rights in Education, H.B. 1557, 2022 Leg., Reg. Sess. (Fla. 2022); Individual Freedom, S.B. 7, 2022 Leg., Reg. Sess. (Fla. 2022); *see also* Kiara Alfonseca, *DeSantis-backed 'Don't Say Gay' Bill Sparks Outrage*, ABC NEWS (Feb. 22, 2022), https://abcnews.go.com/US/dont-gay-bill-moves-forward-florida/story?id=82481565; Nicholas Reimann, *DeSantis Unveils 'Stop W.O.K.E. Act' So Parents Can Sue Over Critical Race Theory in Schools*, FORBES (Dec. 15, 2021), https://www.forbes.com/sites/nicholasreimann/2021/12/15/desantis-unveils-stop-woke-act-so-parents-can-sue-over-critical-race-theory-in-schools/?sh=69b434c024d3.

253. *Battles Continue as "Stop WOKE Act" Law Takes Effect*, CBS NEWS (July 1, 2022), https://www.cbsnews.com/miami/news/battles-continue-as-stop-woke-act-law-takes-effect (noting that multiple lawsuits are alleging that the "Stop WOKE Act" violates the First Amendment).

254. Laurence H. Tribe & Stephen I. Vladeck, *Texas Tries to Upend the Legal System with Its Abortion Law*, N.Y. TIMES (Jul. 19, 2021), https://www.nytimes.com/2021/07/19/opinion/texas-abortion-law-reward.html.

255. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 545–46 (2021) (Sotomayor, J., concurring in part).

256. *Id.* at 543 (Roberts, C.J., concurring in part).

that something must be done to limit the impact of these laws. This is where the current landscape of federal standing falls short—since the abortion providers failed in their attempt to obtain an injunction against the entire Texas court system,[257] the law remained in effect. In denying pre-enforcement relief, the Court cited *Ex parte Young*, which, in contemplating injunctions against state courts, says:

> It is proper to add that the right to enjoin an individual, even though a state official...does not include the power to restrain a court from acting in any case brought before it...[A]n injunction against a state court would be a violation of the whole scheme of our government...The difference between the power to enjoin an individual from doing certain things[] and the power to enjoin courts from proceeding in their own way to exercise jurisdiction[] is plain, and no power to do the latter exists because of a power to do the former.[258]

This interpretation of *Ex parte Young*, while troubling since its "fiction was created for the very purpose of addressing this kind of legislative recalcitrance,"[259] is strictly correct—the doctrine stands for the proposition that injunctions against state courts violate tenets of federalism.

However, in the case of S.B. 8, it was the Texas legislature that attacked the principles of federalism underpinning our society by effectively seizing the role of constitutional arbiter and defying almost fifty years of Supreme Court precedent. As Chief Justice Roberts noted, the "clear purpose and actual effect of S.B. 8 has been to nullify [the Supreme] Court's rulings."[260] Our constitutional structure was designed to curb such legislative excesses,[261] and the Framers, including James Madison and Alexander Hamilton, "were deeply wary of legislative power[;] their apprehension reverberates through

257. *See* Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021); Whole Woman's Health v. Jackson, 13 F.4th 434, 438 (5th Cir. 2021).

258. *Ex parte* Young, 209 U.S. 123, 163 (1908).

259. Borgmann, *supra* note 117, at 806.

260. *Jackson*, 142 S. Ct. at 545 (Roberts, C.J., concurring in part).

261. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 22–23, (1948) (noting that the issue of figuring out the extent that the Constitution restricts "exertions of power by the States has given rise to many of the most persistent and fundamental issues which this Court has been called upon to consider [and t]hat [this] problem was foremost in the minds of the framers of the Constitution," and asserting that when "it is clear that the action of the State violates the terms of the [Constitution], it is the obligation of this Court so to declare.").

the *Federalist Papers*."[262] The frequent allusions to legislative surfeit and the tyranny of the majority underscore this concern.[263] The potential for abuses and infringements on individual liberty by legislatures aligned with majoritarian interests was to be tempered by the judiciary, as "[w]ithin the architecture of the Constitution, federal courts bear the burden of curbing legislative" deprivations of individual rights.[264] As reflected in *Federalist No. 78*, judicial review was the preferred mechanism for settling constitutional disputes and legislative overreach, as the judiciary is an "excellent barrier to the encroachments and oppressions of the representative body."[265]

Similarly, the Framers were suspicious of state governments and frequently emphasized the need for federal supremacy. In *Federalist*

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262. *See* Borgmann, *supra* note 117, at 796.

263. *See* THE FEDERALIST NO. 48, at 102 (James Madison) (J. & A. McLean ed., 1788) (noting that "[t]he legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex[,]" and referring to "the danger from legislative usurpations, which by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations."); THE FEDERALIST NO. 62, *supra*, at 187–88 (James Madison) (referencing "the propensity of all single and numerous assemblies, to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions[.]"); THE FEDERALIST NO. 10, *supra*, at 57 (James Madison) (observing that "[w]hen a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens[,]" and stating that "the majority, having such co-existent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression[.]"); THE FEDERALIST NO. 51, *supra*, at 120 (James Madison) (stating that "[i]f a majority be united by a common interest, the rights of the minority will be insecure.").

264. Borgmann, *supra* note 117, at 797.

265. THE FEDERALIST NO. 78, at 291 (Alexander Hamilton). Hamilton reasoned that the legislative body could not be the constitutional judge of its own actions, as that would:

> enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts.

Id. at 293–94 (emphasis in original). Continuing, Hamilton declared that this did not suppose judicial supremacy over the legislature, but "only . . . that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the [C]onstitution, the judges ought to be governed by the latter rather than the former." *Id.*; *see also* THE FEDERALIST NO. 81, at 313 (Alexander Hamilton) (applauding "the wisdom of those States who have committed the judicial power in the last resort, not to a part of the legislature, but to distinct and independent bodies of men").

No. 33, Hamilton reasoned that "[i]f a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers entrusted to it by its constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed,"[266] extrapolating that without national supremacy, "the laws of the union . . . would amount to nothing."[267] Hamilton worried that nothing "would avail restrictions on the authority of the State legislatures, without some constitutional mode of enforcing the observance of them" and argued that the federal judiciary was the proper tribunal for such disputes.[268] Likewise, Madison advocated for the necessity of federal supremacy in *Federalist No. 44*, noting that without it, Americans would have created a "government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society [everywhere] subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members."[269]

In the early cases of *Marbury v. Madison*[270] and *Martin v. Hunter's Lessee*,[271] the Supreme Court asserted its role as the final arbiter in constitutional interpretation as had been envisioned in the *Federalist Papers*: that of "a check on potential legislative defiance of the constitution."[272] As Justice Marshall said in *Marbury*:

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266. THE FEDERALIST NO. 33, at 204 (Alexander Hamilton).

267. *Id.* Hamilton analogized the States entering the Union to individuals entering a state of society, noting that when individuals do so, "the laws of that society must be the supreme regulator of their conduct." *Id.* Without national supremacy, "it otherwise be a mere treaty, dependent on the good faith of the parties, and not a government." *Id.*

268. THE FEDERALIST NO. 80, at 303 (Alexander Hamilton).

269. THE FEDERALIST NO. 44, at 132 (James Madison) (Roy P. Fairfield, ed., 1961); *see also* THE FEDERALIST NO. 10, at 60–61 (James Madison) (noting the many advantages "enjoyed by a large over a small republic—is enjoyed by the union over the States composing it[,]" in controlling factions as "[t]he influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States[.]"). Indeed, Madison was so in favor of national supremacy that he proposed a federal negative or veto power, vesting the national legislature with the power to declare the laws of the state legislatures unconstitutional and "presented the federal negative as the cure to both the problem of authority that had dogged every other confederation and to what he viewed as the related problem of the states' increasing tendency to carry rule by majority to dangerous excess." Alison L. LaCroix, *The Authority for Federalism: Madison's Negative and the Origins of Federal Ideology*, 28 L. & HIST. REV. 451, 462 (2010).

270. Marbury v. Madison, 5 U.S. 137 (1803).

271. Martin v. Hunter's Lessee, 14 U.S. 304 (1816).

272. Borgmann, *supra* note 117, at 799. Borgmann analyzes these early decisions to demonstrate that the Court "reaffirmed the importance of federal supremacy and the

> It is emphatically the province and duty of the judicial department to say what the law is...If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the [C]onstitution . . . the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If then the courts are to regard the [C]onstitution[,] and the [C]onstitution is superior to any ordinary act of the legislature[,] the [C]onstitution, and not such ordinary act, must govern the case to which they both apply.[273]

Laws like S.B. 8 attempt to eliminate such judicial review and threaten to create the monstrous, Hydra-like landscape warned of in the *Federalist Papers*[274] by allowing each state to use private-enforcement civil actions to effectively decide which constitutional precedents will be respected and followed within their borders, the Court, through its over-reliance on a single paragraph in *Ex parte Young*, has allowed the states to usurp the power of the federal government. Since the Court, at least in the context of abortion regulations,[275] was leery of asserting its power, the question remains of how this issue can be resolved.

Following the Court's opinion in *Dobbs v. Jackson Women's Health Organization*, the Supreme Court cannot be relied on to vindicate abortion rights. One option for securing abortion rights is for Congress to pass federal legislation guaranteeing such rights. The Women's

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place of state legislatures within the constitutional landscape," and "'the legislatures of the states . . . in every case are, under the [C]onstitution, bound by the paramount authority of the United States[,]'" and noting that "[t]he Court reiterated that federal supremacy guards against 'state prejudices, state jealousies, and state interests,' ensures 'uniformity of decisions throughout the whole United States,' and guarantees that constitutional protections redound to the 'common and equal benefit of all of the people of the United States.'" *Id.* (quoting *Martin*, 14 U.S. at 347–48).

273. *Marbury*, 5 U.S. at 177–78.

274. *See* THE FEDERALIST NO. 44, *supra* note 269, at 132 (James Madison); THE FEDERALIST NO. 80, *supra* note 268, at 304 (Alexander Hamilton) ("The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.").

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

Health Protection Act,[276] which broadly[277] protects a woman's right to obtain a pre-viability abortion, as well as a health care provider's right to provide abortion services, is such a bill. If passed,[278] it would preempt existing state laws,[279] including Texas's S.B. 8. The Act provides that the U.S. attorney general, as well as any individual, including health care providers, aggrieved by alleged violations, can commence a civil action for prospective injunctive relief against state officials charged with implementing or enforcing the restrictions that allegedly violate the law.[280] It is here, in the enforcement mechanism, that broad legislation guaranteeing abortion rights is ineffective against state laws crafted to provide for only private enforcement, such as S.B. 8. Under the language of S.B. 8, there are no public

276. Women's Health Protection Act of 2022, H.R. 8296, 117th Cong. (2022). A previous version of the bill, the Women's Health Protection Act of 2021, H.R. 3755, 117th Cong. (2021), passed the Democratic-controlled House of Representatives but lacked the votes necessary to overcome a Republican filibuster in the Senate. *See* Deepa Shivaram, *A Bill to Codify Abortion Protections Fails in the Senate*, NAT'L PUB. RADIO (May 11, 2022, 4:54 PM), https://www.npr.org/2022/05/11/1097980529/senate-to-vote-on-a-bill-that-codifies-abortion-protections-but-it-will-likely-f.

277. The Women's Health Protection Act would do away with many of the current state restrictions on abortion, including the trigger laws and pre-*Roe* abortion bans that have become effective since *Dobbs*. In addition to providing that health care providers have a statutory right to provide abortion services, the Act prohibits requirements that health care providers perform specific tests or procedures in connection with abortion services unless they are generally required for comparable medical procedures; requirements that abortion providers perform specified tests prior to or after the abortion; requirements that abortion providers convey medically inaccurate information; abortion-specific limitations on a health care provider's ability to prescribe drugs; abortion-specific limitations on telemedicine; abortion-specific requirements on staffing, hospital transfer arrangements, or admitting privileges; requirements that women make in-person visits to an abortion provider prior to the procedure; all bans on pre-viability abortions; bans on post-viability abortions when the continuation of the pregnancy would pose a risk to the patient's health; limitations on emergency abortion services when delay would risk a patient's health; requirements that women seeking an abortion disclose their reason for doing so and limitations based on the reason a patient is seeking an abortion. H.R. 8296, § 4(a)(1).

278. Much like its predecessor, it appears likely that House Bill 8296 will likely fail in the Senate, as it appears to lack the votes necessary to overcome a Republican filibuster. Even if the filibuster is abolished, it is unclear whether the bill has the support to meet the 50-vote threshold, as multiple Democrat and supposedly pro-choice Republican senators have yet to voice support. *See* Amy B. Wang & Eugene Scott, *House Passes Bills to Codify Abortion Rights and Ensure Access*, WASH. POST (July 15, 2022, 1:42 PM) ("Despite passage in the Democratic-led House, the bills [to ensure abortion rights] are almost certain to fail in the Senate, where they would require 60 votes or the suspension of filibuster rules and a simple majority[,]" since "[b]oth are unlikely in the face of Republican opposition.").

279. H.R. 8296, § 5(a)(1).

280. *Id.* at § 8.

officials to obtain an injunction against,[281] and the Court has shown that it is unwilling to enjoin the entire Texas court system.[282] Although reproductive rights advocates might champion a bill such as the Women's Health Protection Act, especially in light of *Dobbs v. Jackson Women's Health Organization*,[283] state laws delegating enforcement to private citizens while simultaneously barring public enforcement would continue to effectively deprive people of their rights, even if such a bill was passed.

In addition to laws granting statutory rights to abortion care such as the Women's Health Protection Act, legislation creating jurisdiction in the federal courts to hear equitable suits requesting pre-enforcement injunctions against these private enforcement laws, such as Texas's S.B. 8, is necessary. Congress may pass this legislation based on its power to create, and implicitly to define the jurisdiction of,[284] federal courts inferior to the Supreme Court, granted both in the congressional powers clause[285] and the judicial vesting clause[286] of the Constitution. However, this ability to create jurisdiction is subject to the Court's Article III standing doctrine,

281. TEX. HEALTH & SAFETY CODE ANN. § 171.207 (West 2021).

282. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021) (noting the "complex and novel antecedent procedural questions" involved in analyzing S.B. 8 which prevented the Court from granting injunctive relief).

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

284. Since Congress was not required to create lower federal courts, it also can define their jurisdiction. *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301, 331 (1966) (analyzing the Voting Rights Act and determining that "Congress might appropriately limit litigation . . . to a single court . . . , pursuant to its constitutional power under Art. III, § 1, to 'ordain and establish' inferior federal tribunals"); Lockerty v. Phillips, 319 U.S. 182, 187 (1943) (stating that "[a]ll federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts, conferred on Congress by Article III, § 1, of the Constitution."); Cary v. Curtis, 44 U.S. 236, 245 (1845) (declaring that "the judicial power of the United States, although it has its origin in the Constitution, is . . . dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress[,]" who may invest the courts "with jurisdiction . . . in the exact degrees and character which to Congress may seem proper for the public good."); *Ex parte* Bollman, 8 U.S. 75, 93 (1807) (asserting that "courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction."); Turner v. Bank of N. Am., 4 U.S. 8, 9 (1799) (stating that "[t]he notion has frequently been entertained, that the federal courts derive their judicial power immediately from the [C]onstitution; but the political truth is, that the disposal of the judicial power, (except in a few specified instances) belongs to [C]ongress.").

285. U.S. CONST. art. I, § 8, cl. 9 ("The Congress shall have Power . . . [t]o constitute Tribunals inferior to the supreme Court.").

286. *Id.* art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

which "gives the federal courts authority to hear only 'Cases' and 'Controversies' and serves to maintain the constitutional balance between the branches."[287] The Court's restrictive standing doctrine has been widely criticized;[288] however, it appears unlikely that the Court will be changing course anytime soon.[289]

Article III standing requires a tripartite test: that the plaintiff must have suffered an:

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287. Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 169 (2011). The case or controversy requirement states that:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;— between a State and Citizens of another State,—between Citizens of different States,— between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2, cl. 1.

288. "Standing is an aspect of justiciability and, as such, the problem of standing is surrounded by the same complexities and vagaries that inhere in justiciability. Standing has been called one of 'the most amorphous [concepts] in the entire domain of public law.'" Flast v. Cohen, 392 U.S. 83, 98–99 (1968) (citations omitted); *see also* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221 (1988) (describing standing doctrine as "incoherent . . . 'permeated with sophistry,' . . . 'a word game played by secret rules,' and . . . as a largely meaningless 'litany' recited before 'the Court . . . chooses up sides and decides the case'")(citations omitted); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 480 (1996) (describing the doctrine as "theoretically incoherent"); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 75 (2007) (describing standing and other justiciability doctrines as "pointless constraint[s] on courts"); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1458 (1988) (calling standing "manipulable" and permeated with "doctrinal confusion"); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1418–25 (1988) (describing the doctrine as lacking a historical foundation). Most critics of the Court's standing doctrine suggest that the Court itself remedy the problem. *See generally* Elliot, *supra* note 287, at 177–80.

289. Indeed, recent cases reflect that Article III standing requirements have become even more restrictive, "transform[ing] standing law from a doctrine of judicial modesty into a tool of judicial aggrandizement." TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2225 (2021) (Kagan, J., dissenting). *See id.* at 2211 (a risk of future harm cannot qualify as a concrete harm for Article III purposes in a suit for damages); Spokeo, Inc. v. Robins, 578 U.S. 330, 339–43 (2016) (requiring an injury be both particularized and concrete for Article III standing).

> '[I]njury in fact'—an invasion of a legally protected interest which is...concrete and particularized...and ...actual or imminent, not 'conjectural' or 'hypothetical'[; that] there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . traceable to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court'[, and] that it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'[290]

Article III standing represents a theoretical floor: "It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."[291] However, this does not abrogate Congress' ability to create standing, as the Court itself has said that "where a dispute is otherwise justiciable, the question whether the litigant is a 'proper party to request an adjudication of a particular issue' . . . is one within the power of Congress to determine"[292] and that "[t]he actual or threatened injury required by Art[icle] III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'"[293]

Therefore, it is apparent that Congress must carefully craft legislation, mindful of the Court's standing requirements, when attempting to create jurisdiction in the federal courts to hear equitable suits requesting pre-enforcement injunctions against private enforcement laws. Congress could craft a law like § 1983, but which explicitly allows for injunctions against a class of state court judges when the enforcement of private civil lawsuits threaten statutory or constitutionally protected rights. It could, for example, read something like this:

> Every person, including state court judges and judicial officers, individually or as a class, who, in the enforcement or threatened enforcement of any statute, ordinance, or regulation authorizing private civil enforcement actions, of any State or Territory or the

290. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (citations omitted);
291. Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997).
292. Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972) (quoting Flast v. Cohen, 392 U.S. 83, 100 (1968)).
293. Warth v. Seldin, 422 U.S. 490, 500 (1975) (quoting Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973)).

> District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and federal laws, shall be liable to the party injured in a suit in equity and subject to a potential injunction prohibiting such enforcement.

Any such law should be accompanied by legislative findings[294] explaining how a specific private enforcement law would cause harm to classes of citizens. In the case of S.B. 8, this would most obviously be abortion providers. Similarly, Congress should define chains of causation and redressability by statute[295]—for example, by showing how threatened enforcement of private lawsuits by Texas state court judges harms abortion providers and how this issue is redressable by enjoining the state court system from enforcing the law.

Federal legislation creating a right to enjoin the state court system when the state has created private enforcement laws violative of the Constitution or federal laws, as Texas did at the time S.B. 8 was enacted, would surely face an uphill road—including sovereign immunity challenges and the chance that the Court may reject such congressionally-created standing.[296] However, given the importance of restoring the federal government's ability to define both constitutional and other federal rights, Congress should at least be willing to try. Federal legislation of this kind is needed in addition to federal statutes recognizing reproductive rights. If Congress does not act, it is likely that other states will only be emboldened to pursue legislative strategies like that of the Texas legislature in crafting S.B.

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294. Legislative findings are traditionally reviewed deferentially, however, it is unclear how the Court would review legislative findings defining an "injury-in-fact" for Article III standing purposes, as "the Court is increasingly suspicious of 'fact-finding' that allows Congress to change the balance of the constitutional structure." Elliot, *supra* note 287, at 189.

295. *See* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 230 (1992) (suggesting that "Congress has the power to find causation [and redressability], perhaps [through] deploying its factfinding power, where courts would not do so.").

296. *See, e.g.*, Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 1 (2003) ("In a recent string of decisions invalidating federal civil rights legislation, the Supreme Court has repeated the simple but powerful message: 'The Constitution belongs to the courts[,]'" and that "[n]o longer does the Court emphasize the respect due to the constitutional judgments of a coequal and democratically elected branch of government . . . it claims that only the judiciary can define the meaning of the Constitution.").

8, leading to a patchwork across the country of which constitutional rights are effective.

CONCLUSION

It is blatantly obvious that S.B. 8 placed an undue burden on Texas women's ability to obtain an abortion of a non-viable fetus, in clear contravention of the then-existing precedent of *Casey*. Yet the law remained in effect because Texas's unprecedented scheme of private enforcement, designed to "insulate the State from responsibility for implementing and enforcing [its] regulatory regime,"[297] thereby evading judicial review, apparently baffled the majority of the Supreme Court and rendered it incapable of action.[298] While the Court repeatedly refused to act, abortion providers in Texas and the women they serve were irreparably harmed,[299] months before the Court's decision in *Dobbs*, since providers, as well as anyone else sued under the law for "aid[ing] and abet[ting]" an abortion,[300] would have been forced into a defensive posture in order to assert their constitutional arguments, subjecting them to burdensome litigation,[301] attorney's fees,[302] and potential liability[303] with no guarantee that an appellate court will vindicate the then-constitutionally protected right to a pre-viability abortion. By enacting legislation that violates the Constitution while authorizing private enforcement and barring public enforcement, Texas effectively ended the ability to obtain a pre-viability abortion months before the

297. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2496 (2021) (Roberts, C.J., dissenting).

298. *Id.* at 2495.

299. *See supra* note 20 and accompanying text.

300. TEX. HEALTH & SAFETY CODE ANN. § 171.208(a)(2) (West 2021).

301. *See* Whole Women's Health v. Jackson, 556 F. Supp. 3d 595, 607 (W.D. Tex.) (noting that abortion providers feared subjecting themselves and their staff to private enforcement suits and professional discipline for providing "abortions that they believe[d we]re constitutionally protected, but are prohibited by S.B. 8"), *denying motion for injunction*, No. 21-50792, 2021 WL 3919252 at*1 (5th Cir. 2021), *denying application for injunctive relief*, 141 S. Ct. 2494 (2021).

302. TEX. HEALTH & SAFETY CODE ANN. § 171.208(i) (West 2021); *see also Whole Women's Health*, 556 F. Supp. 3d at 607 (describing the "potentially ruinous liability for attorney's fees and costs").

303. "'S.B. 8 incentivizes lawsuits accusing individuals of aiding and abetting prohibited abortions' through generous award of fees to successful claimants." *Whole Women's Health*, 556 F. Supp. 3d at 607. "S.B. 8 empowers 'any person' to initiate enforcement actions . . . as those who are politically opposed to [abortion providers] are empowered to sue them for substantial monetary gain," and "S.B. 8 incentivizes anti-abortion advocates to bring as many lawsuits . . . as possible by awarding private enforcers of the law $10,000 per banned abortion." *Id.* at 624.

Supreme Court ruled that it could do so and seized for itself the ability to define which rights are protected by the Constitution. Numerous other states have expressed interest in adopting similar legislative strategies,[304] and it is possible that a myriad of controversial constitutional rights could effectively be defined differently depending on within which state's borders a person happens to be.

Offensive pre-enforcement litigation is necessary when states have developed an elaborate procedural scheme of private enforcement to deny people of their constitutionally protected rights and evade judicial review, as Texas did with the enactment of S.B. 8 and as California has done with the passage of S.B. 1327, set to go into effect in January 2023. However, since the Court has denied injunctive relief,[305] it is necessary that Congress look to create new federal legislation authorizing injunctions against state court systems when a state has chosen to hijack the traditional powers of the federal government to define constitutional and other federal rights. Although such legislation will face significant obstacles, Congress must assert federal power, as the Supreme Court is clearly unwilling to do so. Otherwise, federal constitutional and statutory rights will be left to the whims and vagaries of state legislatures, creating an inconsistent imbroglio across the constitutional landscape.

304. *See* Gerson, *supra* note 239.
305. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021).