

# Judicial Review of Unconventional Enforcement Regimes

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*The Supreme Court’s decision in Whole Woman’s Health v. Jackson seriously complicates judicial review of unconventional private enforcement schemes. Announced in December 2021, before the leak and eventual publication of the Dobbs decision, WWH studiously declined to block the effectiveness of the Texas Heartbeat Act, S.B. 8, citing a reluctance to allow injunctive relief against state courts and judges. As a result, parties threatened with bounty-based private enforcement akin to that in S.B. 8 will struggle to secure an effective federal test of the constitutionality of state restrictions. The WWH framework encourages more states, both red and blue, to use unconventional private enforcement regimes to limit pre-enforcement review.*

*Legal scholarship on unconventional regimes like S.B. 8 has yet to consider the writ of prohibition as a vehicle for judicial review. This Essay puts the WWH decision into conversation with the forms of inferior-court supervision available through the common law writ of prohibition. Prohibition empowers superior courts to block lower courts from exercising authority over matters outside their jurisdiction. Among its other features, prohibition operates directly on lower courts and their judges, threatening them with the injunctive relief that WWH deemed improper in an Ex parte Young action. Prohibition thus offers one answer to the judicial-power concerns that derailed the WWH litigation and a foundation for a broader vision of federal judicial oversight of unconventional enforcement schemes.*

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## Introduction

The Supreme Court’s decision in *Whole Woman’s Health v. Jackson*<sup>1</sup> (*WWH*) narrows the presumed right of prospective defendants to mount pre-enforcement challenges to laws, like the Texas Heartbeat Act, S.B. 8, that privatize enforcement of public laws.<sup>2</sup> Building on a nineteenth-century model of private enforcement, S.B. 8 authorizes private parties to collect a \$10,000 penalty from those who “knowingly perform or induce an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child.”<sup>3</sup> By pegging liability to abortions performed after the detection of a fetal heartbeat, the Texas statute was clearly at odds with the then-applicable *Roe*<sup>4</sup>/*Casey*<sup>5</sup> viability framework.<sup>6</sup> But by denying Texas state officials any enforcement authority,<sup>7</sup> S.B. 8 denied plaintiffs a state official to name as a nominal defendant in litigation to block what was then an unconstitutional law.<sup>8</sup>

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1. 142 S. Ct. 522 (2021).

2. *See id.* at 532, 534–35 (2021) (rejecting pre-enforcement suits against the state attorney general, state judges, and court clerks, but allowing suits against state licensing officials).

3. TEX. HEALTH & SAFETY CODE, §§ 171.204–.205 (West 2021) (prohibiting abortions, except in cases of medical emergency); *id.* §§ 171.207–.208 (West 2021) (authorizing private enforcement in suits for bounties of \$10,000).

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

5. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

6. The Supreme Court held in *Casey* that states may not impose an “undue burden” on the right of pregnant people to choose to terminate their pregnancies before viability. *Casey*, 505 U.S. at 846, 76. That regime of choice ended in June 2022. *See Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228, 2242 (2022) (overruling *Roe* and *Casey* in holding that there is no constitutionally protected right to abortion).

7. *See* TEX. HEALTH & SAFETY CODE, § 171.207(a) (West 2021) (declaring that S.B. 8 shall be “exclusively” enforced through private civil actions “[n]otwithstanding . . . any other law”).

8. The Supreme Court temporized, allowing suit to proceed against Texas licensing officials. *Whole Woman’s Health*, 142 S. Ct. at 535–37. On remand, the Fifth Circuit did not return the case to the district court (as some Justices assumed it would). *Whole Woman’s Health v. Jackson*, 23 F.4th 380, 389 (5th Cir. 2022); *see Whole Woman’s Health*, 142 S. Ct. at 543 (Thomas, J., concurring in part and dissenting in part) (“I would instruct the District Court to dismiss this case against all respondents . . .”); *id.* at 544 (Roberts, C.J., concurring in the judgment in part and dissenting in part) (“[T]he District Court should resolve this litigation . . .”); *id.* at 545 (Sotomayor, J., concurring in the judgment in part and dissenting in part) (“I trust the District Court will act expeditiously to enter much-needed relief.”). Instead, that court certified questions to the Texas Supreme Court pertaining to the authority of state licensing officials to enforce S.B. 8. *Whole Woman’s Health*, 23 F.4th at 389. The Texas Supreme Court ruled that the relevant statutes conferred no such authority. *Whole Woman’s Health v. Jackson*, 642 S.W.3d 569, 574 (Tex. 2022).

Some might suppose that the Court’s decision will have little ongoing significance, representing only a refusal to defend abortion rights that a majority had already decided to overrule.<sup>9</sup> But the potential impact of *WWH* extends well beyond the abortion context. Many red states have adopted copycat statutes, enabling private bounty-hunting plaintiffs to enforce a range of public laws, such as limits on the rights of transgender people and restrictions on the way public school teachers address race in the classroom.<sup>10</sup> What’s more, lower federal courts have picked up on the enforcement-authority wrinkle in limiting pre-enforcement litigation in other contexts. In a divided opinion, the Fifth Circuit dismissed a voting-rights challenge on the theory that the Texas Secretary of State lacked the sort of enforcement authority necessary to enable the suit to proceed.<sup>11</sup> These developments have some support in *Ex parte Young*<sup>12</sup> (*EPY*), which viewed wholly nominal suits for injunctive relief against state officials as effectively suits against the state.<sup>13</sup>

With its characterization of suits naming judges and clerks as effectively suits against the state, *WWH* brought the Eleventh Amendment into play as a barrier to effective enforcement. The Eleventh Amendment needs no lengthy introduction. Well-known decisions foreclose suits naming the states as parties in federal and state court, thereby preventing plaintiffs from seeking injunctive relief against the state as such.<sup>14</sup> While some cracks in the edifice of state sovereign immunity have appeared, one cannot confidently predict any thorough reconsideration of the doctrine.<sup>15</sup> To be sure, pre-enforcement suits brought by the government of the United States do not confront a

9. *Dobbs*, 142 S. Ct. at 2242.

10. Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORNELL L. REV. 1187, 1190–91 (2023).

11. *Tex. All. for Retired Ams. v. Scott*, 28 F.4th 669, 670–71 (5th Cir. 2022) (holding that a suit to contest the constitutionality of state voting laws was barred by the Eleventh Amendment when brought against a state official with ambiguous enforcement authority).

12. 209 U.S. 123 (1908).

13. *See id.* at 157 (indicating that suits against officers who lack enforcement authority effectively operate as suits against the state).

14. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 76 (1996) (foreclosing suits seeking declaratory and injunctive relief against states under statutes enacted pursuant to Congress’s Article I authority over commerce); *see also Alden v. Maine*, 527 U.S. 706, 754 (1999) (extending the *Seminole Tribe* immunity to suits brought against states in state courts).

15. *See PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2266 (2021) (finding that states waived their immunity in the “plan of the convention” from suits brought to vindicate federal eminent domain authority); *see also Torres v. Tex. Dept. of Pub. Safety*, 142 S. Ct. 2455, 2466 (2022) (finding that congressional power over the armed forces was “complete in itself” and thereby effected a structural waiver of the state’s sovereign immunity within the plan of the convention, allowing suit to proceed in state court). While *PennEast* and *Torres* both depart from the *Seminole/Alden* framework, they do so by sidestepping, rather than directly challenging, that framework.

sovereign immunity defense.<sup>16</sup> And to be sure, Congress has limited authority to abrogate state sovereign immunity.<sup>17</sup> But the primary vehicle for enforcing the Fourteenth Amendment, 42 U.S.C. § 1983, neither authorizes the federal government to sue nor provides a vehicle by which private parties can pursue claims against the states as such.<sup>18</sup>

In the face of these substantial barriers to effective federal-court review of unconventional, privatized enforcement schemes, litigants and scholars have understandably cast around for other ways to test constitutionality in federal court.<sup>19</sup> So far, the results have been mixed. One defendant in multiple state-court S.B. 8 proceedings, Dr. Alan Braid, brought a federal interpleader action to restrain further enforcement in Texas state court and contest the legality of the S.B. 8 enforcement scheme.<sup>20</sup> Others have suggested that, once

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16. The federal government sued to block S.B. 8, invoking an implied right of action and proposing to defend both the rights of Texas citizens and its own proprietary interests. *United States v. Texas*, 566 F. Supp. 3d 605, 627–28 (W.D. Tex. 2021). The United States sought an order preliminarily and permanently enjoining both the State of Texas (including its officers, employees, and agents) and private parties who would bring suit under the law from implementing or enforcing S.B. 8. *Id.* at 655. Although the district court granted relief, that order was stayed and consolidated for review in the Supreme Court alongside *WWH*. *United States v. Texas*, No. 21-50949, 2021 WL 4786458, at \*1 (5th Cir. Oct. 14, 2021). Ultimately, the Court dismissed the writ as improvidently granted on the same day it decided *WWH*, returning the government’s suit to the Fifth Circuit. *See United States v. Texas*, 142 S. Ct. 522, 522 (2021) (mem.). Such suits by the United States do not implicate the states’ sovereign immunity but do pose right-of-action and standing questions. *See, e.g., Alden*, 527 U.S. at 755–56 (distinguishing between the federal government’s ability to bring suit against the states and that of a private individual); *United States v. Texas*, 143 U.S. 621, 646 (1892) (noting the breadth of the federal government’s standing to bring suit against states under the Constitution).

17. *See, e.g., Allen v. Cooper*, 140 S. Ct. 994 (2020) (holding that Congress lacks power to abrogate state sovereign immunity in legislation to regulate copyright).

18. Section 1983 provides redress for “citizen[s] of the United States” and “other person[s] within the jurisdiction thereof” whose constitutional rights were violated by “person[s]” acting under color of state law. 42 U.S.C. § 1983. It does not authorize the United States to bring such suits, and it was not the predicate for the suit in *United States v. Texas*. *See United States v. Texas*, 566 F. Supp. 3d at 654 (“Section 1983 in no way divests the United States of its existing cause of action in equity, nor scales back that equitable authority.”). On suits by individual plaintiffs, see *Will v. Michigan Department of State Police*, 491 U.S. 58, 66 (1989); § 1983 does not authorize suit against states as such.

19. *WWH* recognized at least one pathway: doctors or others sued by private plaintiffs under S.B. 8 can defend the action by contesting the constitutionality of the Texas law. *Whole Woman’s Health*, 142 S. Ct. at 537; *see also id.* (“Still further viable avenues to contest the law’s compliance with the Federal Constitution also may be possible; we do not prejudge the possibility.”). For the view that defendants’ right to raise constitutional defenses affords adequate protection against the enforcement of an unconstitutional law, see *id.* at 530 n.1 (disagreeing with Justice Sotomayor that such a defense is constitutionally deficient).

20. Complaint for Interpleader and Declaratory Judgment at 2–3, *Braid v. Stilley*, 2022 WL 4291024 (N.D. Ill. Sept. 16, 2022) (No. 1:21-cv-05283), ECF No. 1. By allowing only one recovery for a violation of the law, the Texas statute might be viewed as imposing a limit substantial enough to bring interpleader into play. *Cf. State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 535–36 (1967) (viewing limits in an insurance policy as creating the sort of limited fund that triggers

named as a defendant in a state-court enforcement proceeding, the state-court defendant might bring an anti-suit injunction claim in federal court relying on the § 1983 exception to the anti-injunction act. Such suits may promise some success, assuming plaintiffs can satisfy the state-action requirement and thread the needle of equitable restraint under *Younger v. Harris*.<sup>21</sup>

This Essay examines another alternative: the writ of prohibition. Prohibition arose at common law as a tool by which superior courts blocked lower courts from exercising authority over matters outside their jurisdiction.<sup>22</sup> In the nineteenth-century world of constitutional adjudication, prohibition was used to enforce jurisdictional restrictions and to nullify unconstitutional laws.<sup>23</sup> That model of judicial review persisted well into the twentieth century and remains viable today. Notably, when state courts of last resort deny a petition for a writ of prohibition, their decision satisfies the finality and highest-court requirements for review in the Supreme Court of the United States.<sup>24</sup> Such familiar cases as *World-Wide Volkswagen Corp. v. Woodson*<sup>25</sup> testify to the continuing availability of the writ of prohibition as vehicle for review in the Supreme Court.<sup>26</sup>

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interpleader's availability). On the other hand, the Texas law does not limit the recovery to \$10,000. TEX. HEALTH & SAFETY CODE § 171.208(b).

21. 401 U.S. 37 (1971). Defendants sued in state court under S.B. 8 might file a § 1983 suit in federal court to enjoin the state proceeding. Reliance on § 1983 would presumably resolve any doubts under the anti-injunction act. See *Mitchum v. Foster*, 407 U.S. 225, 243 (1972) (holding that § 1983 falls into an exception allowing injunctions where “expressly authorized” by statute). But such a suit would nonetheless encounter *Younger*'s general policy of abstention unless the state-court claim fell into the exceptions for state proceedings brought in bad faith or to enforce patently unconstitutional state laws. *Younger*, 401 U.S. at 53–54. For an assessment of existing judicial-review options utilized both defensively and offensively, see Charles W. “Rocky” Rhodes & Howard M. Wasserman, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Potential for Defensive Litigation*, 75 SMU L. REV. 187, 219 (2022) and Howard M. Wasserman & Charles W. “Rocky” Rhodes, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Limits and Opportunities of Offensive Litigation*, 71 AM. U. L. REV. 1029, 1057 (2022), respectively.

22. See, e.g., *City of Hous. v. City of Palestine*, 267 S.W. 663, 664 (Tex. 1924) (concluding that the Texas state intermediate courts of appeal may entertain applications for the writ, describing prohibition as “a common-law writ of ancient origin,” and citing Blackstone, High's treatise on extraordinary remedies, and the Supreme Court's decision in *Weston v. City Counsel of Charleston*, 27 U.S. (2 Pet.) 449 (1829), as persuasive authorities). The Texas Supreme Court's power to entertain motions for a prohibition extends only as far as necessary to protect its own appellate jurisdiction. E.g., *Curtis v. Moore*, 110 S.W.2d 1146, 1147 (Tex. 1937).

23. See, e.g., *Weston*, 27 U.S. (2 Pet.) at 463–64 (adjudicating a writ of prohibition regarding an unconstitutional city ordinance).

24. *Id.* at 463. Review extends only to decisions “by the highest court of a State in which a decision could be had.” 28 U.S.C. § 1257. Parties must exhaust even discretionary forms of review at the state supreme court level before petitioning for certiorari in the Supreme Court. *O'Sullivan v. Boerckel*, 526 U.S. 838, 847 (1999).

25. 444 U.S. 286 (1980).

26. See *id.* at 289 (exercising review of state supreme court's decision upholding constitutionality of judicial jurisdiction and therefore denying writ of prohibition); cf. *Burnham v.*

Prohibition in state court does not invariably assure pre-enforcement review. Indeed, access to the writ often (but not invariably) ripens as a response to the initiation of an enforcement action.<sup>27</sup> Once such a suit begins, prohibition has several advantages. It typically operates as freestanding proceeding brought in the original jurisdiction of a superior state court to prohibit the lower court from hearing the case.<sup>28</sup> In addition, a decision by the superior court to inquire further, by issuing a rule to show cause, was understood at common law to operate as a formal or de facto stay of the enforcement proceeding.<sup>29</sup> By pursuing the prohibition while the merits remain on hold, the petitioner can move the issue quickly up the state judicial hierarchy, often to the state supreme court itself.<sup>30</sup> By posing a straightforward question of jurisdictional authority that focuses on the constitutionality of the enforcement proceeding and avoids the need for detailed factual development, prohibition enables relatively speedy engagement with the controlling legal questions. As noted, if the state court resolves the constitutional claim, review in the Supreme Court would follow. In the old days, docketing a petition for a writ of error operated as a stay, meaning that it preserved the status quo pending resolution of the case by the

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Superior Ct., 495 U.S. 604, 608 (1990) (exercising review of state court decision denying writ of mandamus to block assertion of judicial jurisdiction).

27. At common law, practice on the writ typically required the petitioner to have first raised the jurisdictional challenge with the inferior court before approaching the superior court. JAMES L. HIGH, A TREATISE ON EXTRAORDINARY LEGAL REMEDIES: EMBRACING MANDAMUS, QUO WARRANTO, AND PROHIBITION § 773, at 558 (1874) (observing that the prohibition petitioner must plead to the jurisdiction in the original proceeding). Yet modern decisions allow pre-enforcement applications for a writ of prohibition in the state supreme court to settle questions of constitutionality that have not yet ripened for litigation in lower state courts. *See, e.g.*, *Planned Parenthood Great Nw. v. State*, 522 P.3d 1132, 1147 (Idaho 2023) (allowing pre-enforcement challenge to state abortion restrictions by original application for a writ of prohibition). Following the Supreme Court's decision in *Dobbs*, the Idaho Supreme Court found that the state constitution does not guarantee a right to an abortion. *Id.* at 1148.

28. *See* MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 240 (1759) (describing prohibition as a writ issuing “out of the Superior Courts of Common Law to restrain Inferior Courts, whether such Courts be Temporal, Ecclesiastical, Maritime, Military, etc. upon a Suggestion that the Cognizance of the Matter belongs not to such Courts”). On the original writ jurisdiction of state supreme courts, see generally Zachary D. Clopton, *Power and Politics in Original Jurisdiction*, 91 U. CHI. L. REV. 83 (2024). Reproductive health advocates filed a petition for a writ of prohibition to block the implementation of Oklahoma's S.B. 1503 legislation, modeled on Texas's S.B. 8. Application for Original Jurisdiction and Petition for Declaratory and Injunctive Relief and/or a Writ of Prohibition at 24–25, *Okla. Call for Reprod. Just. v. State*, 531 P.3d 117 (Okla. 2023) (No. 120376) (seeking to restrain implementation of S.B. 1503).

29. *See infra* note 109.

30. Nineteenth-century decisions explain the role of supreme courts in granting prohibition. *See, e.g.*, *Conn. River R.R. Co. v. Cnty. Comm'rs*, 127 Mass. 50, 58 (1879) (tracing the authority of the state's superior court of judicature from its origins in colonial practice to a statute granting the court “power to issue writs of error, certiorari, mandamus, prohibition and *quo warranto* . . . to courts of inferior jurisdiction”).

Supreme Court.<sup>31</sup> In other words, stays of enforcement were routine from the outset until the legal question had been resolved.

Second, prohibition, like mandamus, operates on the lower court as such and provides a form of specific relief against the allegedly unconstitutional proceeding.<sup>32</sup> That gives prohibition some natural advantages over the anti-suit injunction, which binds only the parties to the suit. Prohibition specifically binds judges and forbids them from entertaining the case, precisely the form of relief that *WWH* declined to recognize in the context of an *EPY* proceeding.<sup>33</sup> At one time, prohibition would threaten the lower court judge or judges with punishment by contempt.<sup>34</sup> But in the modern world, superior courts assume that lower courts will comply with the declaration of rights set forth in the decree and have no occasion to issue the mandatory writ.<sup>35</sup> Prohibition thus solves the party-defendant problem, rooted in Eleventh Amendment and Article III concerns, that ultimately derailed the *WWH* proceeding.<sup>36</sup>

To be sure, some claimants may worry about the adequacy of state-court remedies. Departing from the common law idea that superior courts have inherent authority to issue writs of prohibition,<sup>37</sup> some states have regulated the prohibition power either by statute or constitutional provision.<sup>38</sup> Some state supreme courts may have no procedure in place comparable to the writ of prohibition as a tool of lower court oversight.<sup>39</sup> States might also engage

31. See *infra* note 111.

32. See James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex parte Young*, 72 STAN. L. REV. 1269, 1277–78 (2020) (discussing the forms of specific relief that writs of certiorari, mandamus, and prohibition provide).

33. *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 532 (2021).

34. HIGH, *supra* note 27, § 804, at 581.

35. See, e.g., *Gen. Atomic Co. v. Felter*, 436 U.S. 493, 497–98 (1978) (per curiam) (assuming that issuance of peremptory writ was unnecessary in view of the trial court’s likely compliance); see also STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, *SUPREME COURT PRACTICE* 5 (11th ed. 2019) (explaining the Court’s reliance on the assumption that state courts will comply).

36. See *Whole Woman’s Health*, 142 S. Ct. at 532–33 (invoking Article III’s adverse-party requirement and the Eleventh Amendment in questioning the propriety of suits that name courts and judges as parties).

37. For a recognition of such inherent authority, see *Pottawattamie Cnty. Dept. of Soc. Servs. v. Landau*, 210 N.W.2d 837, 841 (Iowa 1973) and *State ex rel. Wester v. Caldwell*, 181 P.2d 843, 847 (Okla. Crim. App. 1947), which characterize the writ of prohibition as a common-law writ.

38. See, e.g., *Conn. River R.R. Co. v. Cnty. Comm’rs*, 127 Mass. 50, 58 (1879) (describing the evolution from common law to statutory authority in Massachusetts). In Texas, the prohibition power has been assigned to the intermediate appellate courts, subject to review in the supreme court. See *supra* note 22. Access to an intermediate appellate court might afford plaintiffs some choice in the selection of the panel that hears their application for relief.

39. Under the adequate-and-independent-state-grounds doctrine, procedural issues rooted in state practice may deprive the Supreme Court of appellate jurisdiction over state-court denials of prohibition relief. Yet the state court’s use of unfair or manipulative procedural barriers will not qualify as adequate to block appellate review. See, e.g., *Lee v. Kemna*, 534 U.S. 362, 366 (2002)

in some procedural trimming, challenging the Court's exercise of appellate review.<sup>40</sup>

To address such gaps in state remediation, litigants might seek appellate review in the Supreme Court both by petition for certiorari and by petition for an original writ of prohibition.<sup>41</sup> Alternatively, litigants might invoke the prohibition tradition in seeking to broaden the scope of *EPY* relief in proceedings such as *WWH*. Prohibition provides a traditional basis for the entry of injunctive relief against state judges on which lower federal courts might draw in conducting review of unconventional enforcement schemes.

This Essay offers a three-part reflection on prohibition. Part I briefly reviews the *WWH* Court's approach to the enforcement problems posed by S.B. 8. Part II sketches the history of the writ, describes some of its procedural elements, and explains how prohibition might work to address privatized enforcement schemes like S.B. 8. Part III evaluates the role prohibition might play in bolstering the power of both the Supreme and inferior federal courts to hear suits against state judges. The Essay concludes that prohibition supports expanded federal judicial oversight of unconventional enforcement schemes.

### I. *Whole Woman's Health* and the Limits of *Ex parte Young*

Most observers trace S.B. 8's origins to an article proposing a method to "induce compliance"<sup>42</sup> with state laws despite the prospect of their judicial invalidation.<sup>43</sup> In that vein, the article recommended private enforcement through *qui tam* or "informer" actions.<sup>44</sup> Such suits might proceed in state court without triggering pre-enforcement litigation under § 1983.<sup>45</sup> Nor

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(upholding the petitioner's right to federal review of his due process claim notwithstanding a procedural-default claim rooted in the state's procedural rules).

40. For the suggestion that such manipulation should be treated as an antecedent question of state law rather than an adequate and independent barrier to appellate jurisdiction, see JAMES E. PFANDER, *PRINCIPLES OF FEDERAL JURISDICTION* § 4.5, at 110–12 (4th ed. 2021).

41. On the use of original writs to facilitate the functional equivalent of appellate review, see *infra* note 178.

42. See Jonathan F. Mitchell, *The Writ-Of-Erasure Fallacy*, 104 VA. L. REV. 933, 1001–03 (2018) (outlining the theory of private statutory enforcement to preserve implementation even past an injunction against the state).

43. See Michael S. Schmidt, *Behind the Texas Abortion Law, A Persevering Conservative Lawyer*, N.Y. TIMES (Sept. 12, 2021), <https://www.nytimes.com/2021/09/12/us/politics/texas-abortion-lawyer-jonathan-mitchell.html> [<https://perma.cc/5G5T-KD48>] (describing S.B. 8's origins). Jonathan Mitchell, the author of the article, served as the Texas solicitor general from 2010 to 2015 and was reportedly dismayed that the Court, in *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016), overturned Texas abortion restrictions. *Id.*

44. Mitchell, *supra* note 42, at 1001.

45. The article's thesis—that courts cannot erase, nullify, or repeal the statutes whose enforcement they enjoin on constitutional grounds—set the stage for an exploration of how legislatures might resist anticipated judicial rulings of constitutional invalidity. *Id.* at 1000–01. Among others, the article recommended laws that would eliminate the statute of limitations and



would the doctrines of claim or issue preclusion bar successive claims so long as the plaintiff had not been a party to an earlier failed proceeding.<sup>46</sup> With its provision for venue in any state court of the plaintiff's choosing, its preclusion of cost or fee awards against state-court plaintiffs, and its limits on the preclusive effect of failed enforcement,<sup>47</sup> S.B. 8 takes several pages from the article's playbook.<sup>48</sup> This Part briefly describes the way S.B. 8 evaded pre-enforcement review of what was then a clear violation of the Fourteenth Amendment and the challenges the Court's approach to the statute presents for future litigants seeking pre-enforcement review of evidently unconstitutional private enforcement schemes.

Whole Woman's Health, an abortion provider, sued a variety of state officials in federal district court seeking injunctive and declaratory relief against the enforcement of S.B. 8.<sup>49</sup> The named defendants included a state-court judge (Jackson), a state-court clerk (Clarkston), the state's attorney general (Paxton), and the members of several state licensing boards.<sup>50</sup> In an opinion authored by Justice Gorsuch, the Court concluded that suit could proceed only against the members of the licensing boards,<sup>51</sup> a conclusion the Texas Supreme Court later rejected as a matter of state law.<sup>52</sup> As for the other state officials, the Supreme Court held that Texas state law specifically deprived them of enforcement authority and made the issuance of *EPY* relief

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foreclose any mistake of law defense; such measures would induce compliance by enabling backward-looking prosecution if the constitutional prohibition ended. *Id.*

46. *See id.* at 1002 (arguing that court decisions only bind the named defendants and have no precedential value in other proceedings).

47. TEX. HEALTH & SAFETY CODE, §§ 171.207–208, .210 (West 2021). For a summary of these provisions and an evaluation of offensive and defensive procedures for challenging their constitutionality, see generally Rhodes & Wasserman, *supra* note 21 and Wasserman & Rhodes, *supra* note 21.

48. For a critical assessment of the use of private enforcement of abortion restrictions, see Randy Beck, *Popular Enforcement of Controversial Legislation*, 57 WAKE FOREST L. REV. 553, 560–61 (2022). Professor Beck describes what he sees as problems with reliance on popular actions—the lack of public accountability for enforcement decisions and the tendency of popular actions to reflect private financial considerations rather than the public good. *Id.* at 561; *see also* Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 48 (2014) (noting that public enforcement ensures the political accountability, expertise, centralization, and lack of personal financial incentives that are unavailable in private enforcement). Drawing on case studies of practice under English informer statutes, Professor Beck finds that a “conflict of interest inherent in popular enforcement manifests itself, for instance, when informers file claims based on technical statutory violations tangential to the legislative objectives, extort secret payments to suppress litigation, [or] encourage violations of the law to create new litigation targets.” Beck, *supra*, at 561; *see also* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 775 (2000) (describing informer statutes as “highly subject to abuse”). Professor Beck reports that two disbarred attorneys were among those who sued Dr. Alan Braid, the plaintiff in an interpleader action described below. Beck, *supra*, at 616–17.

49. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 530 (2021).

50. *Id.*

51. *Id.* at 535–37.

52. *See supra* note 8 and accompanying text.

inappropriate.<sup>53</sup> Justice Gorsuch pointed in particular to language in *EPY* characterizing an anti-suit injunction against a state court as “a violation of the whole scheme of our Government.”<sup>54</sup> Concluding that judges and clerks were acting to manage and resolve litigated disputes rather than to enforce state law as executive-branch actors, *WWH* concluded that suits against them could not proceed.<sup>55</sup>

In refusing to allow suit against state courts and judges, *WWH* identified an enduring gap in the use of *EPY* to secure pre-enforcement review of the constitutionality of state legislation. Although the *EPY* Court approved the suit against the Minnesota state attorney general to block the enforcement of a statute that was (like S.B. 8) designed to evade review,<sup>56</sup> it did so only after satisfying itself that the attorney general had enforcement authority.<sup>57</sup> Suits brought against wholly nominal state-official defendants were thought to offend state sovereign immunity:

If, because they were law officers of the State, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former, as the executive of the State was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general,

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53. *Whole Woman’s Health*, 142 S. Ct. at 532–35.

54. *Id.* at 532 (quoting *Ex parte Young*, 209 U.S. 123, 163 (1908)).

55. *Id.* at 539. Dissenting, Chief Justice Roberts and Justices Breyer, Kagan, and Sotomayor viewed the judges as proper party defendants in an action to block the docketing of claims to enforce S.B. 8. *Id.* at 544–45 (Roberts, C.J., concurring in the judgment in part and dissenting in part).

56. First, the Minnesota statute imposed severe penalties on those who violated its terms, making it risky for the railroad and its employees to procure a test of constitutionality by violating the statute. *Ex parte Young*, 209 U.S. 123, 127–28 (1908). Second, the Minnesota statute did not assign any state official specific authority to enforce the rates imposed on railroads. *Id.* at 157. This element of the statute was informed by the Court’s earlier decision in *Fitts v. McGhee*, 172 U.S. 516 (1899), holding that a suit to restrain state officers from enforcing state laws was a suit against the state within the meaning of the Eleventh Amendment. See *Ex parte Young*, 209 U.S. at 141, 156 (contending that *Fitts* precluded suit against state actors). Only where state officers were “specially charged with the execution of a state enactment alleged to be unconstitutional” were such suits viewed as permissible. *Fitts*, 172 U.S. at 529–30, 33.

57. *Ex parte Young*, 209 U.S. at 161. Minnesota’s attorney general, who had drafted the statute in reliance on *Fitts*, argued that his lack of specific enforcement authority meant that the railroad’s proceeding was best viewed as one against the state itself. Brief for Petitioner on Hearing of Rule to Show Cause at 59, 63, 70, *Ex parte Young*, 209 U.S. 123 (1908) (No. 10). The majority in *Ex parte Young* rejected that argument, finding that the attorney general’s enforcement authority was clear, even though conferred in other statutes. *Ex parte Young*, 209 U.S. at 161. Justice Harlan, author of the *Fitts* opinion, dissented. *Id.* at 168. For an account of *Ex parte Young*, see generally Barry Friedman, *The Story of Ex parte Young: Once Controversial, Now Canon*, in *FEDERAL COURTS STORIES* 247 (Vicki C. Jackson & Judith Resnik eds., 2010).

might represent the State in litigation involving the enforcement of its statutes.<sup>58</sup>

*Ex parte Young* determined it was not enough to merely identify a state official: rather, “such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the State a party.”<sup>59</sup>

Approval of suit against the licensing officials apparently led the Court to dismiss *United States v. Texas*,<sup>60</sup> a suit that was brought as a backstop in case *EPY* relief was denied to *WWH*.<sup>61</sup> The Court’s approval of suit against licensing officials also drew a prophetic dissent from Justice Thomas, who argued that state law was best interpreted to bar any state official from enforcing S.B. 8.<sup>62</sup> Sure enough, when the case was returned to the Fifth Circuit (over the objections of the petitioner who argued for remand to the district court<sup>63</sup>), the circuit court certified the state-law question to the Texas Supreme Court and received an eventual answer confirming that S.B. 8 blocked licensing board officials, and all other officials of the state, from enforcing the statute.<sup>64</sup>

S.B. 8 seems to have achieved its goal. After the Supreme Court refused to block the law from taking effect on September 1, 2021,<sup>65</sup> the number of live births in Texas rose significantly.<sup>66</sup> In March 2022, Idaho adopted a similar statute, setting the penalty at \$20,000 and specifying that family members of the “preborn child” could bring suit anytime within four years of the date on which a post-fetal-heartbeat abortion was performed.<sup>67</sup> The Idaho Supreme Court stayed the statute’s effectiveness to allow more time to assess its constitutionality.<sup>68</sup> Later still, California governor Gavin Newsom signed

58. *Ex parte Young*, 209 U.S. at 157 (quoting *Fitts*, 172 U.S. at 530).

59. *Id.*

60. 142 S. Ct. 522 (2021) (mem.).

61. The Supreme Court dismissed the petition as improvidently granted on the same day it decided *WWH*. Compare *id.* at 522 (noting date of decision as December 10, 2021), with *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 522 (2021) (same).

62. *Whole Woman’s Health*, 142 S. Ct. at 541 (Thomas, J., concurring in part and dissenting in part).

63. Petitioners’ Brief at 50, *Whole Woman’s Health*, 142 S. Ct. 522 (No. 21-463).

64. See *supra* note 8 and accompanying text.

65. *Whole Woman’s Health*, 141 S. Ct. at 2495.

66. See Suzanne Bell, *A Spike in Births and Other Potential Impacts of Texas’ Abortion Restrictions*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Aug. 31, 2023), <https://publichealth.jhu.edu/2023/measuring-impacts-of-sb8-in-texas> [<https://perma.cc/58HC-EZ55>] (reporting 3% more Texas births between April and December 2022 than otherwise would have been expected).

67. Act of March 23, 2022, sec. 6, 2022 Idaho Sess. Laws 534–35.

68. *Planned Parenthood Great Nw. v. State*, No. 49615-2022 (Idaho 2022) (order granting motion to reconsider).

into law a measure that seeks to ensure some private enforcement of laws restricting the distribution of illegal weapons.<sup>69</sup> Other states adopted similar laws, regulating the way public schools teach about race and protect the rights of transgender students.<sup>70</sup> The next Part explores the way litigants might invoke a common law or prerogative remedy—the writ of prohibition—to secure a forum for the adjudication of constitutional challenges to such enforcement schemes.

## II. The Writ of Prohibition and Judicial Review of State Action

The writ of prohibition took hold in the English common law court of King’s Bench as a vehicle for blocking inferior courts from taking up questions that fell outside their jurisdiction.<sup>71</sup> This Part briefly sketches the history of prohibition and its use by the Supreme Court of the United States to review the constitutionality of state-court enforcement proceedings.

### A. *Prohibition in the Anglo-American Tradition*

Historians describe the King’s Bench under Chief Judge Coke as peppering the ecclesiastical and admiralty courts with writs of prohibition to keep them in their lane.<sup>72</sup> Alongside other well-known extraordinary writs,

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69. Shawn Hubler, *Newsom Raises His Profile with Hardball Tactics, Starting with a Gun Bill*, N.Y. TIMES (July 24, 2022), <https://www.nytimes.com/2022/07/22/us/newsom-gun-bill-california.html> [https://perma.cc/9NK4-297Z] (reporting on Governor Newsom’s approval of Senate Bill 1327, which authorizes private enforcement suits to recover \$10,000 from anyone who imports, distributes, manufactures, or sells assault-style and other prohibited weapons in California). Senate Bill 1327 was codified as CAL. BUS. & PROF. CODE § 22949.64 (2022).

70. Michaels & Noll, *supra* note 10, at 1198–1201, 1206.

71. Consider the account in a well-known eighteenth-century abridgement:

As all external Jurisdiction, whether Ecclesiastical or Civil, is derived from the Crown, and the Administration of Justice is committed to great Variety of Courts, hence it hath been the Care of the Crown, that these Courts keep within the Limits and Bounds of their several Jurisdictions prescribed them by the Laws and Statutes of the Realm; and for this Purpose the Writ of Prohibition was framed; which issues out of the Superior Courts of Common Law to restrain the Inferior Courts, whether such Courts be Temporal, Ecclesiastical, Maritime, Military, etc. upon a Suggestion that the Cognizance of the Matter belongs not to such Courts; and in Case they exceed their Jurisdiction, the Officer who executes the Sentence, and in some Cases the Judges that give it, are in such Superior Courts punishable, sometimes at the Suit of the King, sometimes at the Suit of the Party, sometimes at the Suit of both, according to the Variety of the Case.

BACON, *supra* note 28, at 240 (margin notes omitted).

72. JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 154–55 (5th ed. 2019); Edward Jenks, *The Prerogative Writs in English Law*, 32 YALE L.J. 523, 530–31 (1923). For cases tracing the prohibition authority of state superior courts to common law powers exercised by King’s Bench, see *State ex rel. Standard Oil Co. v. Review Board of Indiana Employment Security Division*, 101 N.E.2d 60, 64 (Ind. 1951), *State ex rel. Auto Finance Co. v. Landwehr*, 71 S.W.2d 144, 145 (Mo. Ct. App. 1934), *Huchins v. City of Des Moines*, 157 N.W. 881, 890 (Iowa 1916), and *Kelly v. Kemp*, 162 P. 1079, 1080 (Okla. 1917).

such as mandamus, habeas corpus, and certiorari, the writ of prohibition played a significant role in the rise of judicial review.<sup>73</sup> Thus, the common law or prerogative writs were seen as tools enabling superior courts to oversee the work of lower courts and ensure the supremacy of law.<sup>74</sup>

As a prerogative or extraordinary writ, prohibition had a remedial potency that party-focused writs (injunctions, trespass, and assumpsit) lacked.<sup>75</sup> For one thing, prerogative writs issued in the name of the Crown (and, later in American practice, in the name of the state) and therefore did not pose any sovereign immunity issues.<sup>76</sup> Applications for the writ proceeded on the assumption that the Crown was demanding, through its duly appointed judges, that its inferior courts refrain from hearing questions that belonged to another tribunal.<sup>77</sup> For another thing, the writ operated as a directive to the inferior court and its judges, much like an injunction, threatening them with contempt for non-compliance.<sup>78</sup> It thus promised speedy and effectual relief from litigation before an improper tribunal. Finally, the writ operated as an independent proceeding that effectively

73. On the origin and current use of prerogative writs of mandamus, certiorari, and prohibition to ensure judicial review, see STANLEY A. DE SMITH, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 611–25 (Harry Street & Rodney Brazier eds., 5th ed. 1985).

74. See Pfander & Wentzel, *supra* note 32, at 1296–98 (recounting the rise of administrative writs and their use by the King’s Bench to correct errors in both judicial and official activity); JAMES E. PFANDER, *ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL POWER OF THE UNITED STATES* 26–27 (2009) (detailing the King’s Bench use of supervisory writs to control lower courts and administrative officials).

75. Sir William Holdsworth explained the difference well:

In principle the scope of the two remedies [prohibition and injunction] was different. A writ of prohibition lay if the court had no jurisdiction . . . and a judge who proceeded in spite of a prohibition broke the law, and was guilty of a contempt of the court . . . The issue of an injunction did not necessarily involve any decision as to the ambit of the court’s jurisdiction. It was a remedy given by a court of equity which acted *in personam*.

12 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 697–98 (1938) (footnote omitted).

76. On the inapplicability of sovereign immunity to applications for prerogative writs of mandamus, prohibition, and the like, see Pfander & Wentzel, *supra* note 32, at 1335–37. See also, e.g., *Conn. River R.R. Co. v. Cnty. Comm’rs*, 127 Mass. 50, 59–60 (1879) (“The fact that an agent of the Commonwealth [was] the adverse party in the proceedings . . . afford[ed] no reason” for asserting sovereign immunity because the prerogative writs, even in the American tradition, were “properly sued out in the name of the . . . State.”).

77. See *supra* note 71 and accompanying text.

78. On the use of contempt sanctions to enforce the prerogative writs, see Pfander & Wentzel, *supra* note 32, at 1313–14, 1350 & nn. 265, 268, 502. For the text of a writ of prohibition, directing the lower court judge to refrain from further process “at your peril,” see *id.* at 1278 n.32 (quoting *United States v. Peters*, 3 U.S. (3 Dall.) 121, 132 (1795)). See also HIGH, *supra* note 27, § 763, at 550 (explaining that, unlike an injunction that binds the parties to litigation, the writ of prohibition “strikes at once at the very jurisdiction of the [inferior] court”).

stayed the litigation before the inferior court.<sup>79</sup> Parties could seek prohibition as a collateral matter in the superior court, thereby eliding the necessity of litigating the merits before the inferior tribunal as a prelude to a later appeal to the superior court.<sup>80</sup>

Superior courts in the colonies and later in the confederated states and later still in the United States issued writs of prohibition to settle jurisdictional questions.<sup>81</sup> They did so on the basis that, as superior courts of common law, they were clothed with the usual common law powers, including the power to issue prerogative writs.<sup>82</sup> The source of the power in question varied; it might come from a state constitution or judiciary act or from one of the statutes incorporating common law rules from England.<sup>83</sup> But, it was far more common for state supreme courts to exercise prohibition powers than to quibble about their source.<sup>84</sup>

The acknowledged authority of state superior courts to issue the writ made prohibition a natural tool for federal judicial oversight of the constitutionality of state action. In the leading case, *Weston v. City Council of Charleston*,<sup>85</sup> Chief Justice Marshall concluded that the Supreme Court, on writ of error, had jurisdiction to review a state-court decision denying a writ of prohibition.<sup>86</sup> The dispute began when the city council of Charleston, South Carolina, imposed a tax on government bonds issued by the United States.<sup>87</sup> Bond owners sued to block enforcement of the tax as unconstitutional under the principle of inter-government tax immunity announced in *McCulloch v. Maryland*.<sup>88</sup> Instead of contesting constitutionality on a case-by-case basis by defending against proceedings brought to collect the tax, petitioners sought a writ of prohibition from the state court of common pleas.<sup>89</sup> While that court prohibited enforcement of

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79. On the independent or collateral nature of prohibition, see HIGH, *supra* note 27, § 768, at 554. See also *infra* text accompanying notes 104–07 (discussing the collateral characterization of prohibition in *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947)).

80. See *Conn. River R.R. Co.*, 127 Mass. at 59 (acknowledging that certiorari review might be available after completion of proceedings in the lower court but issuing the writ of prohibition to forestall such proceedings).

81. For an account tracing prohibition in Massachusetts to colonial days, see *id.* at 58–59.

82. *Id.* at 58.

83. See, e.g., FLA. STAT. § 2.01 (1927) (declaring “the common and statute laws of England . . . down to [July 4, 1776] to be of force in this state,” except as otherwise provided in the Constitution and laws of the United States and the state of Florida).

84. See, e.g., *Conn. River R.R. Co.*, 127 Mass. at 59 (acknowledging that few instances of prohibition were to be found in the state reports but concluding that the court had ample power to issue prohibition in a proper case).

85. 27 U.S. (2 Pet.) 449 (1829).

86. *Id.* at 451.

87. *City Council v. Weston*, 16 S.C.L. (Harp.) 340, 340 (1824).

88. *Id.* at 343; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 429 (1819).

89. *Weston*, 16 S.C.L. (Harp.) at 340.

the tax, South Carolina's constitutional court reversed, concluding on a 4–3 vote that the tax did not violate the federal Constitution.<sup>90</sup>

In holding that the South Carolina decision fell within the Court's appellate jurisdiction under Section 25 of the Judiciary Act of 1789, Chief Justice Marshall reached three conclusions. First, he found that the application for a writ of prohibition was a "suit" within the meaning of Section 25.<sup>91</sup> Second, he found that the decision below qualified as a final decision by the highest state court in which decision might be had.<sup>92</sup> The question of constitutionality, set up separately from the merits of any tax-collection proceeding, had been authoritatively resolved even though further proceedings had been contemplated after the state court denied the writ.<sup>93</sup> Third, he found that the tax ordinance of the city was "repugnant to the constitution [and laws] of the United States."<sup>94</sup> Appellate jurisdiction having attached, Marshall pronounced the South Carolina tax invalid under the *McCulloch* principle.<sup>95</sup>

Nominally straightforward, the Court's decision expanded the boundaries of Supreme Court review. For starters, the Court accepted a broad conception of the role of the writ of prohibition. It was not limited to the enforcement of jurisdictional restrictions embedded in constitutional or statutory provisions; instead, prohibition might issue to block enforcement of a state law repugnant to the federal Constitution. Consistent with the understanding that unconstitutional action by state actors was *ultra vires* and void, that conclusion makes prohibition (like habeas and mandamus) an appropriate vehicle for more than narrow jurisdictional contests.<sup>96</sup>

Notably, the Judiciary Act of 1789 did not expressly give the Supreme Court or any lower federal court explicit power to issue writs of prohibition to state courts. The Court's only explicit prohibition power was to confine federal district courts within the proper bounds of their admiralty

90. *Id.* at 340, 348, 354.

91. *Weston v. City Council*, 27 U.S. (2 Pet.) 449, 464 (1829).

92. *Id.*

93. *Id.* at 465–67.

94. *Id.* at 469.

95. *Id.*

96. South Carolina was not alone in using prohibition to test the constitutionality of state laws. *See, e.g.,* *Huntington Chamber of Com. v. Pub. Serv. Comm'n*, 99 S.E. 285, 285 (W. Va. 1919) (allowing prohibition action where, absent unconstitutional grant of statutory authority, tribunal would have no jurisdiction); *In re Schumaker*, 63 N.W. 1050, 1051 (Wis. 1895) (denying prohibition in the same circumstance); *Lockheed Aircraft Corp. v. Superior Ct.*, 171 P.2d 21, 23 (Cal. 1946) (*en banc*) (analyzing prohibition to block suit on a cause of action created by a void statute); *State ex rel. Walker v. Judge*, 1 So. 437, 438–39 (La. 1887) (allowing prohibition to block unconstitutional criminal proceeding); *State ex rel. Hovey v. Noble*, 21 N.E. 244, 252 (Ind. 1889) (using prohibition to block commissioners from proceeding pursuant to unconstitutional statutory appointment).

jurisdiction.<sup>97</sup> Were the courts of South Carolina inclined to disobey the Court's decision, one can only guess what relief the Court would have granted. Section 25 authorized the Court, in cases of state-court intransigence, to "proceed to a final decision of the same, and award execution."<sup>98</sup> For the dissenters, Justice Johnson and Justice Thompson, the Court's lack of explicit statutory power to execute its judgment through a writ of prohibition directed at state courts confirmed the absence of any appellate jurisdiction over the matter at hand.<sup>99</sup> In the end, the Court's role in *Weston* was almost purely declaratory, pronouncing on the issue of constitutionality and leaving enforcement of its mandate to further proceedings in state court.

The Court's willingness to declare the unconstitutionality of the city tax takes on greater significance against the backdrop of the recognition that the owners of government bonds might have contested state-court levies and execution by asserting constitutional defenses to the city tax. One dissenting Justice characterized the majority's decision as "no more than an opinion expressed upon an abstract question, and in its nature and effect only monitory."<sup>100</sup> But the parties appear to have assumed that the Court's decision, once issued, would be accepted on the issue of constitutionality without any necessity for further proceedings. If further proceedings were nonetheless brought to enforce the disputed tax, bond holders could presumably rely on the Court's earlier pronouncement as a defense. Having issued a wholesale declaration, the Court put government bond holders in a position to defeat any enforcement proceeding.

The *Weston* rule authorizing Supreme Court appellate review of the denial of applications for state-court writs of prohibition has become an accepted feature of federal judicial practice. Thus, in a series of decisions from the early-to mid-twentieth century, the Supreme Court reaffirmed its appellate jurisdiction in relation to state-court applications for the writ. In 1916, Justice Holmes wrote for the Court in confirming prohibition review but refusing to disturb the state's decision on the merits.<sup>101</sup> And in 1929,

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97. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80–81.

98. *Id.* § 25, at 86.

99. *Weston*, 27 U.S. (2 Pet.) at 470 (Johnson, J., dissentiente) (emphasizing that neither the "letter [n]or the policy" of section 25 gives jurisdiction for the cause); *id.* at 474 (Thompson, J., dissentiente).

100. *Id.* at 474 (Thompson, J., dissentiente).

101. *Mt. Vernon–Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30, 31 (1916). Justice Holmes reasoned that:

Prohibition is a distinct suit and the judgment finally disposing of it is a final judgment within the meaning of the Judicial Code . . . . The fact that it does not decide the merits of the principal suit is immaterial. It is not devoted to that point, but only to the preliminary question of the jurisdiction of the court in which that suit is brought.

*Id.*



Justice Brandeis wrote for the Court in confirming appellate jurisdiction and holding that a state supreme court erred in refusing to prohibit a lower state court from hearing a specific claim.<sup>102</sup> In both instances, the prohibition petitioners set up a federal constitutional limit that was said to bar the lower court from hearing the case.<sup>103</sup> As late as 1947, in *Rescue Army v. Municipal Court of Los Angeles*,<sup>104</sup> the Court reaffirmed its appellate jurisdiction.<sup>105</sup> As the Court explained, the effect of the California Supreme Court’s judgment (refusing to issue prohibition) was to permit further proceedings by the inferior state court.<sup>106</sup> But treating the state-court prohibition proceeding as collateral to the underlying criminal prosecution, the Court followed *Weston* in holding that “‘the judgment finally disposing of it,’ as did the state Supreme Court’s judgment, ‘is a final judgment.’”<sup>107</sup>

#### B. Prohibition as a Response to S.B. 8

At least three different aspects of practice on the writ of prohibition make it an attractive vehicle for a challenge to unconventional statutes like S.B. 8. For starters, as the Court recognized in *Rescue Army*, the writ of prohibition initiates an independent proceeding, often in a state superior court, to challenge the authority of the lower court. That enables defendants in a state-court enforcement action, such as those named in a bounty claim under S.B. 8, to secure a relatively prompt hearing on their constitutional challenge to the lower court’s authority to proceed. Instead of litigating the merits before the trial court, awaiting entry of judgment, and seeking appellate review, prohibition shifts the litigation of the constitutional questions to a higher state court, setting the stage for Supreme Court review.<sup>108</sup> Although it differs from pre-enforcement review, prohibition separates the constitutional questions from the merits of the enforcement proceedings and allows for an independent resolution.

To be sure, even that relatively clean form of constitutional litigation may take some time, failing to offer the sort of immediate relief that a suit seeking injunctive relief and a stay of the statute’s enforcement would appear to offer. But the application for a writ of prohibition operates as a stay of proceedings in the inferior tribunal until such time as the superior court rules

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102. See *Mich. Cent. R.R. Co. v. Mix*, 278 U.S. 492, 494, 496 (1929) (reversing denial of application for writ of prohibition).

103. *Ala. Interstate Power Co.*, 240 U.S. at 31; *Mich. Cent. R.R. Co.*, 278 U.S. at 494–95.

104. 331 U.S. 549 (1947).

105. See *id.* at 568 (“[W]e are unable to conclude that there is no jurisdiction in this cause . . .”).

106. *Id.* at 565.

107. *Id.* (quoting *Bandini Petrol. Co. v. Superior Ct.*, 248 U.S. 8, 14 (1931)).

108. *Weston v. City Council*, 27 U.S. (2 Pet.) 449, 451–52, 457 (1829).

on the challenge to the lower court's authority.<sup>109</sup> Such a stay may offer those resisting enforcement of statutes like S.B. 8 much of the same relief that they would obtain through the entry of pre-enforcement injunctive relief, barring prosecutions.<sup>110</sup> Also note that, at least under the rules governing appellate review in the nineteenth century, the writ of error inviting Supreme Court review of a state court's denial of a prerogative writ was thought to operate as a *supersedeas*, effectively staying further proceedings in state court pending resolution by the Supreme Court.<sup>111</sup> Together, the two stays would put the enforcement proceeding on hold until the Supreme Court ruled. If other state-court enforcement proceedings were to begin separately, practice on the writ of prohibition viewed the threat of multifarious litigation as a

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109. At common law, practice on the writ typically involved at least a two-step process. The petitioner filed an application or motion for prohibition with the proper superior court, requesting intervention. If that court agreed that the petition was well founded, it would issue a rule to show cause, directing the lower court (and perhaps the party that invoked the lower court's jurisdiction) to respond to the claims in the petition. Upon considering the response, the superior court would then decide whether to make the rule absolute (effectively compelling dismissal of the lower court proceeding) or to discharge the rule (allowing the matter to proceed). For an account of practice including the issuance of a stay, see HIGH, *supra* note 27, at § 795, at 574–75, which describes the motion and rule to show cause, and *id.* § 796, at 575, which notes that service of the rule to show cause stayed all proceedings in the lower court.

110. As with preliminary injunctive relief in federal court, however, issuance of a stay while a superior court considers a writ of prohibition does not necessarily shield the petitioners from enforcement of the relevant statute if the stay were lifted. The Supreme Court has yet to rule definitively on whether the state may punish individuals whose conduct in violation of state law occurred under the protective umbrella of a preliminary injunction that was later vacated. *See* Edgar v. MITE Corp., 457 U.S. 624, 630 (1982) (leaving the issue open). The same uncertainty would confront individuals during a stay in state court enforcement. Professor Morley argues that erroneous injunctions should be interpreted as precluding punishment for action taken while they were in effect. Michael T. Morley, *Erroneous Injunctions*, 71 EMORY L.J. 1137, 1144 (2022).

111. *See* Holmes v. Jennison, 39 U.S. 540, 563 (1840) (upholding, on writ of error to secure review of a state court denial of habeas relief, the Court's appellate jurisdiction by analogy to prohibition and noting in passing that the writ of error operated as a stay or *supersedeas* blocking the state court from taking further action pending resolution of the matter in the Supreme Court).

strong argument for granting relief<sup>112</sup> and allowed interested parties to join as intervenors in the superior court.<sup>113</sup>

A second intriguing feature of prohibition as a procedure to test the legality of enforcement regimes like S.B. 8, the writ operates directly on the lower courts and their judges. It was of course this element of the pre-enforcement challenge in *WWH* that divided the Court. The majority understood the judges and clerks of the Texas state courts to be acting in a judicial capacity, lacking any executive branch enforcement authority within the meaning of *EPY*. The Texas courts, their clerks, and their judges were thus immune from suit in an *EPY* proceeding.<sup>114</sup> But prohibition does not recognize any immunity in either the court or its judges. The procedure seeks to test the court's authority to hear a particular claim and names the court and its judges as respondents to the writ. Or, as the author of a nineteenth-century treatise explained in distinguishing injunctive relief from prohibition: the suit for an injunction acknowledges the jurisdiction of the lower court "and proceeds on the ground of equities affecting only the parties litigant," whereas prohibition "strikes at once at the very jurisdiction of the court."<sup>115</sup> As noted above, if prohibition issues, it operates as a command to the lower court to refrain from any further adjudication of the matter on pain of contempt. In other words, prohibition neatly solves the central problem in

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112. The prospect of vexatious or multifarious proceedings has long been viewed as an important justification for relief through prohibition. *See Hughes v. Recorder's Ct.*, 42 N.W. 984, 985 (Mich. 1889) ("It would be vexatious and unjust in so clear a case . . . to turn over parties to submission to wrong or to the expense of the multifarious and persecuting prosecutions . . ."). Accordingly, superior courts often grant prohibition in cases of threatened multiplicity, judging the prospect of multiple appeals as an inadequate remedy when compared to determination in one proceeding by writ of prohibition. *See, e.g., Architectural Tile Co. v. Superior Ct.*, 291 P. 586, 587 (Cal. Dist. Ct. App. 1930) (noting that remedy by appeal while over two thousand other cases involving the same question are pending warranted granting of a writ of prohibition); *State ex rel. Anheuser-Busch Brewing Ass'n v. Eby*, 71 S.W. 52, 62 (Mo. 1902) (recognizing that without relief, relators "would be compelled to go to trial in 1,203 cases," making each appeal inadequate). Thus, superior courts will issue prohibition to effectuate a criminal defendant's right to freedom from double jeopardy. *See, e.g., Elder v. Commonwealth*, 431 N.E.2d 571, 572, 574 (Mass. 1982) ("[A] refusal by us to review before trial the claim of rights under the double jeopardy clause would . . . result in the irremediable denial of such rights." (quoting *Costarelli v. Commonwealth*, 373 N.E.2d 1183, 1186 (Mass. 1978))). Similarly, prohibition may issue to block a civil action that poses a threat of multiple claims in separate courts involving the same subject matter. *See, e.g., Mammoth Med., Inc. v. Bunnell*, 265 S.W.3d 205, 213 (Ky. 2008) ("Permitting [this] declaratory judgement action to proceed could potentially open the courthouse doors to . . . multiple claims in separate courts involving similar subject matter.").

113. State superior courts allow additional parties with similar interests to intervene in a pending application for a writ of prohibition. *E.g., Milford Sch. Dist. v. Whiteley*, 401 A.2d 951, 952 (Del. Super. Ct. 1979); *State ex rel. Jackson v. Willson*, 40 N.W.2d 910, 911–12 (Minn. 1950); *State ex rel. Spriggs v. Dist. Ct.*, 301 P.2d 550, 551–53 (Wyo. 1956).

114. *See Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532 (2021) (describing injunctive relief directed at state court judges and clerks as a "violation of the whole scheme of our Government" (quoting *Ex parte Young*, 209 U.S. 123, 163 (1908))).

115. HIGH, *supra* note 27, § 763, at 550.

*WWH*: how to bind the state when executive-branch officials lack any enforcement authority.

Prohibition also binds the individuals, if any, who have brought bounty-hunting enforcement claims under S.B. 8. The plaintiff in *WWH* joined a prospective bounty hunter as a private defendant, hoping to block the initiation of S.B. 8-enforcement proceedings. But the Court dismissed that party, reasoning that the plaintiff had no standing to sue a potential state-court enforcer who had yet to take any concrete steps towards initiating an S.B. 8 proceeding.<sup>116</sup> In circumstances where the state initiates an enforcement proceeding, such as the criminal proceeding in *Rescue Army*, the writ of prohibition names only the lower court or its judges as respondents.<sup>117</sup> But when the party seeking a writ of prohibition has been named as a defendant in a private enforcement proceeding, such as one under S.B. 8, successful petitions for a writ of prohibition were thought to bind both the lower court and the party who instituted the proceeding in that court.<sup>118</sup>

To be sure, prohibition arose to address jurisdictional defects in the proceedings of an inferior court. But by the nineteenth century, prohibition had come to play an accepted role in policing the constitutionality of legislative action.<sup>119</sup> When a grant of legislative authority exceeded constitutional limits, it was viewed as a void or *ultra vires* act, incapable of investing an inferior tribunal with the authority to entertain enforcement proceedings under the statute.<sup>120</sup> A wide range of other constitutional defects—not directly implicating the jurisdiction of the tribunals in

116. *Whole Woman's Health*, 142 S. Ct. at 537.

117. *See, e.g., Rescue Army v. Mun. Ct.*, 331 U.S. 549, 552 (1947) (naming the court in a federal suit seeking to enjoin enforcement of a criminal ordinance).

118. As the Supreme Court explained:

The object of a writ of prohibition is to prevent a court of peculiar, limited or inferior jurisdiction from assuming jurisdiction of a matter beyond its legal cognizance. It can only be issued to restrain the exercise of judicial functions. When the suit complained of is brought by a private person, he may be joined as a defendant. But when it is a suit or prosecution on behalf of the government, the writ of prohibition can go to the court only.

*Smith v. Whitney*, 116 U.S. 167, 176 (1886); *see also Ex parte Braudlacht*, 2 Hill 367, 368 (N.Y. Sup. Ct. 1842) (“The office of a prohibition is to prevent courts from going beyond their jurisdiction in the exercise of *judicial*, not *ministerial* power. Otherwise we might be called on to send the writ whenever a justice of the peace was about to issue civil or even criminal process irregularly.”); *Thomson v. Tracy*, 60 N.Y. 31, 31 (1875) (explaining that a party, through a writ of prohibition, “may be enjoined with the court from further proceedings in the suit or matters specified”); *Conn. River R.R. Co. v. Cnty. Comm’rs*, 127 Mass. 50, 59–60 (1879) (affirming a writ of prohibition against a county commissioner).

119. *See HIGH, supra* note 27, at § 781 at 566 (explaining that prohibition was not limited to matters of jurisdiction but extends to situations in which the tribunal has “exceeded its legitimate powers”); *see also supra* note 84 and accompanying text.

120. *See Zylstra v. Corp. of Charleston*, 1 S.C.L. (1 Bay) 382, 377, 381–82, 391 (Ct. Com. Pl. 1794) (prohibiting enforcement proceeding on ground that it was based on an ordinance that exceeded the city’s legislative power and was therefore “void” or “*coram non judice*”).

question—gave rise to prohibition challenges. In *Weston* itself, a leading Supreme Court case, the constitutional challenge was to the power of the city council to levy a tax on bonds representing the indebtedness of the United States.<sup>121</sup> If the claimants were right as to the immunity of those bonds from local tax, then any court entertaining an enforcement proceeding to collect the taxes would exceed its lawful jurisdiction. The decision of the Massachusetts Supreme Judicial Court in *Connecticut River Railroad v. County Commissioners*<sup>122</sup> was to much the same effect. There, the court issued a prohibition to block the taking of the railroad’s property through proceedings that did not make appropriate provision in advance for the payment of just compensation.<sup>123</sup> The “invalidity of the taking” produced a “consequent want of jurisdiction in the county commissioners” that warranted interposition by way of prohibition.<sup>124</sup>

One third and final procedural wrinkle deserves mention. When writs of prohibition succeeded at common law, they could trigger both a stay of the proceeding in the inferior court, enforceable by contempt,<sup>125</sup> and an award of damages for non-compliance with the writ.<sup>126</sup> At least in theory, then, practice on the writ of prohibition might enable the defendant in an S.B. 8-enforcement proceeding to secure a stay and compensation for any burdens imposed by any subsequent efforts to prosecute an unconstitutional private enforcement proceeding. Depending on how a state court interpreted the breadth of the S.B. 8 bar to the award of costs or fees against a frivolous suit for bounties, prohibition practice might provide a measure of compensation

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121. *Weston v. City Council*, 27 U.S. (2 Pet.) 449, 450, 465. The Supreme Court recently confirmed that such collateral supervisory-writ proceedings produce final judgments for purposes of further review in the Supreme Court, even where they direct the matter under review to proceed to trial. *See Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1349 (2020) (applying finality rule to collateral supervisory review proceeding).

122. *Conn. River R.R. Co. v. Cnty. Comm’rs*, 127 Mass. 50, 59–60 (1879).

123. *Id.* at 54, 57, 60.

124. *Id.* at 57; *see also Thomson v. Tracy*, 60 N.Y. 31, 37 (1875) (describing prohibition as “a proper remedy when the inferior court either entertains a proceeding in which it has no jurisdiction, or when having jurisdiction, it assumes to exercise an unauthorized power”). Some might argue that the Court should refrain from using a procedural vehicle that arose to facilitate a test of jurisdiction to reach the merits of a claim of unconstitutionality. After all, the Court’s recent decisions strive to separate issues of jurisdiction from those on the merits. *See, e.g., Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89–93 (1998) (emphasizing the importance of distinguishing jurisdictional matters and noting that the word has “many, too many, meanings” (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996))). But these problems of jurisdictionality do not arise on review of state court prohibition decisions. The Supreme Court’s appellate jurisdiction clearly extends to any federal questions in the proceeding below, enabling the Court to refrain from confounding its resolution of the merits with jurisdictional puzzles.

125. *See Pfander & Wentzel, supra* note 32, at 1313–14, 1350 & nn. 265, 268, 502.

126. *See HIGH, supra* note 27, § 801, at 579–80.

to those named as defendants under legislation like S.B. 8 that seeks to facilitate an obviously unconstitutional enforcement proceeding.<sup>127</sup>

Of course, prohibition will not solve all problems posed by legislation like S.B. 8. At common law, the injury triggering access to a writ of prohibition was often thought to ripen when the proceeding gets underway in an inferior court.<sup>128</sup> But some superior courts exercise supervisory review of prospective enforcement proceedings, enabling those targeted by new legislation to challenge the statute before it takes effect. Consider the proceedings in Idaho seeking to block a restrictive abortion statute modeled on S.B. 8. The Idaho Supreme Court has “original jurisdiction to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all writs necessary or proper to the complete exercise of its appellate jurisdiction.”<sup>129</sup> Petitioners, including a Planned Parenthood affiliate, invoked Idaho rules of appellate practice that, tracking the common law, enable “any person” to “apply to the Supreme Court for the issuance of any extraordinary writ or other proceeding over which the Supreme Court has original jurisdiction.”<sup>130</sup> Coupling a request for prohibition with an application for declaratory relief, petitioners sought review of the statute’s constitutionality before its effective date and secured a stay of enforcement.<sup>131</sup> As the court with ultimate supervisory authority over litigation in Idaho state courts, the supreme court sensibly concluded that its role included the exercise of original, pre-enforcement review.<sup>132</sup>

Building on the viability of petitions by any person, state courts might use the writ of prohibition to offer similarly effective pre-enforcement review of dubious private enforcement schemes. As noted above, common law courts welcomed petitions by any party, much the way Idaho does.<sup>133</sup> That helps to solve a problem with standing that petitioners like Planned Parenthood might otherwise confront as they seek pre-enforcement review.<sup>134</sup> Idaho treated the original petition for prohibition as ripe for

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127. Notably, the award of compensation would flow from non-compliance with the writ, a basis for compensation that the statute does not address in blocking the award of costs for the initiation of a frivolous or duplicative S.B. 8 enforcement proceeding.

128. HIGH, *supra* note 27, at § 773, at 558–59.

129. IDAHO CONST. art. V, § 9; *accord* IDAHO CODE ANN. § 1-203 (West 2023); *see also* IDAHO CODE ANN. § § 7-402 (West 2023) (detailing when and how this authority may be used).

130. Planned Parenthood Great Nw. v. State, 522 P.3d 1132, 1157 (Idaho 2023) (quoting IDAHO APP. R. 5(a)).

131. *Id.* at 1147, 1153–55.

132. *Id.* at 1157.

133. *See* HIGH, *supra* note 27, § 779, at 565 (explaining that, at common law, a petitioner may seek a writ of prohibition without first establishing any personal interest in the proceeding below).

134. Although *Roe/Casey* conferred rights on pregnant women, their doctors and clinics were thought to have a right to litigate restrictions on abortion rights under the doctrine of third-party standing. *See* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2119–20 (2020) (explaining that abortion providers are “far better positioned than their patients to address the burdens of

consideration and entered a stay without awaiting the initiation of enforcement proceeding in an inferior state court.<sup>135</sup> Other states might well follow Idaho in authorizing pre-enforcement applications for prohibition in appropriate settings.<sup>136</sup>

Even where state courts decline to allow pre-enforcement review, parties named in state-court enforcement proceedings may find prohibition helpful. For a person in the position of Dr. Braid, whose prosecution for admitted violations of S.B. 8 prompted overlapping enforcement actions, the writ of prohibition might offer a useful alternative to a federal interpleader action.

### III. Prohibition and Review in the Federal Courts

In challenging legislation like S.B. 8 that creates private-enforcement schemes to burden constitutional rights, litigants hope to steer their claims to the Supreme Court for a resolution of their constitutional challenge. Only through the Supreme Court's intervention, wisdom has it, can parties subject to private enforcement secure protection against repetitive litigation. A favorable decision by the Court would make it clear that any proposed S.B. 8-enforcement proceeding would violate the Constitution, thereby easing the task of securing its dismissal. Until then, state and federal courts might disagree as to the viability of the enforcement scheme, producing some uncertainty as to its legality. The article that gave rise to S.B. 8 acknowledged that the goal of sowing chaos in the lower state and federal courts would succeed only so long as the Supreme Court had yet to address the issue.<sup>137</sup>

The Essay has so far explored one well-traveled path to Supreme Court review, focusing on suits that pursue prohibition at the state level as a prelude to review on appeal or by writ of certiorari in the Supreme Court. That well-worn path was confirmed in *Weston* and remains available today. It has the distinctive advantage of relying on established state-court procedures and rules of appellate jurisdiction that would simplify the path to ultimate

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compliance" with abortion laws and thus have third-party standing). On the development and application of the rules of third-party standing, see Curtis A. Bradley & Ernest A. Young, *Unpacking Third-Party Standing*, 131 YALE L.J. 1, 10–13 (2021).

135. *Planned Parenthood Great Nw.*, 522 P.3d at 1153–54, 1159.

136. Thus, lower courts have sometimes issued prohibition to block the initiation of an enforcement proceeding rather than its continued prosecution. In *Weston*, for example, those subject to the city tax were permitted to seek a writ of prohibition in state court *before* the city treasurer had initiated proceedings to levy and collect the tax in question. See *Weston v. City Council*, 27 U.S. (2 Pet.) 449, 453 n.(a) (1829) (noting that the writ was sought to “restrain the treasurer . . . from levying a tax” (quoting *City Council v. Weston*, 16 S.C.L. (Harp.) 340, 348 (1824) (Huger, J., dissenting))). There, the city council had imposed the tax and charged its public officials with tax enforcement and collection, clarifying the target of pre-enforcement litigation. *Id.*

137. See Mitchell, *supra* note 42, at 949, 1002 (explaining that litigation could proceed unless and until the Supreme Court of the United States declares a statute unconstitutional).

Supreme Court review. Such a proceeding also creates the possibility that the state supreme court might invalidate the enforcement proceeding as a matter of both state and federal law. S.B. 8 certainly suffered from a variety of defects apart from its clear violation of the *Roe/Casey* viability regime. Issuance of a writ of prohibition by the state supreme court could settle the issues for the state law in question as decisively as review in the Supreme Court.<sup>138</sup>

This Part considers other, less well-mapped routes to the Supreme Court, all of which use prohibition. In one, a state-court defendant might ask the Supreme Court to issue an “original” writ of prohibition to block a state court from entertaining a proceeding that clearly lies beyond its constitutional authority. In a second pathway, litigants might draw on the history of prohibition to broaden the injunctive relief available under *Ex parte Young*. Third, and perhaps most intriguingly, the United States might initiate a proceeding on the Court’s original docket, seeking prohibition against any enforcement in the state.

#### A. *The “Original” Writ of Prohibition*

So far, this Essay has focused on the Court’s ability to conduct appellate review of state-court decisions evaluating petitions for writs of prohibition. But the Court also enjoys authority, under the federal All-Writs Act, to issue writs of prohibition directly to state courts.<sup>139</sup> The Act empowers the Court to “issue all writs necessary or appropriate in aid of [its jurisdiction] and agreeable to the usages and principles of law.”<sup>140</sup> As aptly explained in an early edition of Stern and Gressman, this provision “does no more than recognize that it is the Court’s function to determine when it is appropriate for a writ to issue.”<sup>141</sup>

As Stern and Gressman also suggest, the cases applying the All-Writs Act have proceeded “in common-law fashion.”<sup>142</sup> Those cases make clear that the all-writs authority extends to the extraordinary writs of mandamus, prohibition, and certiorari, which have a somewhat interchangeable

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138. A state court decision that invalidated the state law on an independent state ground would preclude Supreme Court appellate review. *See* *Murdock v. City of Memphis*, 87 U.S. 590, 631, 635 (1874) (concluding that the Supreme Court’s appellate jurisdiction does not extend to independent issues of state law and explaining that such issues can sometimes block review of federal claims as well).

139. 28 U.S.C. § 1651.

140. *Id.* The all-writs authority has been on the books since the first Judiciary Act in 1789. James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court’s Supervisory Powers*, 101 COLUM. L. REV. 1515, 1529 n.52 (2001).

141. ROBERT L. STERN & EUGENE GRESSMAN, SUPREME COURT PRACTICE 260 (1950).

142. *Id.*



quality.<sup>143</sup> The cases also make clear that the Court's authority to issue these original writs as part of its appellate jurisdiction extends in principle to both the lower federal courts and to the state courts.<sup>144</sup>

The Court's decision in *General Atomic v. Felter*<sup>145</sup> illustrates its use of the original writs in relation to state courts. There, the state trial court in Santa Fe, New Mexico, granted injunctive relief to block a party from initiating related proceedings in federal court.<sup>146</sup> On appeal from the state supreme court, the Supreme Court summarily reversed, applying its decision in *Donovan v. Dallas*<sup>147</sup> that state courts lack power to grant anti-suit injunctive relief to block in personam proceedings in federal court.<sup>148</sup> On remand, the Santa Fe state trial court again granted injunctive relief to stay overlapping proceedings in federal court.<sup>149</sup> On petition, the Court granted the motion for leave to file petition for an original writ of mandamus, clearly threatening the state trial court with issuance of a mandatory writ if it were to fail to conform to the Court's mandate.<sup>150</sup> In issuing this relief directly against the state trial court, the Court excused the petitioner from any obligation to exhaust proceedings available in the state judicial hierarchy.<sup>151</sup>

The Court's use of the original writs to demand state-court compliance with its mandates represents an important step toward the issuance of original prohibition. For starters, the Court directed relief specifically at state courts and judges; the respondents in the leading cases were all judges of their respective state courts.<sup>152</sup> The decisions, though formally couched in terms of mandamus, support the issuance of prohibition relief directed at state courts. Indeed, although one or two Justices dissented on other grounds from the issuance of original writ relief to enforce the Court's mandates, none argued that the Court lacked authority under the Constitution or laws to act

143. *See id.* at 261 n.1 (noting that parties have petitioned for relief by invoking all three writs and the Court has reached the merits without identifying any substantial distinction between them).

144. For an example of mandamus blocking, in the nature of prohibition, a federal district court from entertaining a suit in admiralty barred by foreign sovereign immunity, see *Ex parte Republic of Peru*, 318 U.S. 578, 583–85 (1943). For mandamus to state courts, see *Gen. Atomic Co. v. Felter*, 436 U.S. 493, 497 (1978) (per curiam) (mandamus to New Mexico trial court); *Bucolo v. Adkins*, 424 U.S. 641, 644 (1976) (per curiam) (mandamus to abate a Florida criminal obscenity prosecution); *Deen v. Hickman*, 358 U.S. 57, 58 (1958) (per curiam) (mandamus to Texas Supreme Court to foreclose further proceedings on a question previously resolved by Supreme Court).

145. 436 U.S. 493 (1978) (per curiam).

146. *Gen. Atomic Co. v. Felter*, 434 U.S. 12, 12 (1977) (per curiam).

147. *Donovan v. City of Dallas*, 377 U.S. 408 (1964).

148. *Gen. Atomic Co.*, 434 U.S. at 16–17 (citing *Donovan*, 377 U.S. at 411–12).

149. *Gen. Atomic Co.*, 436 U.S. at 493–94.

150. *Id.* at 497–98 (granting but declining to issue a formal writ on the assumption that the state court would promptly comply with the mandate and vacate or modify its order).

151. *Id.* at 496–98.

152. *See cases cited supra* note 144 (identifying as respondents Judges Felter, Hickman, and Adkins).

directly on state courts to ensure the efficacy of its mandates and the supremacy of federal law on which they were based.<sup>153</sup>

To be sure, mandamus to effectuate the Court's judgments differs from an original writ of prohibition to block a state court from continuing to entertain a proceeding that lies beyond its power. But the relief available in the mandate-enforcement decisions resembles that provided by the writ of prohibition. In all three proceedings, the Court effectively blocked further prosecution of state-court proceedings: in New Mexico, prohibiting injunctions against federal litigation;<sup>154</sup> in Florida, blocking a criminal trial;<sup>155</sup> and in Texas, overriding a state court order directing a jury trial on an issue that had been foreclosed by prior proceedings.<sup>156</sup> All these cases dealt with state-court defiance of the Court's decrees, and all effectively blocked state-court proceedings on grounds reminiscent of prohibition.<sup>157</sup>

Prior decisions provide authority to block state-court proceedings that the Supreme Court views (along lines articulated in Chief Justice Roberts's and Justice Sotomayor's *WWH* dissents) as meant to defy the supremacy of federal law. Its appellate jurisdiction clearly extends to state-court enforcement proceedings that violate the Constitution. Issuance of a writ of prohibition operates in aid of that jurisdiction, enabling the Court to offer

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153. See generally *General Atomic Co.*, 436 U.S. 493 (showing no evidence of dissenting on the basis of lack of constitutional authority to act direct on state courts). The Court's acceptance of mandamus apparently resolves lingering doubts as to the propriety of that form of state court oversight. Cf. *In re Blake*, 175 U.S. 114, 117–18 (1899) (holding that writ of error, not mandamus, "is manifestly the proper remedy" to correct state courts that fail to give "full effect to the mandate" from the Supreme Court of the United States by mistaking or misconstruing its judgment). Nineteenth-century practice on the writ of error could similarly lead to highly directive orders to state judges, as it did in the run-up to *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). See RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 465 (7th ed. 2015) (describing the Supreme Court's "command[]" that the "Honorable Judges" of Virginia's high court conduct "such proceedings" as ought to be had according to "right and justice, and the laws of the United States" and agreeably to the "judgment and instructions" of the Supreme Court (quoting *Hunter v. Martin*, 18 Va. (4 Munf.) 1, 2–3 (1815))).

154. See *Gen. Atomic Co.*, 436 U.S. at 497–98 (granting motion for leave to file a petition for a writ of mandamus against New Mexico trial court to block further proceeding to enjoin federal litigation).

155. See *Bucolo v. Adkins*, 424 U.S. 641, 644 (1976) (per curiam) (granting motion for leave to file a petition for a writ of mandamus to abate a Florida criminal obscenity prosecution).

156. See *Deen v. Hickman*, 358 U.S. 57, 57–58 (1958) (per curiam) (granting motion for leave to file a petition for a writ of mandamus to Texas Supreme Court to block jury trial on a question previously resolved by Supreme Court).

157. In all three cases, the Supreme Court declined to actually issue the writ, assuming instead that each court would voluntarily conform to its decision. *Gen. Atomic Co.*, 436 U.S. at 497–98; *Bucolo*, 424 U.S. at 644; *Deen*, 358 U.S. at 58. But (presumably) in case they did not, the Court nevertheless granted each petitioner's motion for leave to seek mandamus. *Gen. Atomic Co.*, 436 U.S. at 497–98; *Bucolo*, 424 U.S. at 644; *Deen*, 358 U.S. at 58.

speedy relief where other remedies appear inadequate.<sup>158</sup> Rather than making the petitioners in a case like *WWH* pursue relief through a “lengthy process of litigation, involving several layers of courts,”<sup>159</sup> the Court might agree to make relief available more quickly by issuing prohibition to the first state trial court that took up the issue. Just as the Court sometimes grants certiorari before judgment in the circuit courts to bring matters to a head,<sup>160</sup> so might a Court satisfied as to the unconstitutionality of the enforcement scheme provide those threatened by its operation with speedy relief.<sup>161</sup>

If parties were to challenge S.B. 8 or similar laws shortly after having been named as a defendant in an enforcement proceeding, the proceeding would fall on the appellate side of the *Marbury* line, enabling the Court to hear an “original” petition (much the way the Court has deployed the “original” writ of habeas corpus).<sup>162</sup> By enabling the Supreme Court to address the constitutional challenge as a matter separate from the merits and by placing the inferior court proceedings on hold during the pendency of review, original prohibition would solve many of the challenges that the petitioners faced in *WWH*. A decision by the Supreme Court granting relief would block enforcement proceedings throughout the state of Texas.

One can, of course, identify several concerns, prudential and otherwise, that might incline the Court to refrain from agreeing to hear such petitions. Realistically speaking, the Court had little interest in invalidating S.B. 8 as it pondered and eventually ended the *Roe/Casey* viability framework. One might suppose that any such “original” petition would have failed to attract the support necessary for docketing.<sup>163</sup> True, one can imagine other privatized enforcement schemes attacking constitutional rights more salient to the Court as currently configured. Original prohibition might have some appeal for a Court confronting what it views as a legislative end-run around established constitutional protections. Yet even were the Court inclined to

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158. On the use of all-writs authority to implement the Supreme Court’s constitutional grant of appellate jurisdiction, see PFANDER, *supra* note 74, at 78. On the application of the principle of inferiority to state courts, bringing the Supreme Court’s supervisory powers into play, see *id.* at 86–87.

159. *General Atomic Co.*, 436 U.S. at 497.

160. *E.g.*, *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 529 (2021).

161. Although the Court’s appellate jurisdiction extends only to “[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had,” 28 U.S.C. 1257, the Court often uses the extraordinary writs to intervene in pending proceedings, state and federal. See *supra* notes 154–56 and accompanying text.

162. See PFANDER, *supra* note 74, at 70–72 (discussing the *Marbury* principle prohibiting expansion of the Court’s original jurisdiction and its inapplicability to appellate-style review of lower courts through habeas corpus and other prerogative writs); see also STERN & GRESSMAN, *supra* note 141, at 259 (describing the original writs as triggering the exercise of the Court’s appellate jurisdiction to correct a lower court error).

163. It takes five votes to docket an original petition but only four votes to grant certiorari.

intervene, some Justices might worry that original prohibition would burden it with a cluster of new petitions.<sup>164</sup>

A second objection might sound in tradition. The Court has tended to issue its original or supervisory writs to lower federal courts.<sup>165</sup> The current statutory and constitutional framework would support the extension of supervisory oversight to state courts, but the Court might prefer to await a clearer congressional signal before undertaking that form of review.<sup>166</sup> Congress conferred the All-Writs authority in 1789 but has yet to confer more explicit power on any federal court to issue writs of prohibition to state courts.<sup>167</sup> So long as the Court can effectively police state courts through the exercise of certiorari, including by granting stays on its shadow docket, it may prefer to pursue oversight in that manner instead of expanding an alternative form of control.<sup>168</sup>

#### B. *Prohibition and the Expansion of Ex parte Young Relief*

Apart from undertaking direct state-court supervision,<sup>169</sup> the Court might view the history of prohibition litigation as reason to reconsider the

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164. That objection would be moderated, of course, by the Court's ability to exercise its discretion over the docketing of any such application.

165. Research discloses just three instances in which the Court has issued an extraordinary writ to halt proceedings in state court. *See* cases cited *supra* notes 154–56.

166. Viewing the All-Writs Act as a codification of the Court's appellate jurisdiction as conferred in the Constitution would enable the Court to issue writs to effectuate its jurisdiction over state court proceedings. *See* PFANDER, *supra* note 74, at 86–87 (discussing the basis for the Court's supervision of state tribunals). The Constitution treats all such courts, when they have been appointed by Congress to hear claims arising under federal law, as inferior to the Supreme Court, thus triggering the availability of supervisory review. *Id.* at 87–89. The First Congress appears to have taken the same view; its grant of mandamus authority to the Supreme Court extends not just to the federal district and circuit courts that were established in the Judiciary Act of 1789 but to all courts "appointed . . . under the authority of the United States." Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80–81. Early federal statutes frequently relied on state courts to adjudicate federal claims. *See, e.g.*, Act of July 31, 1789, ch. 5 § 24, 1 Stat. 29, 43 (assigning adjudication of applications for federal search warrants to state "justice[s] of the peace"); Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103 (assigning adjudication of naturalization claims to any "common law court of record"—a reference that encompassed both state and federal courts); *see also* JAMES E. PFANDER, *CASES WITHOUT CONTROVERSIES: UNCONTESTED ADJUDICATION IN ARTICLE III COURTS* 33–40 (2021) (describing early practice of relying on state and federal courts). The mandamus provision would authorize any necessary oversight of state courts when conducting such assigned federal business.

167. 28 U.S.C. § 1651; *accord* Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–87.

168. *See* STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* 250 (2023) (discussing the Court's shadow docket decisions, including its emergency stay orders).

169. The Court agreed to hear appeals from the non-Article III court of appeals for the armed forces as part of its appellate jurisdiction, concluding that direct review of non-Article III tribunals would nonetheless qualify as appellate within the meaning of Article III. *Ortiz v. United States*, 138 S. Ct. 2165, 2176 (2018). But the Court qualified its decision to reflect a concern with the burden of supervision. *See id.* at 2180 (declining to say anything about "appellate jurisdiction over cases

strictures of *Ex parte Young*. If we take the long view of *EPY*, we find that its model of pre-enforcement judicial review of state legislation owes more to the prerogative writ traditions of mandamus, certiorari, and prohibition than to the rules of equity jurisprudence as deployed in the High Court of Chancery circa 1789.<sup>170</sup> Reliance on the injunction as a tool of public law litigation arose during the nineteenth century as state courts came to view the prerogative writs as a less effective tool of judicial review.<sup>171</sup> Equity absorbed many of the lessons of prerogative-writ practice, adapting its remedial contours to account for changes in the common law framework. In circumstances where a state statute suffers from a clear constitutional defect, one that evidently deprives all state courts of enforcement power, the prohibition tradition supports the issuance of relief that binds the parties and the inferior-court judges who would preside over such defective claims.

The prohibition tradition thus supports the position of the *WWH* dissenters.<sup>172</sup> Without invoking prohibition in terms, they argued that a blatantly unconstitutional enforcement statute like S.B. 8 called for extraordinary judicial relief—a form of extraordinary relief that prohibition was meant to supply. The dissenters argued that, whatever *EPY* might have to say on the matter, the judges of the state courts should be enjoined from further processing such claims.<sup>173</sup> Prohibition arose to facilitate that model of judicial intervention, enabling the issuance of injunctive-type relief against the judges of inferior courts. An analogy to prohibition would help address the majority’s argument that injunctions against judges were wholly unprecedented. Superior courts have for centuries blocked inferior courts from exceeding their jurisdiction and constitutional authority.<sup>174</sup>

To be sure, early statutes assigned the power to oversee state courts to the Supreme Court rather than to the lower federal courts.<sup>175</sup> That perhaps

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from other adjudicative bodies in the Executive Branch, including those in administrative agencies”).

170. See Pfander & Wentzel, *supra* note 32, at 1335 (discussing the importance of these writs as used in England).

171. *Id.* at 1276.

172. See *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 544–47 (2021) (Roberts, C.J., concurring in the judgment in part and dissenting in part) (arguing that *Ex parte Young* authorizes pre-enforcement review of S.B. 8).

173. *Id.* at 544–45, 547, 549.

174. See *supra* notes 71–72 and accompanying text. Analogies to habeas corpus may help here as well. No one questions the authority of the federal courts to proceed in a habeas proceeding that identifies a wholly nominal defendant, the jailer or warden, as a stand-in for the state. The jailer, of course, has custody of the habeas petitioner but does not have the sort of enforcement authority on which the *WWH* majority insisted. Instead, the jailers operate as ministerial officers, responding to judicial decrees and conforming their conduct to law on pain of contempt if they fail to do so. The habeas model suggests that suits effectively against the state might proceed by naming nominal officials, such as judges and clerks in prohibition proceedings.

175. James E. Pfander, *An Intermediate Solution to State Sovereign Immunity: Federal Appellate Court Review of State Court Judgments After Seminole Tribe*, 46 *UCLA L. REV.* 161,

explains why nineteenth-century treatises assumed that prohibition would not issue from the lower federal courts to block state-court proceedings, at least within then-existing statutory provisions.<sup>176</sup> Working around that perceived limitation does not appear to present any constitutional issues; courts and commentators have long assumed that Congress can assign lower federal courts authority to conduct appellate review of state-court decisions.<sup>177</sup> Indeed, many familiar grants of lower court jurisdiction—including federal habeas review of state criminal convictions and federal jurisdiction over actions removed from state court—operate functionally as forms of appellate jurisdiction to review state-court proceedings.<sup>178</sup> Section 1983 confers

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214–15 (1998). Were Congress inclined, it might authorize lower federal courts to review state court decisions. *See id.* at 216–17 (citing THE FEDERALIST NO. 82, at 554–56 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)) (noting that Hamilton perceived the Constitution to authorize such appellate review). Prohibition could surely follow as an entailment of those grants of appellate jurisdiction in relation to state court adjudication.

176. *See* HIGH, *supra* note 27, § 787, at 571 (expressing doubts that federal circuit courts have statutory authority to issue the writ of prohibition to state courts because such relief was not seen as necessary to any existing jurisdiction). An early writ of certiorari, directed by a lower federal court to a North Carolina state court, triggered a contretemps that would eventually lend support to the adoption of the Anti-Injunction Act. James E. Pfander & Nassim Nazemi, *Morris v. Allen and the Lost History of the Anti-Injunction Act of 1793*, 108 NW. U.L. REV. 187, 190–91 (2014).

177. On congressional power to authorize lower federal courts to hear appeals from state courts, *see supra* note 175. Admittedly, the Supreme Court plays a unique role in the judicial system and enjoys a constitutional grant of appellate jurisdiction that extends to proceedings in state court. *See* *Martin v. Hunter's Lessee*, 14 U.S. 304, 323 (1816) (discussing the Supreme Court's powers and limitations). Of course, all courts that Congress constitutes to conduct federal judicial business (including both lower federal courts and state courts appointed to serve as federal tribunals) must remain inferior to the Supreme Court. U.S. CONST. art. I, § 8, cl. 9. The Court's supervisory authority (and with it, the power to issue writs of mandamus and prohibition) derives in part from its status as a supreme court in relation to inferior courts. PFANDER, *supra* note 74, at 45. The power of lower federal courts to issue writs of mandamus and prohibition derives from the All-Writs Act and comes into play when necessary in aid of the court's jurisdiction. 28 U.S.C. § 1651(a). All-writs authority to issue such writs would thus depend on the existence of a form of appellate jurisdiction.

178. Chief Justice Marshall characterized habeas corpus as a form of appellate jurisdiction in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100–01 (1807). Justice Story similarly characterized the removal jurisdiction of the lower federal courts as effectively a form of appeal from state courts. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 349 (1816). Such characterizations support the power of lower federal courts to stay proceedings in state court that defy habeas decrees or seek to frustrate federal removal jurisdiction. *See generally* James E. Pfander & Nassim Nazemi, *The Anti-Injunction Act and the Problem of Federal-State Jurisdictional Overlap*, 92 TEXAS L. REV. 1 (2013) (tracing the history of federal power to enjoin state court proceedings). One might worry that the exercise of appellate jurisdiction by district courts under § 1983 runs afoul of the *Rooker-Feldman* doctrine. *Rooker v. Fid. Tr. Co.*, 263 U.S. 413 (1923); *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983). Based on the statutory assignment of appellate jurisdiction to the Supreme Court, the doctrine bars the losing party in a state court proceeding from seeking the equivalent of a reversal of a state court decision through the guise of a suit for relief under § 1983. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 287 (2005). But the Court defines the doctrine as one that prevents “state-court losers from complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced.” *Id.* at 284. As contemplated here, the remedy of prohibition would come into play before judgment in the underlying state court case and would

similar power, authorizing lower federal courts to intervene when state tribunals threaten violations of the federal Constitution under color of state law.<sup>179</sup>

Section 1983 has long been understood as having fundamentally changed the relations between state and federal courts. One can find those changes nicely summarized in *Mitchum v. Foster*,<sup>180</sup> which provides a detailed reconstruction of the statute's language and history.<sup>181</sup> The Court in *Mitchum* held that § 1983 represents an implicit exception to the Anti-Injunction Act's ban on the issuance of injunctions to stay proceedings in state court.<sup>182</sup> *Mitchum* approves federal judicial power to enjoin pending state judicial proceedings, thereby going beyond *Ex parte Young*'s approval of injunctive relief where no proceeding had yet been initiated in state court.

Of course, the doctrine of equitable restraint limits federal court authority when the federal claimants can vindicate their constitutional rights as a defense to a pending state-court enforcement proceeding.<sup>183</sup> But exceptions exist, both when the state acts in bad faith or in clear violation of federal law and where state courts administer rules of state law that do not arise as defenses to pending state criminal proceedings.<sup>184</sup> State-judicial decisions setting bail and defining the conditions of pre-trial detention exemplify the category of matters that do not arise as defenses to pending state criminal proceedings and therefore trigger potential federal oversight.<sup>185</sup>

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block the state proceeding altogether rather than overturning a judgment at the behest of a state court loser.

179. See 42 U.S.C. § 1983 (imposing liability for “[e]very person” who violates such a right when acting under color of state law).

180. 407 U.S. 225 (1972).

181. *Id.* at 238–39. For a sample of litigation, see Jean R. Sternlight, *Forum Shopping for Arbitration Decisions: Federal Courts’ Use of Antisuit Injunctions Against State Courts*, 147 U. PA. L. REV. 91, 91 n.3 (1998).

182. *Mitchum*, 407 U.S. at 242–43. By its terms, § 1983 authorizes injunctive relief to effectuate federal rights threatened by action under color of state law but does not authorize a stay of state court proceedings. The Court has so far declined invitations to extend *Mitchum* to other federal statutes. See, e.g., *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 632–33 (1977) (rejecting claim that Clayton Act authorized anti-suit injunctions).

183. See *Younger v. Harris*, 401 U.S. 37, 41 (1971) (directing lower courts to refrain from hearing suit to vindicate constitutional defense to a pending state court enforcement proceeding); cf. *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 72–73 (2013) (limiting *Younger* to criminal prosecutions, civil enforcement proceedings brought by the states, and certain orders arising in civil litigation).

184. On the exceptions for bad faith and flagrantly clear violations, see *Younger*, 401 U.S. at 53–54. Both exceptions flow naturally from the equitable rules, which call for assessment of the clarity of the legal right invoked and the threat of irreparable harm posed by the defendant’s conduct. See PFANDER, *supra* note 40, at 374–75 (recounting the requirements of injunctive relief and linking them to the exceptions recognized in *Younger*).

185. See *Gerstein v. Pugh*, 420 U.S. 103, 114, 116–19 (1975) (disapproving of Florida’s procedure permitting pre-trial detention without judicial determination of probable cause as contrary to the Fourth Amendment); *Pulliam v. Allen*, 466 U.S. 522, 524–26, 541–42 (1984)

Although many such injunctions name the parties rather than courts, the Court has approved injunctions that bind state judges, doing so in *Mitchum* itself.<sup>186</sup> Similarly, in *Pulliam v. Allen*,<sup>187</sup> the Court approved an injunction against a Virginia state magistrate who had ordered pre-trial detention of a criminal defendant whose offense did not carry jail time.<sup>188</sup> *Pulliam* assumes the propriety of such injunctions from the perspective of judicial immunity and allows the federal plaintiff to collect attorney's fees as well.<sup>189</sup> The majority opinion in *WWH* distinguished both decisions as having failed to address the Eleventh Amendment and Article III issues posed by a suit in federal court to enjoin a state court.<sup>190</sup>

The history of prohibition may help resolve these concerns. Like mandamus and habeas corpus, the writ of prohibition precipitates a test of the legality of government action by naming a responsible state official as a stand-in for the state itself. As noted above, the writ emerged from a historical context in which the prerogative writs were understood to fall well within the judicial power to test, on behalf of the Crown, the legality of the actions of the Crown's officials.<sup>191</sup> Just as the judges themselves enjoy no judicial immunity from § 1983 litigation, as *Pulliam* confirms, so too proceedings to prohibit state judges do not implicate the states' sovereign immunity. Like the jailer or warden who serves as a nominal defendant in a habeas proceeding, the judge who lacks power to preside over a particular kind of proceeding serves as a representative of the state whose joinder does not trigger immunity.<sup>192</sup> As the Court has explained, *Ex parte Young* "rests on the premise—less delicately called a 'fiction,'—that when a federal court

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(holding that a magistrate could be subject to injunctive relief for imposing pre-trial detention for a non-jailable offense).

186. See *Mitchum v. Foster*, 315 F. Supp. 1387, 1388 (N.D. Fla. 1970) (per curiam) (noting that the proposed injunction operated against a state judge and prosecutor).

187. 466 U.S. 522 (1984).

188. See *id.* at 524–25, 541–42 (concluding that judicial immunity did not block an injunction directed at a magistrate who followed an unconstitutional practice of imposing detention following an arrest for a non-jailable offense). Two commentators argue that *Pulliam* deserves more attention in discussions of the power to enjoin state judges, explaining that the state magistrate was understood to have been acting in a judicial, rather than an executive capacity. See Alexandra Nickerson & Kellen Funk, *When Judges Were Enjoined: Text and Tradition in the Federal Review of State Judicial Action*, 111 CALIF. L. REV. 1763, 1766, 1780, 1783, 1828–29 (2023) (explaining that the state magistrate was understood to have been acting in a judicial, rather than an executive capacity).

189. For the statutory codification of this provision for the payment of fees in appropriate cases, see Nickerson & Funk, *supra* note 188, at 1765–66.

190. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532–34 (2021).

191. See *supra* note 76 and accompanying text.

192. On the inapplicability of sovereign immunity to habeas proceedings, see *Central Virginia Community College v. Katz*, 546 U.S. 356, 374–75 (2006) (observing that the Bankruptcy Act of 1800 conferred power on federal courts to release debtors from state prisons in habeas proceedings to which the Eleventh Amendment interposed no objection).



commands a state official to do nothing more than refrain from violating federal law, [the official] is not the State for sovereign-immunity purposes.”<sup>193</sup>

Nor does a suit naming a judge as defendant fail the case-or-controversy requirement of Article III. As the history of prohibition makes clear, the judicial power as exercised in the Anglo-American tradition has long included suits brought against judges to restrain them from acting *ultra vires*.<sup>194</sup> Indeed, in the early republic, the Court directed writs of mandamus and prohibition to lower court judges.<sup>195</sup> In many circumstances, the modern Court has treated historical practice as centrally important in determining whether federal courts may entertain an unconventional form of adjudication. Thus, in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,<sup>196</sup> the Court treated history as “well-nigh conclusive” in allowing a private informer to pursue bounty claims on behalf of the government to recover under the False Claims Act.<sup>197</sup> The Court reached that conclusion even though the informer had suffered no injury in fact that a bounty would redress.<sup>198</sup>

The Court in *WWH* took little interest in the history of prohibition in suggesting that suits against judges failed to implicate Article III judicial power. Instead, the Court relied primarily on a federal appeals court decision written by then-First Circuit Judge Stephen Breyer.<sup>199</sup> Breyer’s opinion held

193. *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 255 (2011) (citation omitted). As a result, Supreme Court decisions reviewing state court denials of the writ of prohibition do not implicate the state’s immunity from suit. *See, e.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 289–91 (1980) (reversing state denial of prohibition and thus foreclosing state courts from hearing certain claims); *Burnham v. Superior Ct.*, 495 U.S. 604, 608, 628 (1990) (reviewing state court denials of mandamus). Yet such proceedings compel the state to comply with a federal judicial interpretation of federal law in a proceeding nominally brought against the state judge. *See generally id.* (implying states are still bound to comply with federal judicial interpretation vis-à-vis the fact that the Court had jurisdiction over this case); *World-Wide Volkswagen Corp.*, 444 U.S. 286 (same). On the Eleventh Amendment as a limit on the Court’s appellate jurisdiction, compare Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 *YALE L.J.* 1, 13–15, 25 (1988), with William Baude & Stephen E. Sachs, *The Misunderstood Eleventh Amendment*, 169 *U. PA. L. REV.* 609, 612–13, 650–51 (2021).

194. *See supra* text accompanying note 71.

195. *See* 8 *DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800*, at 390 (Maeva Marcus ed., 1st ed. 1985) (discussing *Ex parte Fitzbonne*, an unreported Supreme Court case decided in 1800, in which the Court issued a writ of mandamus to correct lower court’s mistaken interpretation of the naturalization statute). For an account, see PFANDER, *supra* note 74, at 67–68. *See also* *United States v. Peters*, 3 U.S. (3 Dal.) 121, 129 (1795) (writ of prohibition issued to block lower court judge from entertaining an admiralty proceeding).

196. 529 U.S. 765 (2000).

197. *Id.* at 776–78.

198. *Id.* at 773.

199. *See* *Whole Woman’s Health v. Jackson*, 141 S. Ct. 522, 532 (2021) (citing *Pulliam v. Allen*, 466 U.S. 522, 538 n.18 (1984)); *see also* *Pulliam*, 466 U.S. at 538 n.18 (citing *In re Justs. of the Sup. Ct. of P.R.*, 695 F.2d 17, 21 (1st Cir. 1982)) (“[N]o case or controversy between a judge

only that judges were not proper parties to name as defendants in § 1983 claims to contest the legality of the law they were called upon to interpret and apply.<sup>200</sup> In reaching that decision, Judge Breyer dismissed the relevance of mandamus and prohibition, characterizing those proceedings as interstitial modes of supervising lower courts.<sup>201</sup> As we have seen, however, prohibition frequently served to facilitate a challenge to the constitutionality of state law, going well beyond the housekeeping functions Breyer identified. What's more, the Court's decision in *Pulliam*, which came after Judge Breyer's decision, viewed the mandamus and prohibition tradition as supporting § 1983 proceedings against state judges.<sup>202</sup>

Breyer's reluctance to allow suit against judges when other proper defendants were abundantly available has little resolving power in unconventional cases where no executive branch official of the state government plays an enforcement role.<sup>203</sup> In such a context, suits under § 1983 will founder unless the court allows the joinder of state-court judges as nominal defendants. Once joined, even as nominal defendants, state judges face the possible entry of a remedial order enforceable by contempt.<sup>204</sup> Such a personal interest on the part of the judge, though rarely implicated in a world of declaratory adjudication, surely creates the sort of adverse relationship that the Court has viewed as a hallmark of Article III cases and controversies.<sup>205</sup>

### C. *Prohibition and the Supreme Court's Original Jurisdiction*

So far, this Essay has focused on litigation brought by individuals threatened with S.B. 8 enforcement. But in addition to individual litigation, the Biden Department of Justice sued to enjoin Texas from enforcing the

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who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute.”).

200. See *In re Justs. of the Sup. Ct. of P.R.*, 695 F.2d 17, 21–22 (1st Cir. 1982) (“[A]t least ordinarily, no ‘case or controversy’ exists between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute.”).

201. *Id.* at 23.

202. See *Pulliam*, 466 U.S. at 539–41 (examining the legislative intent of § 1983 and history of judicial immunity to determine that judicial immunity does not bar § 1983 actions).

203. See *In re Justs.*, 695 F.2d at 21 (concluding that other defendants were available in a suit to challenge certain regulations governing members of the Puerto Rico bar, thereby eliminating any need to name the state judges who promulgated the rules).

204. The amendment to § 1983 adopted after the decision in *Pulliam* provides that any § 1983 relief against state judges be framed initially in declaratory terms. See 42 U.S.C. § 1983 (barring injunctive relief against judicial officers acting in their judicial capacity unless they violate the terms of a declaratory judgment or a declaratory judgment was unavailable).

205. See, e.g., *United States v. Windsor*, 570 U.S. 744, 759 (2013) (concluding that the requisite adverseness was preserved even though the parties no longer disagreed on the legal merits).

statute.<sup>206</sup> As discussed above, the suit was put on hold by the Fifth Circuit and then brought to the Supreme Court on a writ of certiorari before judgment alongside *WWH*.<sup>207</sup> During oral argument, the Justices focused on the United States' standing to pursue claims on behalf of individuals in Texas and the existence of a right of action.<sup>208</sup> In the end though, the Court dismissed the case as one in which certiorari had been improvidently granted, apparently because the Court had allowed the individual claims to proceed, at least in theory, against the licensing officials.<sup>209</sup>

An action brought by the United States against Texas in the Supreme Court's original jurisdiction might usefully invoke the history of prohibition to overcome the hurdles that arose at the district court level. For starters, the Court has long held that its original jurisdiction extends to suits brought by the United States against the states.<sup>210</sup> In addition, the Court has long said that the states do not enjoy any sovereign immunity from suit brought by the United States in either the Supreme or lower federal courts.<sup>211</sup> By initiating a claim in the Supreme Court, the United States might overcome any immunity a state otherwise enjoys and proceed against the state as such. Prohibition would serve as a natural adjunct to such litigation, operating as a writ

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206. See *United States v. Texas*, 566 F. Supp. 3d 605, 627–28 (W.D. Tex. 2021) (detailing the United States' requests for declaratory and injunctive relief).

207. See *supra* note 16.

208. See generally Transcript of Oral Argument, *United States v. Texas*, 142 S. Ct. 522 (2021) (No. 21-588). Section 1983's provision for redress of constitutional violations under color of state law does not expressly authorize the United States to sue. The Court has held that Native American tribes do not qualify as persons entitled to sue to vindicate the tribe's sovereign rights under § 1983 (although the tribe might bring suit on behalf of a member whose individual rights had been violated). See *Inyo Cnty. v. Paiute-Shoshone Indians*, 538 U.S. 701, 704 (2003) (holding that tribe's claim for violation of its sovereignty was not cognizable under § 1983 but refraining from a broad ruling that tribes can never invoke § 1983); cf. *Breard v. Greene*, 523 U.S. 371, 378 (1998) (noting that, as a foreign nation, Paraguay is not a person entitled to enforce rights under § 1983). Government briefing in *Inyo County* indicates that the Department of Justice then viewed the reference to "persons" in § 1983 as excluding sovereign governments as proper plaintiffs. Brief for the United States as Amicus Curiae Supporting Petitioners in Part and Respondents in Part at 6–7, *Inyo Cnty.*, 538 U.S. 701 (No. 02-281). The United States did not invoke § 1983 as a source of authority to sue in challenging S.B. 8. See *United States v. Texas*, 566 F. Supp. 3d 605, 627–28 (W.D. Tex. 2021) (describing the government's arguments).

209. See *United States v. Texas*, 142 S. Ct. 522, 522 (2021) (mem).

210. Article III confers original jurisdiction on the Supreme Court in all "those [cases] in which a State shall be Party." U.S. CONST. art. III, § 2, cl. 2. On its application to suits brought by the United States, see *United States v. Texas*, 143 U.S. 621, 644–46 (1892).

211. *United States v. Texas*, 143 U.S. at 646. The inapplicability of state sovereign immunity extends to suits brought by the United States in lower federal courts. See, e.g., *Alden v. Maine*, 527 U.S. 706, 755–56 (1999) ("In ratifying the Constitution, the States consented to suits brought by . . . the Federal Government. [A suit brought] by those who are entrusted with the constitutional duty to 'take Care that the Laws be faithfully executed' differs in kind from the suit of an individual . . . ." (citations omitted)); cf. *Arizona v. United States*, 567 U.S. 387, 398, 416 (2012) (allowing action against Arizona to enjoin state law as preempted without raising any question as to the state's amenability to suit).

necessary for the exercise of the Court's original (as well as its appellate) jurisdiction.<sup>212</sup> With an available right of action, the United States might deploy prohibition to block Texas state courts from entertaining suits to enforce S.B. 8.

Identifying a right of action may prove tricky. In its S.B. 8 litigation, the government relied<sup>213</sup> on *In re Debs*,<sup>214</sup> a controversial decision allowing the United States to seek an injunction to end the 1894 *Pullman* rail strike.<sup>215</sup> In *Debs*, the government argued that the strike obstructed “interstate transportation of persons and property” and “carriage of the mails.”<sup>216</sup> The Court agreed, reasoning that the national government had ample power to punish interference with the mails and interstate commerce.<sup>217</sup> Two commentators offer an account of *Debs* that seeks to limit the government's right to pursue injunctive relief to cases that involve protection of a property right. Professors Bamzai and Bray suggest that equity's broad power needs limits; one traditional limit has been the reluctance of equity to intervene except to protect property rights.<sup>218</sup>

But the Court in *Debs* did not base its decision upon property interests alone. Instead, the Court explained:

Every government, entrusted . . . with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter.<sup>219</sup>

Instead of solely acting to protect property, the government was said to owe an obligation to “promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare.”<sup>220</sup> That general interest was

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212. Under the applicable statute, the federal courts have power to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. § 1651. The act operates in aid of both original and appellate jurisdiction. *See id.*

213. Application to Vacate Stay of Preliminary Injunction Issued by the United States Court of Appeals for the Fifth Circuit at 20, *United States v. Texas*, 142 S. Ct. 522 (2021) (No. 21-588).

214. 158 U.S. 564 (1895).

215. *Id.* at 597–600.

216. *Id.* at 577.

217. *Id.* at 579.

218. *See* Aditya Bamzai & Samuel L. Bray, *Debs and the Federal Equity Power*, 98 NOTRE DAME L. REV. 699, 711 (2022) (discussing areas of law where courts traditionally will not apply equity).

219. *In re Debs*, 158 U.S. at 584.

220. *Id.*

thought sufficient to give the government both a right to seek injunctive relief and “standing in court” to do so.<sup>221</sup>

One can certainly question the persuasive force of the *Debs* opinion as applied to the labor injunction.<sup>222</sup> But whatever one makes of the government’s effort to secure an injunction against S.B. 8, it appears to rest on a desire to protect the then-settled constitutional rights of pregnant people in Texas to seek an abortion within the *Roe/Casey* framework. The government’s effort to defend what it sees as a settled framework from a disruptive state law may distinguish efforts to block S.B. 8 from the more adventuresome regulatory features of the injunctive authority upheld in *Debs*. Of course, any action the Court takes on the question of abortion will ignite a public debate. But critics of *Debs* might support an action to block S.B. 8 enforcement on the theory that it would not change the substantive law or put the federal courts in charge of regulating interstate commerce in the absence of congressional guidance.<sup>223</sup>

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221. *Debs*, 158 U.S. at 584–86 (citing *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 285 (1888) and *United States v. Am. Bell Tel. Co.*, 128 U.S. 315, 367 (1888)). In *San Jacinto Tin*, the Court upheld an injunction sought by the government to invalidate a land patent where the government held a reversionary (and evidently pecuniary) interest in the land in question. *San Jacinto Tin Co.*, 125 U.S. at 286, 301. In *American Bell Telephone*, the Court went further, upholding an injunction to invalidate an invention patent secured by fraud without demanding that the government identify a pecuniary interest. *Am. Bell Tel. Co.*, 128 U.S. at 350, 373. The *American Bell* Court explained that *San Jacinto Tin*’s references to pecuniary interest were meant to forestall government interference in wholly private controversies, not to require the government to identify a proprietary interest as a condition of obtaining injunctive relief: “The essence of the right of the United States to interfere in the present case is its obligation to protect the public from the monopoly of the patent which was procured by fraud.” *Id.* at 367. In basing its decision on the government’s interest in promoting the general welfare rather than on its proprietary interest in the mails, the *Debs* Court picked up this element of *American Bell*. See *Debs*, 158 U.S. at 585–86 (relying on *American Bell* as the basis for its holding).

222. In reasoning that the government had full power to enact criminal laws to punish striking workers and to use force to quell a strike, the Court paid scant attention to the need for congressional authority. See *Debs*, 158 U.S. at 599 (failing to identify any congressional act regarding labor disputes). True, Congress might have exercised commerce power over the interstate implications of labor disputes as it did in the 1930s, but Congress had yet to enact any such laws when *Debs* came down (unless one counts the provisions of the Sherman Act which were later used to attack unions as conspiracies in restraint of trade). It seems curious to base federal-injunctive power on regulations that Congress had yet to enact. In effect, then, the federal courts in cases like *Debs* were regulating labor relations by injunctive decree and imposing criminal sanctions for violation of their own regulations in the form of contempt. That helps explain why the federal courts were seen by progressives as exercising a lawmaking function that exceeded the bounds of legitimate adjudication. See FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 15 (1930) (“Thus it is that the federal courts, under the Supreme Court’s lead, have dealt with labor controversies apart from the authority of federal legislation and untrammelled [sic] by state decisions.”).

223. For an argument favoring the recognition of implied public rights of action, see Davis, *supra* note 48, at 48. There, Professor Davis asserts that public enforcement ensures political accountability, expertise, centralization, and a lack of personal financial incentives unavailable in private enforcement. *Id.* Apart from *Debs*, he points to two additional cases. See *id.* at 19–20, 21, 53, 78 & n.284 (discussing *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971) and *Arizona v. United*

The history of prohibition helps to clarify that Article III extends to an original application to the Supreme Court to block state courts from entertaining enforcement actions like those contemplated in S.B. 8. As we have seen, suits seeking to block lower courts from hearing matters that exceed their constitutional authority fall well within the scope of the judicial power of the United States.<sup>224</sup> At common law, as noted above, any person was entitled to pursue a prohibition to block a court from acting outside its authority.<sup>225</sup> In other words, the interest in assuring lower court compliance with the law was thought sufficient to warrant the litigation. The Court's understandable reluctance to allow private litigants or other states to pursue such claims on its original docket should not prevent the government of the United States from initiating such a proceeding.<sup>226</sup>

### Conclusion

The plaintiffs in *Ex parte Young* invoked federal equity as the vehicle for seeking injunctive relief against the enforcement of unconstitutional state rate regulations. Operating within the framework of equity, the Court confirmed the legality of an injunction blocking executive branch officers from enforcing the statute. It did so even though the state had attempted to structure its enforcement system to evade federal judicial review. Much the same motive informed the structure of S.B. 8—a deliberate attempt by the state of Texas to block pre-enforcement federal judicial review of drastic and then-clearly unconstitutional restrictions on reproductive health services. Yet in *WWH*, the federal judiciary declined to intervene, citing a reluctance to enjoin state-court judges as nominal defendants in challenges to the constitutionality of state regulations.

Had the Court taken S.B. 8's apparent unconstitutionality more seriously, the prohibition tradition would have provided considerable support for the requested relief. Under that tradition, which began in early modern Britain and was adapted for use in the American constitutional system, superior courts may block the judges of a lower court from entertaining suits

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*States*, 567 U.S. 387 (2012)). In *Nash-Finch*, the Supreme Court allowed the Labor Board to seek injunctive relief, thus blocking enforcement of a state court decree limiting the picketing rights of a labor union. 404 U.S. at 142, 144. And the decision in *Arizona v. United States* reached the merits of a suit for injunctive relief against preempted state immigration law by assuming the right of the United States to sue. 567 U.S. at 415–16.

224. See *supra* pp. 50–52.

225. See Pfander & Wentzel, *supra* note 32, at 1302–03 (noting that prohibition could be sought by parties extrinsic to the dispute).

226. On the comparative advantage of the United States as litigant, see *supra* note 211 (noting inapplicability of state immunity from suit). On the rejection of original proceedings brought by the states, see Heather Elliott, *Original Discrimination: How the Supreme Court Disadvantages Plaintiff States*, 108 IOWA L. REV. 175, 177–79 (2022), discussing the Court's refusal to docket Texas's original docket challenge to Biden's election.

to enforce an unconstitutional scheme. Like jailers in habeas proceedings, judges have previously served as nominal defendants in suits to test the legality of state action. They enjoy no sovereign or judicial immunity from such proceedings. In refusing to adapt the remedies available in equity to the needs of the case, the decision in *WWH* may tell us less about the prohibition tradition, which the majority studiously ignored, than about the Court's own reluctance to stay an abortion law that it had already decided in-effect to sustain.